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The sudden collapse of the Union of Soviet Socialist Republics (USSR) has presented acute constitutional problems for the successor States. But it has also provided unexpected opportunities to create State structures based upon democratically elected legislatures; pluralistic philosophies and an independent court system. The importance of independent courts in law-abiding societies was seen in the decision of the Russian Constitutional Court on 23 March 1993. That Court held that the declaration by President Boris Yeltsin of "direct Presidential rule" was in breach of the constitution and laws of the Russian Federation. The decision was arrived at by a split vote of the Court. However, having been publicly declared, it was accepted by all participants in the unfolding events, including Mr Yeltsin.

This incident is but one of many others which have occurred in the former states of the USSR. Between 28-30 January 1993 an international conference took place in Chisinau (in Russian, "Kishinyov"), the capital of the Republic of Moldova - formerly the Moldavian Soviet Socialist Republic (SSR) within the USSR. The purpose of the conference was the study of juridical reform and the reform of the law in new Moldovian Republic. The conference was attended by judges, parliamentarians and high level officials from

Moldova. Foreign participants included the Director of Juridical Affairs of the Council of Europe (Dr Erik Harremoes), the President of the Juridical Chamber of Rome, Italy (Dr A Sciolla-Lagranga), a Judge of the Supreme Court of Norway (Hon Arne Christiansen), representatives of the newly independent States of Central and Eastern Europe, lawyers and judges from the United States and speakers from international human rights organisations. Also participating were a number of experts from the conference on Security and Cooperation in Europe (CSCE) led by Mr Vladimir Weissman. The writer took part in his capacity of Chairman of the Executive Committee of the International Commission of Jurists (ICJ), Geneva and representative of that body's Centre for the Independence of Judges and Lawyers (CIJL).

A notable feature of the conference in Chisinau was the strong empathy between lawyers in Moldova and practising lawyers and legal academics from other newly liberated countries nearby. As a sign of the strong ethnic and historical links between Moldova and Romania, for example, the Romanian Minister of Justice (Hon Petre Ninosu) attended and addressed the opening session of the conference on the development of the new constitution of Romania, 1991.

Another close link exists between Moldova and Italy. The Moldovian language is of Romance origin. Through Romania, strong contacts existed with legal and governmental bodies in Italy before these were severed on the establishment of the Moldovian SSR in 1940 as a Union Republic of the USSR. The links are now being re-established.

Establishment and dismantlement of the Moldavian SSR

Moldova is found to the north-east of Romania, in Bessarabia. Control of the territory shifted after the 14th Century between the Ottoman Empire to the south and the Tsarist Russian empire to the

north. In 1878 most of the territory which is now part of Moldova was annexed by Russia. It set about the discouragement of the use of the Romanian language and the dismantlement of institutions and a policy of what would now be called "ethnic cleansing". Following the First World War, Bessarabia was returned to Romania by the Treaty of Paris of 28 October 1920. However the USSR, as successor to the Tsarist claims, maintained its designs upon the territory of Moldova. By a secret protocol to the Soviet-German Non-Aggression Pact of 23 August 1939 (the Ribbentrop-Molotov Pact), Germany ceded control of what is now Moldova to the USSR. In June 1940 the USSR submitted an ultimatum to Romania demanding the surrender of the territory. Romania did not resist. A large part of Moldova was thus incorporated in the USSR in August 1940 as the Moldavian SSR. Part of the territory annexed was actually included in the neighbouring Ukrainian SSR. Over the years of Soviet rule, it was often difficult to secure local officials of the Communist Party who were Moldavian nationals and who could be trusted by Moscow. At one stage, during the 1950s, Leonid Brezhnev (later the Soviet leader) served as head of the Communist Party in Kishinyov.

The dissolution of the Soviet Union in 1991 presented the Moldovans with a new opportunity for independence. The attempted *coup d'état* against President Gorbachev in Moscow in August 1991 led to the proclamation by the Parliament of Moldova (the Sfatul Tarii) of independence from the USSR under the name of "the Republic of Moldova". The declaration was carried by a two-thirds vote of the members of the Parliament on 27 August 1991. However, this declaration coincided with two separate independence movements within the territory of the Moldavian SSR. In the south, the Gagauzian SSR had been proclaimed in August 1990. This is a Christian enclave left over from the former Ottoman rule. It comprises mainly Orthodox

Christians, many of whom speak the Bulgarian language. In the north a so-called Dniester Moldovan SSR was proclaimed by mainly Russian-speaking Moldovans on 2 September 1990. This "republic" comprises a large minority of ethnic Russians living in the region which formerly made up, or supported, the XIV Soviet Army. The total population of Moldova is about 4.5 million.

The actual decision to dissolve the Soviet Union and to replace it by the Commonwealth of Independent States (CIS) occurred in Minsk, Belorussia in December 1991. By March 1992 the Republic of Moldova had been admitted to the United Nations and had been recognised as an independent State by more than one hundred States around the world. Australia is one of ten countries to which an Ambassador is accredited by Moldova. One of the principal industries of Moldova is wine growing. Co-operative economic arrangements for advice on improving the quality and marketing of wine have already been negotiated with Australian wine growing interests.

On 19 June 1990 the Parliament of Moldova established a Commission to prepare a draft constitution (Fundamental Law). The Commission's task was to create a "sovereign, independent, democratic and legal state, which is free to decide its present and future".¹

The constitution draft which emerged from the Commission's work was designed to avoid the lawlessness of the recent past. According to a commentary:

*"Taking into consideration the fact, that a real democracy is realized on the basis of political and ideological pluralism, the Constitution Draft stipulates, that no ideology can be established in the quality of the official ideology and any political party association or movement cannot create alternative bodies [to] the state power, to decide the destiny of the people, or to intervene [in] the activity of the state bodies."*²

It was against this background that the conference in Chisinau

in January 1993 assembled. Tabled at the Chisinau conference was a discussion paper prepared in the Ministry of Justice titled "The Principles of Judicial and Law Reform".³ The object of the conference, from the Moldovian point of view, was to secure assistance in the design of judicial and legal institutions. Moldovian speakers repeatedly stressed their long period of isolation from rule of law societies, the absence of a tradition of an independent legal profession and judiciary, and the need for guidance based upon the experience of societies which had long enjoyed constitutionalism. It is a remarkable tribute to the resilience of the democratic idea that the conference could take place at all while the Republic of Moldova was facing severe economic difficulties in its heartlands and separatist ethnic conflicts to the north and south.

Proposals for constitutionalism

The discussion paper acknowledged that judicial and law reform was one of the most important steps by which the former totalitarian system of administration would move to a "democratic state based on law". The paper acknowledged the complex character of the planned reform, requiring as it did "not a partial modification, but the total reorganisation of a state power, based on new principles". The necessity to take reform measures in stages and to institute programmes for the education and improvement of juridical personnel was acknowledged. The sensitive problem of the revocation of Soviet judicial appointments and the bringing of disciplinary action against judges who had abused their offices was mentioned. so was the difficulty which all involved in the law faced with the proliferation of new laws apt for a market economy. The growth of lawlessness, which has tended to accompany such significant changes was another topic of discussion. One of the new problems which the greater

freedom that accompanied independence produced in Moldova was the provision of passports and departure visas for Moldovian citizens - previously severely limited during Soviet times. Plane travel into Moldova is still heavily restricted and usually routed through Moscow. Road journeys (as the writer witnessed) involve extremely long delays, even for Moldovian officials. Curiously, the border guards of the perimeter of this part of the former Soviet Union remain overwhelmingly Russians, often still dressed in Soviet uniforms.

Amongst the highest priorities assigned by the Moldovian discussion paper was the reorganisation of the bodies of State security and the removal from them of the functions of the former political police. The need for a broad-based investigation into the Ministry of National Security and the necessity to bring it under constitutional power was repeatedly stressed. In future, this Ministry would be confined to investigating and combating attacks on the Moldovian constitution; defending the borders of the State and fighting contraband, currency speculation and commerce in drugs.

Of the greatest importance for the conference was the discussion paper's chapter on the "third power" - the judiciary. The stated objects of proposed judicial reform in Moldova are to establish a system of laws based on the national traditions of the State and basic human rights; to form legal conditions which would guarantee the independent functioning of the judiciary; to replace the "repressive" accusatory system of law by one protective of human rights; and to improve the access of citizens to courts of any instance, in accordance with law. The provision of wider rights of appeal and accessible courts in all parts of the Republic together with the specialisation of judges in particular fields of jurisprudence were also mentioned in the paper. It seems that courts

of appeal were abolished under the former Soviet system. The discussion paper proposes their re-establishment.

As an indication of the kind of assertions of judicial independence which the Moldovian paper writers had in mind, proposals are made to leave it to the judiciary to determine where the courts will sit in different parts of Moldova. For ethnic reasons, former judicial sitting arrangements did not necessarily suit the convenience of the majority of the Moldovan- (Romanian)- speaking people.

For the supreme judicial body, a jurisdiction of cassation (the power to quash) is proposed with a general right of re-examination. The paper proposes a strict separation of the Supreme Court from the Presidium structure which has hitherto been observed after the Soviet model of courts. It states that the administration and co-ordination of the activities of employees in judicial bodies should be kept apart from the independent determination of cases before the courts.

At the apex of the proposed judicial system described in the discussion paper is a Constitutional Court designed to "ensure the correspondence of the laws and other normative acts [with] the constitution and international obligations of the Republic". Under the proposal the interpretation of the constitution would be exclusive to the Constitutional Court in order to ensure a high level of consistency and authority in the application of the new Moldovian constitution.

In chapter 4 of the discussion paper, proposals are made for the appointment of judges. In deference to the principle of judicial independence, the chapter proposes electing the judges to office for life, after a preliminary "trying" (probationary) term. The removal of judges is to be confined to "a needed" case and performed "exclusively by the people through its representative bodies by a

special act, stated by law". This power was explained as necessary to "guarantee the corresponding professional level and the moral purity of the [judicial] personnel".

The fifth and sixth chapters of the discussion paper attracted the greatest interest amongst the large audience of Moldovian lawyers who gathered in the Statul Tarii for the conference. These concerned the office of the Public Prosecutor and other public order bodies. The office of the Public Prosecutor, inherited from the Soviet legal system, has a number of features which strike a Western lawyer as crossing the borderline between the judicial and executive powers.⁴ But, naturally enough, many careers are bound up in the system. A number of the Public Prosecutors spoke passionately of the way in which, during Soviet times, they had used their offices to avoid the worst abuses of tyranny and oppression in the prosecution of the criminal and public law.

The remaining sections of the discussion paper dealt with the investigatory functions of the judicial system (typical of an inquisitorial regime), the penitentiary system and the rôle of the independent legal profession. The need for legal aid, for the reorganisation of the Moldovian Bar and for the definition of the monopoly rights of lawyers was examined. At the end of the paper a long list of necessary laws for the implementation of the component parts of the process of legal and judicial reform is collected. No fewer than forty-four laws are listed as essential. The list looks daunting. However, the methodical approach to the task of rebuilding legalism is reassuring. It is interesting to note that amongst the priorities, the adoption of a law for the elaboration of judicial reform and reform of the law is placed first, even before the adoption of the new constitution of the Republic and the election of a fully democratic Parliament and presidency.

Help from outside

The international participants in Chisinau offered comments on the general problem of creating an independent judiciary. Dr Harremoes specifically offered the assistance of the Council of Europe which has become an important source of basic materials on legal and human rights for the newly emerging nations of Central and Eastern Europe. The re-establishment of links with Europe is a reassurance to many of the new nations, and the Council of Europe plays a vital function in this process. Several of the Moldovian participants spoke vigorously of the difficulty of providing fully the essential legal protections for human rights when, as they alleged, serious abuses of human rights were occurring within the territory of the country on the part of the Russian XIVth Army. Others were quite direct. It was insufficient to change the system. It would also be painfully necessary to change some of the personnel who were left over from the old regime.

Dr Sciolla-Lagranga, a judge in Rome, explained the Italian procedures for the recruitment of judges. He gained the sympathy of the audience by describing the way in which Italy, like Germany, had endured a period of dictatorship. After its end, it had to accommodate the rule of law to the judges left over from the period of autocracy. He suggested that Moldova could learn from the Italian experience.

Mr Nikolai Gorea, a member of the Supreme Court of Moldova, spoke strongly against the establishment of *ad hoc* courts. He explained the need, in the transitional period, to accept an increasing rôle for the judiciary in keeping the various branches of the Moldovian government in harmony.

A United States lawyer, Richard Enseln, described that country's constitutional arrangements and the importance of ensuring

that persons appointed to the Bench were immune from political influence. He advocated the jury system which, he suggested, spread respect for the law and its institutions amongst ordinary citizens. Judge Christiansen of Norway emphasised the importance of satisfactory salaries and working conditions for the judges. Otherwise, the recruitment of well-educated people of strong personality would be impossible. He described the difficulties which judges in the West had suffered from poor salaries, enormous workloads and serious attacks upon them in the mass media. He outlined the limits accepted by judges upon extra-judicial activity, especially in the higher courts.

Professor Andrzej Rzeplinski of the University of Warsaw outlined the way the Polish judiciary had emerged from the period of communist autocracy. He said that judicial independence depended, in large part, upon the personality of the judges who were appointed. An attitude of independence was something which began in the mind of the judge. The allocation of judges to sit in cases had to be reserved to the judicial branch in order to assure against manipulation.

Professor Paolo Ungari, a Professor at the Free University of Rome outlined the judicial training of magistrates in Italy. He urged instruction in basic human rights law, particularly for judges who had grown up in a system of abuses of power. This message was also reflected by Mr Mihai Petracki, Chairman of the Legislative Department in the Parliament of Moldova. He described how the State structure of the country had been inherited from the totalitarian regime. It was important to ensure that this structure should not impede the path to political and economic reform. But he did not underestimate the complexity of securing legal reform or the relative inefficiency of a democratic parliament as a means of doing so.

One of the most stirring speeches was given by Professor Giuzepe Di Federico of the Centre for Juridical Studies at the University of Bologna, Italy. He explained the basics of an independent and credible judiciary and the need for judges to both be, and to appear to be, impartial. He explained the increasing rôle played by the judiciary in Western countries. He said that influence upon the judiciary was to be watched. It could occur not only from outside but also from inside the ranks of the judges, eg in promotion, salaries and the provision of other advantages. He also stressed the importance of a strong legal culture to support the judicial branch of government. Similar messages were brought from several participants from the United States.

The writer's contribution contained a description of the independence of the Australian judiciary and the way in which this is sometimes undermined, as by the abolition of courts and tribunals.⁵ The role of conducting hearings in public and the giving of reasoned explanations for judicial decisions was outlined. The manner in which judges in their day to day work could call upon international human rights law, to spread a culture of human rights was illustrated with a number of recent Australian examples.⁶ The work of the ICJ's Centre for the Independence of Judges and Lawyers was mentioned, as was the offer of the ICJ and the CIJL to help and support colleagues in Moldova and in other former States of the USSR. Reservations were expressed about the possible dangers of a probationary term for judges and the need for care in judicial training, lest it become a vehicle for orthodoxy and State propaganda.

In the streets of Chisinau, the people of this newly independent country went about their activities blissfully unaware of the intensive debates proceeding in their Parliament affecting their

future. The great statute of Lenin which formerly dominated the main street has been removed to a museum. Otherwise, in externals, life goes on much as before. Yet, in the Moldovian judiciary and legal profession the moves towards a pluralistic State, respectful of human rights, have begun. It behoves Western lawyers, and other citizens, to give whatever assistance they can.

FOOTNOTES

1. See *The Republic of Moldova, A Short History*, Chisinau, 1992, 50.
2. *Ibid.*
3. The Parliament of the Republic of Moldova, *The Principles of the Judicial and Law Reform*, discussion paper, 1992.
4. See eg R David and J E C Brierley, *Major Legal Systems in the World Today*, London, Stevens, 1978, 247.
5. See note P W Young, "Dismissal of Judges" (1993) 67 *Aust Law Journal* 83. See also M D Kirby, "Judicial Independence Reaches a Moment of Truth" (1990) 13 *Uni NSW LJ* 187.
6. A case cited was *Gradidge v Grace Bros Pty Limited* (1988) 93 FLR 414 (NSWCA), 422, 426.