

POLITICAL ABUSE OF JUDICIAL PROCESS IN EUROPE'S EAST:

A NEW SECURITY THREAT?

Summary: Europe faces a new threat from the East: an increasingly personalised abuse of legal process in former Soviet republics that will, if left unchecked, undermine their ability to develop strong economies and even to control their borders against terrorist activity. Since 1991, most members of the Commonwealth of Independent States (CIS) have undertaken fundamental political, economic and social reforms, inspired in at least one case by the hope of signing an accession agreement with the European Union but underpinned more broadly by commitments undertaken in the Council of Europe and the Organisation for Security and Cooperation in Europe. There is mounting evidence that judicial reform has taken a backseat in this process. Although many of the CIS states have made public commitments to legal reform and in some cases have made changes to their constitutions to bring it about, compliance with fundamental norms of judicial practice is lacking. CIS members, almost without exception, suffer from inadequate judicial infrastructure, appropriate human capital, often corrupt officials and the mistrust of their own citizens. This policy brief outlines some of the negative trends in rule of law compliance in the CIS, examining Russia, Ukraine and giving special consideration to the Republic of Moldova and the case of former Defence Minister, Valeriu Pasat. These negative trends represent a new pattern, whereby leaders are abusing newly constructed judicial systems to achieve extra-judicial, political goals.

CIS leaders must act now to regain the trust of their citizens by making sweeping changes, both physically and functionally to judicial systems. Other European countries and their multilateral institutions (EU, CoE and OSCE) need to acknowledge the emerging negative trend of judicial abuse and deliver both political incentives and assistance programmes more likely to have strategic effects on the practices of CIS judicial systems.

A Policy Brief from the Foreign Policy Centre provides commentary and practical policy recommendations on topical problems confronting the international community. The views are not necessarily those of the Foreign Policy Centre. The author of this Policy Brief is Raffaella Murano, who wrote it on assignment as a visiting Researcher at the Centre.

Introduction: What is Rule of Law?

Good governance depends on the rule of law: a 'system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century'.¹ One essential difference between communist dictatorships and democratic societies is that the former are ruled by the ad hoc directives of leaders often in direct contravention of their own laws, while the latter are governed by laws agreed in an elected parliament and mediated by a judiciary that is independent of political direction. The former republics of the USSR that are now members of the Commonwealth of Independent States (CIS) were not going to make this transition quickly and easily.

According to Carothers, the rule of law reform process includes three phases: changing/creating laws themselves, improving efficiency and accountability in law-related institutions and the actual compliance of the government and law-related institutions with the law.² The first two types of reform have been implemented quite successfully in Russia and the other CIS countries. It is the third type of reform, compliance, which remains a giant hurdle for many of them. Recently, there have been a dismaying number of high-profile examples of non-compliance across the region, despite the fact that all of the CIS states have proclaimed a commitment to reforming their judicial systems and to strengthening the rule of law within their borders. What is most dismaying is that non-compliance and disregard for the rule of law has come from the highest levels of government.

This policy brief examines some of the negative trends in rule of law reform across the region and examines in particular the current case regarding the Republic of Moldova's former Defence Minister, Valeriu Pasat. This case appears to be a new trend, whereby leaders are abusing newly constructed judicial systems to achieve extra-judicial, political goals.

Negative Trends: Russia and Ukraine

In 2003, Russian authorities arrested, Mikhail Khodorkovsky, the founder of Yukos, Russia's most profitable oil company, and charged him with fraud, tax evasion and embezzlement. The Kremlin was simultaneously accusing Khodorkovsky of filling the Duma with his loyalists and contributing extensively to political parties opposed to President Putin. Further, because Khodorkovsky was identified as one of the key oligarchs, the wealthiest and most politically active businessmen, Kremlin officials singled him out for his activism and targeted him as a criminal of the Yeltsin era. Although Khodorkovsky was a wealthy businessman and was politically active, Yukos had paid billions of pounds in taxes and consistently donated millions to charity. It was not until after Khodorkovsky began heavily contributing to Putin's political opponents that Putin began to publicly criticise him. This supports the belief of many that the arrest and trial of Khodorkovsky is nothing but a political stunt. Professor Bill Bowring, Director of the London Metropolitan University's Human Rights and Social Justice Research Institute agrees that

¹ Thomas Carothers, 'The Rule of Law Revival', *Foreign Affairs*, Vol. 77, No. 2, 1998

² Ibid.

‘There is now a wealth of evidence, supported by the findings of the Council of Europe's Rapporteurs and conclusions, and by the OECD and others, that the prosecution and trial of MBK (Mikhail Khodorkovsky), as well as Lebedev, was and is politically motivated, because of the political threat which MBK poses to President Putin. There is an increasingly widely held view in Russia, including in mass circulation newspapers, that MBK, however he gained his wealth, was courageous in deciding not to leave the country (like Berezovsky and Gusinsky) but to stand trial and lose his property. He is thought to have conducted himself in an exemplary manner during the trial, and his final speech has aroused considerable sympathy. He is now seen as a challenger for the Presidency.’³

The arrest of Khodorkovsky, his detention without bail, the subsequent destruction of the Yukos oil company, and eventually Khodorkovsky's conviction and jail sentence demonstrate Putin's willingness to undermine the rule of law, when it suits his purposes, despite the passing of significant legal reform measures during his administration.⁴ The fact that Mr. Khodorkovsky was denied bail and that hearings were conducted in closed sessions were direct violations of the Russian Constitution which states that arrest and detention for more than forty-eight hours is unlawful without a court order and that ‘anyone charged with a crime has the right to have his or her case reviewed by a court of law with the participation of jurors in cases stipulated by the federal law’.⁵

The consequences of the Yukos affair continue to harm Russia and range from a decline in foreign direct investment to the undermining of the rule of law, damage to its economy and court system. Mr. Khodorkovsky and others are convinced that his arrest and the elimination of Yukos were strictly political moves by Putin and his supporters to curb a possible presidential bid by Khodorkovsky in 2008. An important question to ask, especially after the recent sentencing of Khodokovsky to nine years in prison, is whether the reforms achieved under Putin will make much difference in the future if high-ranking officials are prepared to toss them aside when politically convenient.⁶

Ukraine has also come under the spotlight in the last year for fundamental weaknesses in its judicial system. The Presidential election last November that sparked the Orange Revolution demonstrated how the rule of law was consistently violated at the highest levels in the Ukrainian government. There is no more fundamental breach in the rule of law than corruption of the processes for certifying election results. When Ukraine's Central Election Commission (CEC) declared Prime Minister, Viktor Yanukovich, the winner of Ukraine's November 2004 Presidential election, the election results were hard to swallow for many Ukrainians who not only hoped, but expected to see the opposition party leader, Viktor Yushchenko, prevail at the polls. Independent exit polls had placed Yushchenko ahead of Yanukovich by a margin of 52 per cent to 43 per cent.⁷ Foreign and domestic election monitors warned that serious election violations were being committed throughout the country, but particularly in the eastern part of Ukraine. Voters were seen being transported

³ E-mail correspondence between Professor Bill Bowring and Raffaella Murano, 7 July 2005

⁴ ‘Khodorkovsky Sentenced to 9 Years in Russian Prison’, <http://quote.bloomberg.com/apps/news>

⁵ ‘The Constitution of the Russian Federation’, Section 1, Chapter 2, Articles 22 (2) and 47 (2)

⁶ Dr. Greg Austin, ‘Political Change in Russia: Implications for Britain’, the Foreign Policy Centre, November 2004

⁷ Adrian Karatnycky, ‘Ukraine's Orange Revolution’, <http://www.foreignaffairs.org/20050301faessay84205/adrian-karatnycky/ukraine-s-orange-revolution.html>

from one polling station to another to cast multiple ballots, resulting in an increase in voter turnout in favour of the Prime Minister in his home region of Donetsk from 78 per cent to 96.2 per cent in less than twenty-four hours.⁸ The apparent poisoning of Mr Yushchenko during the campaign also raised serious doubts about observance of the law by government officials.

When Mr Yanukovich was declared the winner, opposition party supporters, who viewed the election between the two candidates as a decision to remain closely linked with Moscow or to move towards a stronger partnership with America and the European Union, took matters into their own hands. Much like citizens in East Germany and Prague in the late 1980's Ukrainians took to the streets in peaceful protest against the election results and the manner in which the election was conducted. After seventeen days of protest in the cold, the Ukrainians celebrated a victory when the Supreme Court ordered a re-run of the election.⁹ According to a senior official in Britain's Foreign and Commonwealth Office, 'Yanukovych's side had called for votes in certain regions to be recounted, but Yushchenko's rejected this as inappropriate as they would just be recounting fraudulent ballots'.¹⁰ The Supreme Court came to the same conclusion as Yushchenko and thus ordered a re-run of the election and not a simple re-count of the ballots cast in the first election. The Organisation for Security and Co-operation in Europe's Chairman-in-Office, Bulgarian Foreign Minister Solomon Passy strongly supported the court's decision to re-run the vote, stating that 'the court decision echoed the findings of international observers from the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and other bodies that both rounds of the elections had been marred by serious shortcomings'.¹¹ Mr. Yushchenko was eventually declared to be the true winner of the election.

Moldova: The Pasat Case

On 11 March 2005, Moldovan authorities arrested Valeriu Pasat, the former Defence Minister and adviser to the head of the Russian energy company United Energy Systems (UES), on his arrival in Moldova's capital, Chişinău. The prosecutor's office accused Pasat of abuse of power while he was defence minister from 1997-1999, claiming that he made an illegal sale of rocket systems to a foreign company, Joy Slovakia. The prosecutor alleged that the deal was illegal, and was made at below market prices, with losses to the state from it estimated at US\$1.8 million dollars.¹² A more serious charge, pocketing proceeds from the illegal sale of twenty-one Moldovan MIG jet fighters to the USA in 1997, has also been brought against Mr. Pasat. Damages relating to the latter charge were claimed to be \$53 million, but have since risen to \$55.8 million.¹³ According to the Moldovan prosecutor's office, the jets were

⁸ Ibid.

⁹ 'OSCE Chairman welcomes Ukraine Supreme Court decision, pledges full support for new elections', OSCE Press Release, <http://osce.org/item/8786.html>

¹⁰ Information provided by UK government official in e-mail correspondence with the author dated 8 July 2005

¹¹ Ibid.

¹² 'Preliminary Hearings into Pasat Case Have Begun in Chisinau', *Moldova Post*, 18 May 2005,

<http://archive.wn.com/2005/05/18/1400/moldovapost/>

¹³ Ibid.

considered to be military property set aside to be included in a privatisation programme, in compliance with a 1997-1998 Privatisation Programme approved by the Republic of Moldova's Parliament. Therefore, according to the prosecutor, when Pasat sold the property without Parliamentary approval, he committed a crime.¹⁴

Legal proceedings in the Pasat case up to this point have been held behind closed doors because the court has ruled that information about the sale of the MIGs to the USA represents a 'state secret' for the Republic of Moldova.¹⁵ The former president of the Republic of Moldova, Petru Lucinschi, heard by the court as a witness in the Pasat case, stated in his testimony that the sale of the twenty-one MIG-29 aircraft did no harm to Moldova, but that the sale was profitable for it because the USA had paid US\$40 million for the MIGs and also agreed to openly support the Republic of Moldova on the international stage.¹⁶ Lucinschi noted that the 'Cabinet had decided to sell the aircraft, and we only found the best offer'.¹⁷ Pasat's lawyer, Gheorghe Amihalachioaie, has pointed to such statements of support saying that they help confirm the innocence of his client by demonstrating that the sale of the MIGs was a strategic undertaking on behalf of the Defence Ministry and not a scheme cooked up by Pasat.¹⁸ This position was reiterated by E. Wayne Merry, a Pentagon official who oversaw the US purchase of the MIGs from Moldova. Merry agreed that the purchase was "a good financial deal for Moldova", primarily because the aircraft were left in Moldova after the Soviet Union's collapse and Moldova had no practical use for them nor the money to afford to keep them running.¹⁹

The Pasat case shares some similarities with the Yukos affair and the trial of Mikhail Khodorkovsky. Pasat has been detained, without bail, for a period longer than normally allowed under Moldovan law. In fact, Mr. Pasat's preliminary detention period expired on 15 May, but the court announced that he would remain in custody until a verdict on his case was reached.²⁰ For Pasat, whose health appears to be deteriorating, this was not encouraging news. His lawyer insists that Pasat's condition is very serious and that it was worsening daily due to the cramped and unsanitary conditions in which he was being held. Pasat's legal team have petitioned for house arrest, but the Moldovan government has turned a deaf ear, claiming that Pasat has been examined by a group of doctors from the Moldovan Interior Ministry and found to be in good health.²¹ Meanwhile, Pasat's trial, which was set to begin on 25 May 2005, only began on 27 June.

Given the nature of his arrest and detention, Pasat and his legal team are convinced that this is strictly a political affair. Pasat claims that he fell out of favour with the Moldovan government because he has been openly critical of current Moldovan Communist authorities and encouraged Moldovan citizens to support the opposition movement, Democratic

¹⁴ 'General Prosecutor's Office Takes Pasat Case to the Court', *Moldova Azii*, 16 May 2005, <http://www.azi.md/news>

¹⁵ 'Former President Petru Lucinschi testifies in Pasat Case', 4 July 2005, <http://www.basa.md>

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ E. Wayne Merry, 'Moldova: An Insider Looks at the Pasat Case', <http://rferl.org/featuresarticleprint/2005/07>

²⁰ 'General Prosecutor's Office Takes Pasat Case to the Court', *Moldova Azii*, 16 May 2005, <http://www.azi.md/news>

²¹ 'Advisor of Russian UES Under Investigation in Moldova', *Moldova.org*, <http://politicom.moldova.org/articole/eng/645/>

Moldova.²² The Moldovan government disagrees with this position, claiming that the charges brought against Pasat are valid because he violated an administrative law while serving as Defence Minister.

A senior Moldovan official confirmed to this author that Pasat had committed an administrative offence and that the Moldovan government's actions do have a legal base.²³ The official also assured the author that the Moldovan government stringently supports transparency in this case.

However, the circumstances surrounding Pasat's arrest and his prolonged detention without bail seem rather harsh for having committed a simple administrative or procedural error. Moreover, no evidence of a *criminal* offence committed by Pasat has been presented, at least publicly. It has not been shown that Mr. Pasat personally gained financially from the sale of the MIGs to the USA. This lack of evidence gives support to the idea of the case being solely a political affair. It is striking too that Pasat's arrest came just before Moldova's March parliamentary elections.

Policy Recommendations: Getting back on Track

1. CIS leaders must regain the trust of their citizens by making sweeping changes, both physically and functionally, to judicial systems. Laws and judicial procedure must be transparent and easy to understand.

2. The European Union and the Council of Europe need to change the way in which they monitor rule of law abuses in the CIS. The Council of Europe should develop a more strategic plan for encouraging rule of law reform and compliance in the CIS, meeting in an annual conference to evaluate their progress in the region and the effectiveness of their strategic programs.

The problem of rule of law, or lack thereof, in the CIS stems from a lack of real commitment and a lack of compliance. Rule of Law is not a new topic, but it is one that is enjoying a revival spurred by the collapse of the former Soviet Union and the creation of fledging independent states in its wake.²⁴ Reforming electoral and judicial processes is a major goal for those countries seeking membership in the European Union. Many of the new EU members from the former Soviet satellite states, including: Poland, the Czech Republic and Hungary owe their membership partly to the fact that they have made impressive strides in improving rule of law, as have former Soviet republics such as Lithuania. Other countries, like those examined in this brief, will continue to fall short of fundamental rule of law reform as long their leaders continue to use the court system for political purposes. These countries must be held to account for failing to make the difficult and necessary reforms in the area of compliance.

²² Democratic Moldova became an official political party in June 2005

²³ Members of the Foreign Policy Centre (FPC) staff were fortunate enough to meet with Moldova's Ambassador to the United Kingdom, The Honourable Mariana Durlesateanu, about the Pasat case. Embassy of Moldova, 1 June 2005. Attendees: Ambassador of Moldova, Mariana Durllesteanu, Dr. Greg Austin (FPC), Jennifer Moll (FPC) and Raffaella Murano (FPC)

²⁴ Thomas Carothers, 'The Rule of Law Revival', *Foreign Affairs*, Vol. 77, No. 2, 1998

Leaders must go beyond shallow professions of commitment to legal reform, improving judicial structures both physically and functionally. New judges must be trained, giving special attention to retraining of judges retained from the Communist period. Courts must be able to prosecute alleged criminals in a timely fashion.

Probably the most important goal for post-Communist states when conducting judicial and rule of law reform is to gain the trust of their citizens. Individual citizens must feel that their rights will be protected under the law equally, and that should they find themselves in trouble with the law, that they will be granted a fair and prompt trial by unbiased judges and peers. A recent report by the World Bank has shown that Eastern Europeans view the courts as the most corrupt institution.²⁵ Transition from Communist judicial systems, where cases were often decided by bribes rather than evidence, to fair and transparent systems is difficult. Before change can really take root, leaders and citizens must want and demand change.

International watchdogs, policy think tanks and foreign governments need to pay more attention to rule of law failings in the CIS. The Council of Europe, in particular, should take the lead in re-examining the way in which it monitors rule of law in the CIS to reflect the current trend in abuse at the highest levels of government. The Council of Europe should develop programmes that will have a more strategic effect on rule of law reform and compliance. These new programmes could be reviewed at a special intergovernmental conference dedicated to the subject and held annually. The consequences of not taking action to push rule of law reform in a positive direction will be a fall in the amount of foreign direct investment in Russia and Eastern Europe, leading to political and economic destabilisation throughout the region and a general weakening of the governance systems.

²⁵ Anatoly Medetsky, 'Russia's Courts Lag Behind, Report Says', <http://www.themoscowtimes.com/stories/2005/06/21/011.htm>