SYMPOSIUM

CONSTITUTIONAL “REFOLUTION”
IN THE EX-COMMUNIST WORLD:
THE RULE OF LAW
September 26, 1996

FOREWORD*

Since the collapse of communist power in the early 1990s, Eastern Europe and the rest of the former Soviet-dominated world have experienced significant and unprecedented changes. Although potentially revolutionary in impact, the economic, political, and legal transitions have been achieved through reform of existing institutions rather than violent revolution. Timothy Garton Ash has called this process “refolution.” This symposium will focus on the development and promotion of the rule of law in the context of this “refolution” now underway in the former communist world. The panelists, each an experienced and renowned specialist, will present their views in a roundtable format that will include extensive audience questions.

Welcome and Introduction

Dean Claudio Grossman
Dean and Raymond I. Geraldson Scholar in International and Humanitarian Law, Washington College of Law, American University

Professor Herman Schwartz
Professor of Law, Washington College of Law, American University

Panel I: The Constitution-Making Process and the Rule of Law

The Honorable Lloyd Cutler
Wilmer, Cutler & Pickering; former Counsel to Presidents Bill Clinton and Jimmy Carter

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Professor A.E. Dick Howard
White Burkett Miller Professor of Law and Public Affairs, University of Virginia

Professor Robert Sharlet
Chauncey Winters Professor of Political Science, Union College

Professor Eric Stein
Hessel E. Yntema Professor Emeritus, University of Michigan Law School

Special Presentation: Promoting the Rule of Law in the Former Soviet Bloc

Mr. Aryeh Neier
President, Open Society Institute

Panel II: Constitutional Courts and the Rule of Law

Professor Herman Schwartz
Professor of Law, Washington College of Law, American University

Mr. Mark Brzezinski
Hogan & Hartson, Washington, D.C.

Professor Kim Lane Schepple
Professor of Law, University of Pennsylvania; Co-Director, Program on Gender and Culture, Central European University

Professor Herbert Hausmaninger
Professor of Law, University of Vienna

Panel III: The Role of Foreign Experts in Establishing the Rule of Law

The Honorable Patricia M. Wald
Judge, United States Court of Appeals for the D.C. Circuit

Mr. Mark Ellis
Executive Director, American Bar Association, Central and East European Law Institute

Ms. Dimitrina Petrova
Executive Director, European Roma Rights Center (Budapest, Hungary)

The Honorable Richard Schifiter
Special Assistant to the President for National Security Affairs
WELCOME AND INTRODUCTION

DEAN CLAUDIO GROSSMAN: Good morning, I am Claudio Grossman, Dean of the Washington College of Law of American University. I want to welcome you and thank you for your presence in the conference. This conference is part of our program to celebrate the Law School's Centennial.

We were created 100 years ago by two women. And we are, I would say, the only law school in the country and in the world created by women. And that is why we are very proud.

Ms. Gillett and Ms. Mussey, as a matter of fact, 100 years ago decided to create a law school because women were excluded from the legal profession in most jurisdictions. And they understood something else that was very important and has continued through our tradition. They understood that there was not a possibility or a chance to promote important values of human dignities if women themselves could not be empowered by the knowledge of the legal field.

They realized that the law in the legal system played a role as an important instrument of social engineering. However, without empowering those who would like to advance their positions in the legal system, without empowering themselves with the skills and values and the knowledge necessary in the legal field, it would not be possible to achieve a society without discrimination and where people could develop themselves to their limit or potential.

There was another interesting aspect to Ms. Mussey and Ms. Gillett when they created this law school. Since the beginning, they had a strong universalist approach. One was working for the Red Cross, the other was an advisor of the Kingdom of Sweden. And they were promoting values in the global arena at the same time. They understood that it was not possible to advance the position of women in the country and the expansion of democracy and human rights if, in their world, those values would not be advanced.

They thought that the best way to consolidate and expand a rule of law in their country was also to achieve a world where the rule of law and human rights and dignity would be achieved for all. That is why we are very happy to receive you in the spirit of the tradition of the founding mothers of the Washington College of Law with this very important conference.

Many of our professors and, in particular, Professor Herman Schwartz, have had a strong interest in Eastern Europe. As a matter of fact, I suspect sometimes that Herman has a brother that looks like him because I don't know how he can, at the same time, be in the Czech Republic, in Russia, and here teaching a class and, in addition to that, creating an exciting environment that motivates our students and us, his colleagues, to continue to pursue the values of our founders. So, at the same time that I open this conference today, I want to express my recognition for the type of role model that Herman represents here in the Washington College of Law.

Thank you very much for your presence here. We are honored to have you all, and I wish you a very good conference and deliberations. Thank you very much.
PROFESSOR HERMAN SCHWARTZ: Thank you. As you can tell, without paying any attention to the content of what has been said, we are truly an international law school. Claudio's accent from South of the Border and mine from South Brooklyn assure you that we present you with a world-wide view.

We are really very pleased to have you here and to have this really quite splendid list of panelists today. I am sure many of you have wondered about the title of the conference and whether it is a typographical error: the use of the word "refolution" with an "F" instead of a "V". We really do know how to spell "revolution."

The fact is, it is not an error. Back in mid-1989, the noted English journalist, Timothy Gartin Ash, wrote an article about the massive changes taking place in Poland and Hungary. And these were clearly not traditional revolutions, and yet they were so much more than simply reforms. They were transformations of some kind or another. And he gave them the name of "refolution," creating a new word that combined the notions of reform and revolution. Of course, within months after he wrote that, more and more countries have gotten involved in that process, this largely, except in one or two places like Romania, bloodless transformation, ignoring of course, Bosnia. And although he has since reverted to using the word "revolution" for what has occurred in places like Prague and East Germany and the like, the fact remains that these still have been relatively bloodless transitions rather than the kind of traditional revolutions, such as one which occurred in America, France, Russia, China and the like, that we all read about in history.

Now the extensible goal, it is not clear how true it has been, of all these has been the creation of some kind of constitutional democracy governed by the rule of law and devoted to freedom and protection of individual rights. All of those countries profess that. Back in 1990, Ralph Darndorf, the great social scientist now at Oxford, wrote a little book that he modeled on Edmund Burke's "Reflections on the Revolution in France." He entitled it "Reflections on the Revolution in Europe," a letter intended to be sent to a Polish gentleman. Burke's was a letter intended to be sent to a French gentleman.

And he suggested that there are three stages to this kind of revolutionary change, revolutionary whatever you want to call it: constitutional, economic, and social. And he said, the first canon should be done immediately. The second will take at least six years, and, as we have seen in many places, far more than six years. The third, the creation of some kind of social institutions, that might take as many as sixty years. Now, the second and third stages are really not our business here. We are a law school, and our focus is indeed, on the first. But none of us are so naive or foolish as to think that first can take place without the second and third.

And, indeed, the fact that, partly by accident and because of who they were, if you look down the list of our nine panelists, in every case we have two lawyers and one social scientist in each group. This reflects the interrelationship between law, civil society, and the economy. Darndorf noted, when referring to the first stage, the constitutional stage, "This is the hour of the lawyers." But he did not, obviously, mean all lawyers, just the lawyers around here when he said, "Those
who have the imagination and comparative experience to find a way out of the monopoly of the party and all subordinate monopolies."

Today, we are going to talk about that hour of the lawyers, the three facets of it. First, the process of actually making a constitution, a process that has proceeded smoothly in some areas and surprisingly bumpily in other areas; surprising because the place where they seem to be having the most trouble is where it all started, Poland.

The second panel will deal with one of the key props of this new order, the constitutional courts. Because in almost all of these countries, this new and strange institution has become an essential part of the effort being made, often a very controversial part.

And in the third panel, in recognition of the fact that lawyers, political scientists, and others from outside this area from the West have played a very significant role, we have decided to have a discussion of what kind of role this has been, how useful it has been, how effective it has been, what the shortcomings have been, and the like.

And to deal with these, we have assembled a set of experts, all of whom have had extensive experience working in these areas. I think that at least all the panelists and at least some of the moderators fit Darndorf's description of imagination and comparative experience.

The first panel will be moderated by Lloyd Cutler, and I will introduce the panelists and Mr. Cutler, and then we will turn to Mr. Cutler. Lloyd Cutler, I would say, is almost a household name to those people who spend a few minutes in front of the nightly news. We have worked together for some six years now, and to me he exemplifies one of the great American traditions of the lawyer, statesman, and scholar that goes back to Madison and Hamilton and Jay and Jefferson. As a lawyer, he has created, really from scratch, one of the major law firms in America and has represented and been involved in some of the major causes of our time in every court, and has argued numerous Supreme Court cases.

As a statesman, as you probably know, he has been counsel to two Presidents, both of whom were in a good deal of need at the time: President Bill Clinton recently and President Jimmy Carter back in 1979.

And, of course, he has been involved, if only through that, in some of the great events of the day. But he has also recently been counsel to Secretary Christopher as a member of the Balkan Commission at Dayton.

Some years ago, he headed a Commission on Violence in America at President Kennedy's request. He helped found the Lawyer's Committee for Civil Rights under Law, one of the major civil rights groups of America.

As a scholar, he has studied deeply and written frequently, spending time at Oxford studying the science of government. And, most relevant to this conference, on constitution making, he co-chaired a committee of a group of us—five of us, actually, are here today—who were probably the first group of foreigners to come and try to work with the countries in Europe on constitutional reform, as early as
And, during this period and before, he has also been chairman of the Salisbury Seminar, an institution which has introduced and trained hundreds of European and Latin American and African and other young people in what it takes to have a decent constitutional democracy and rule of law.

I will simply tell you that at the last session which I was privileged to attend, which was a very exciting time, Judge Goldstone was there, and others. I turned to one of the staff people and asked, "Tell me, are all of these sessions like this?" And she paused and said, "When Lloyd runs it." So, that is our moderator, Lloyd Cutler.

Since I am up here, I may as well introduce the rest. And these are all not only distinguished, not only among the very, very best in their field, but also the most experienced in working in that area.

Immediately to Lloyd's right is Professor Eric Stein of the University of Michigan, truly one of the great men in the world of international law. Eric is Professor of Comparative Law at the University of Michigan emeritus.

He was working with us in Czechoslovakia. He is originally from Czechoslovakia, and his personal story, which will be incorporated in a really quite wonderful, comprehensive book on the Czechoslovakian effort of constitution-making, will be published soon by the University of Michigan Press.

The weaving together of his personal experiences and what has happened subsequently makes the book a treat to read as well as practically a textbook in the difficulties of trying to put together a constitution between nations which are unhappy with each other, which do not have a lot in common with each other.

He has been an advisor to the State Department, to the European Union, has taught all over Europe, has received umpteen honors from all over, and we are very fortunate to have Eric here.

Next to him is one of the odd fish we have imported into this law school, Professor Robert Sharlet, who has just been made, actually, the Chauncey Winters Professor of Political Science at Union College.

Bob, it is not too much to say, is one of the two or three leading experts on Russia and the former Soviet Union in the world today. He has written extensively, producing numerous books and articles. He has advised the American Bar Association's Central and East European Law Initiative ("CEELI") Project on a lot of the work they do, and, for two years, he worked intensively here in Washington with the Rule of Law Consortium, which has been working on trying to introduce and facilitate judicial reform in the former Soviet Union. That has involved judicial training, legal reform, and the like, and he has gone back to Union college but continues to work with the Rule of Law Consortium.

And on the end is Professor A. E. Dick Howard, The Whiteburk and Miller Professor of Law at the University of Virginia. I think I can say without the slightest fear of contradiction that there is no more outstanding constitutionalist in America than Dick Howard.