Constitutional *Refolution* in the Ex-Communist World

*by Tom Lynch**

On September 28, 1998, the Center for Human Rights and Humanitarian Law at the Washington College of Law (WCL) hosted a symposium entitled "Constitutional *Refolution* in the Ex-Communist World: The Rule of Law," which was the second in a biennial series of conferences about Central and Eastern European constitutional justice. The conference presented a discussion and evaluation of the progress of constitutional courts in Eastern Europe. Panel topics included "Constitutional Courts in the Age of Transition," Country Reports, and "The Constitutional Courts and Freedom of Expression."

After the downfall of the Communist governments in Eastern Europe, a number of new constitutional courts were established in Eastern Europe. The new governments modeled these courts after the post World War II constitutional courts in Germany, Spain, Italy, and Portugal. The principal goal of the European constitutional court system is to resolve constitutional disputes and to invalidate unconstitutional legislation. Although U.S. courts prefer to avoid rulings on constitutional grounds, the European constitutional courts exist primarily for the purpose of constitutional review. The mission of these courts is to ensure that the laws passed in these newly democratic countries adhere to their respective constitutions.

Herman Schwartz, professor of law at WCL, opened the conference by asking if this new group of constitutional courts has the power and will to set aside unconstitutional legislation. Such actions, Schwartz proffered, would deviate from the historical role of the court system in Central and Eastern Europe, where courts limited themselves to applying statutory texts. Schwartz also asked if these new, "strange," institutions could influence the roads to constitutional democracy on which these countries are traveling. He presented these issues to the first group of panelists, which consisted of A.E. Dick Howard, professor of law and public affairs at the University of Virginia, Stephen Holmes, professor of political science at Princeton University, and Lech Garlicki, Judge on the Constitutional Tribunal of Poland and professor of law at Warsaw University.

Howard queried what role the new courts will play in "nurturing" democracy and questioned whether the courts can truly protect the broad constitutional rights of individuals. He cited the Polish and Hungarian constitutional courts as examples of courts helping to actively broaden the constitutional doctrine of their countries. He also asked if the constitutional courts could actually restrain the excesses of legislatures, enforce separation of powers between branches of government, and strike down barriers to political participation. Howard's impression, based in part on the Polish and Bulgarian courts, is that a momentum exists, at least in some countries, for the courts to take on the job of trying to define the limits of parliamentary power. He next addressed the courts' role in enforcing the principles of separation of powers, using Albania and Bulgaria as examples of constitutional courts that view the enforcement of separation of powers as part of their mandate. Howard also examined the role of the courts in de-legitimizing unconstitutional political parties and determining the place of national minorities, ". . . one of the most troubling issues in all of Central and Eastern Europe . . ." today. Finally, he addressed the responses that lower courts and legislatures have had toward the constitutional courts and whether constitutional courts' mandates are effective. Citing the Czech Republic as an example, Howard believes that a "pattern has developed in which the supreme court of that country will respect constitutional court judgments." Although the response of parliaments tends to be less deferential, there has, so far, not been any direct disobedience of a constitutional court's mandate. Methods do exist, however, where a parliament can override or amend the constitution, and this power has the potential to undermine the constitutional courts. Howard concluded that the major challenge of the constitutional courts is to develop a "constitutional culture in which political institutions and the wide republic accept and understand the place of the constitutional court and the place of judicial review."

Holmes argued that the constitutional courts' effectiveness depends on the existence of a "constitutional culture" among the people. After decades of Communist rule without effective judicial institutions, these new high level tribunals do not have any precedent or lower court structures to build on. For these courts to succeed, society must mobilize strongly in support of these new legal institutions. This situation, however, could lead to the problem of "over-legitimized" courts. Holmes argued that such courts could undermine fragile new democracies by heavily criticizing executive and legislative branches, which could, in turn, undermine a populace's confidence in its leaders and thereby threaten the electoral process. In these countries, the relationship between society and the state is still quite fragile and society's faith in the government can easily erode. The question then becomes how the constitutional courts can effectively bind together state and society.

The second panel issued reports on the status of constitutional courts in individual countries. The panel featured Dr. Alexander Blankenagel, professor of law at Humboldt University in Berlin, Dr. Mark Brzezinski, attorney at Hogan & Hartson in Washington, D.C., and Venelin Ganev, a constitutional scholar from Bulgaria. Blankenagel discussed the constitutional court in Russia, Brzezinski lectured on the court of Poland, and Ganev analyzed the Bulgarian Constitutional Court. Blankenagel outlined the types of cases that the Russian court has heard, and he questioned whether it would be willing to tackle political cases or challenge the legislature in the case of a crisis. Brzezinski remarked on the surprising strength of the Polish court, which is growing in terms of its institutional clout and its willingness to create a body of jurisprudence emphasizing substantive individual rights. Finally, Ganev analyzed the growing success of the Bulgarian court, which has resulted in part from the court's alliance with other political branches and is reflected in the growing

continued on next page

Refolution, continued from previous page

respect for the rule of law throughout Bulgaria.

Aryeh Neier, President of the Open Society Institute, was the luncheon speaker. Neier argued for the need to develop the rule of law to ensure the development of constitutional norms. Authoritarian governments such as those in Serbia, Belarus, Kazakhstan, Uzbekistan, and Albania, Neier asserted, are stifling this growth. To foster political support for the rule of law, Neier advocated both a domestic and an international approach. For real change to take effect, it must emerge domestically. A major problem in this region, however, is crime and corruption, which has a corrosive effect on domestic rule of law efforts. In addition, Neier stated that many states in transition are suffering from explosions in unemployment, criminal activity, and declining health care. As a result, Neier asserted that local accountability and anti-crime strategies need to be fostered in order to support the development and enforcement of internal laws. To encourage these efforts, Neier suggested that multinational institutions increase their influence in this area. For example, financial institutions such as the World Bank and International Monetary Fund should incorporate the level of corruption in borrowing countries as a factor in their lending decisions.

The final panel of the day focused on "Constitutional Courts and Freedom of Expression." The panelists were Gabor Halmai, head of the Human Rights Information and Development Centre in Hungary, Peter Krug, professor of law at the University of Oklahoma, Leonard Sussman, senior scholar in International Communications at Freedom House, and Herman Schwartz, from WCL.

Gabor Halmai discussed freedom of the electronic media and Hungarian jurisprudence. Halmai discussed the contributory role of the Hungarian Constitutional Court in some of the problems facing the media in Hungary today. The court, according to Halmai, tried to determine the principles of the planned media law in 1992. Part of the court's decision included the notion that public radio and television should be independent from all lawmakers. In 1995, however, the Hungarian legislature established the National Board for Radio and Television, a media supervisory body which contains delegates from the political parties sitting in parliament. The constitutionality of this legislation was immediately challenged. The question for the court, according to Halmai, is whether this type of control complies with the independent status of public media established by the court in 1992. The court has yet to render a decision on the issue. Halmai concluded that the court is influenced by the political debate in Hungary and reluctant to take a stand on controversial issues. Hungary needs instead to transform its court into a true judicial body of review, not a participant in a political debate.

Peter Krug analyzed the Russian Constitutional Court's role in protecting freedom of speech in Russia, which still has a defamation law in place that severely curtails freedom of speech by defining a wide variety of speech as defamatory and, therefore, actionable. The Russian government, however, has limited the constitutional court's ability to rule on the defamation law's constitutionality, only permitting the court to take a case by case approach to the issue. Krug argued that Russia has taken steps towards granting greater freedom of speech, as evidenced by its ratification of the Universal Declaration on Human Rights, but this process will still take some years to materialize.

Herman Schwartz discussed insult and defamation laws around the world. He concluded that former Communist countries in Central and Eastern Europe must incorporate constitutional law into the daily routine of the lower court system. The lack of free speech, Schwartz argued, presents a threat to the very foundations for any democratic society.

Finally, Leonard Sussman categorized Eastern European countries according to their freedom of speech levels. He concluded that the Czech Republic, Hungary, and Poland represent free speech countries; Bulgaria, Romania, Albania, and Slovakia are partly free speech countries; and Bosnia, Croatia, and Serbia represent less than free speech countries.

Conclusion

The symposium discussion provided insight into the legal developments occurring in Eastern Europe and presented case studies that discussed the practical aspects of fostering the rule of law in post-Communist states. The challenges it presented, however, can only be solved if a culture arises that respects the new legal institutions and if the political will, domestically and internationally, exists to support this change. The Center for Human Rights and Humanitarian Law expects to host the next biennial symposium on constitutional justice in Eastern and Central Europe in 2000.

**Thomas Lynch is a first year J.D. candidate at the Washington College of Law and a junior staff writer for* The Human Rights Brief.

Fourth Annual Inter-American Human Rights Moot Court Competition May 24–28, 1999

- ***First** Moot Court based on the Inter-American System*
- *Only competition conducted in both **Spanish and English***
- *Intensive day-long **Training Seminar** on hemispheric human rights issues*

The Inter-American Human Rights Moot Court Competition is designed to enhance the development of human rights law in the Americas. This bilingual competition will provide students with an interactive exposure to the institutions and legal instruments of the Inter-American System, as well as the academics, experts, government representatives, and NGOs that work within this framework to strengthen democracy and the rule of law in this hemisphere.

For more information, contact:

Robert Guitteau, Jr.
The Washington College of Law
Center for Human Rights & Humanitarian Law
4801 Massachusetts Ave., NW
Washington, DC 20016-8181
Phone: (202) 274-4180
Fax: (202) 274-4130
E-mail: humlaw@american.edu
Website: www.wcl.american.edu/pub/humright/home.html