

RUSSIAN LAW ON EMERGENCY POWERS AND STATES OF EMERGENCY

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§ Part I

Before the 1990's there existed no parliamentary statute in the Soviet Union for dealing with emergencies, for example, such as those arising as a result of popular unrest or in the wake of a natural disaster.

The previous USSR Constitution of 1977 (sometimes called 'Brezhnev's Constitution') did not contain any provisions dealing with a 'state of emergency'. It distinguished between two regimes of exception: a 'state of war' (*sostoianie voiny*) and a 'state of martial law' or just 'martial law' (*voennoe polozhenie*). Questions of peace and war, including the power to declare war, were assigned to the exclusive jurisdiction of Union authorities¹. Simply put, this was the sole prerogative of the USSR Supreme Soviet.

In the alternative, Article 121(17) provided that "during the time between the sessions of the Supreme Soviet of the USSR", a 'state of war' could be proclaimed by its permanently working Presidium. Such a proclamation could be issued in the "event of a military attack on the USSR" or when it was necessary for fulfilling "treaty obligations concerning mutual defence against aggression".

In contrast to such a 'state of war', the Presidium of the USSR Supreme Soviet was authorised to proclaim martial law in specific localities or in the whole country when it was demanded by the USSR defence interests².

General rules regarding a 'state of martial law' were contained in a Decree of the USSR Supreme Soviet Presidium of 22 June 1941, "*On Martial Law*" (*O voennom polozhenii*)³. Even though it was introduced on the day

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1 Article 73 (8) of the USSR Constitution.

2 Article 121 (15) of the USSR Constitution.

3 Decree of the Presidium of the USSR Supreme Soviet of 22 June 1941 "On a State of Martial Law" (*O voennom polozhenii*) (Vedomosti Verkhovnogo Soveta SSSR, No.29, 1941); Resolution of the USSR Council of People's Commissars of 1 July 1941 "On Additional Powers of the USSR People's Commissars During the War Period" (*O rasshirenii prav narodnykh komissarov SSSR v usloviyakh voennogo vremeni*).

when Nazi Germany began its undeclared aggression against the Soviet Union, the 1941 decree didn't deal exclusively with the defence of the country during the Great Patriotic War (1941-1945) but stayed in effect long after the end of the war. It was partially superseded by subsequent legislation, notably by the Statute "*On Military Tribunals*" (*O voennykh tribunalakh*) of 1958.

According to the 1941 decree, the proclamation of a state of martial law in the USSR (or in some of its areas) was to lead to the following consequences: competence and responsibility in matters of public order and state security being transferred to military authorities; military authorities acquiring broadly defined powers to take over ('requisition'⁴ without compensation) means of transportation and to conscript civilian labour force; and in all fields of administration under military control, the military authorities were authorised to back up their orders by the imposition of administrative fines and short-term detentions.

Existence of a declared state of martial law during the Great Patriotic War did not preclude the USSR Supreme Soviet Presidium from occasionally proclaiming an additional state of exception - a 'state of siege' (*osadnoe polozhenie*) - within certain defined territories: Moscow, Crimea, Stalingrad Oblast', etc.⁵ A state of siege could be regarded as a stricter form of a state of martial law and had more extreme consequences. For instance, it entitled the military to shoot looters, spies, and saboteurs, on the spot.

The 1988 amendments broadened the justification for martial law to

4 Speaking about requisition, we must remember that the socialist legal doctrine prescribed that the right of the Soviet state to seize any property in the USSR was superior to any individual's right of ownership over the property in question. Aware of the potential for misuse of this right, the Soviet state consented to certain self-imposed limitations. Accordingly, under the Civil Code of the Russian Federation (art.149) requisition was defined as the seizure by the state of an owner's property in the interests of the state or public, with reimbursement for the value of the property. Requisition was permissible only in the instances specifically designated and pursuant to established procedure. Instances under which requisition was permissible could be found both under federal law and law of the fifteen republics constituting the USSR (like Russia, Ukraine, Moldova, etc.) In all of those instances, the taking of property was permitted only if it was "in the public interest" or if there were no other adequate alternatives to requisition. The determination of whether a planned requisition was in the public interest, or whether an adequate alternative to requisition existed, fell within the exclusive prerogative of the state. No such determinations could be challenged in a court.

5 See, e.g., Resolution of the USSR State Committee on Defence of 19 October 1941 "On Introduction of a State of Siege in the City of Moscow" (*O vvedenii osadnogo polozhenia v g. Moscvu*), in *Kommunisticheskaia partia v period Velikoy Otechestvennoy voiny (iun' 1941 g. - 1945 g.)*. *Dokumenty i materialy* [Communist Party in the Period of Great Patriotic War (June 1941-1945). Documents and Materials] (Moscow: Gospolitizdat, 1961), pp. 97-98.

6 As a result of the 1988 constitutional amendments, the revised and expanded martial law powers were found in Article 119(14). After the 1989-1990 amendments, those powers migrated to the new Art.127(3)(16), becoming a 'presidential power'. For a translation, see Gordon B. Smith, *Soviet Politics* (NY: St.Martin's, 1992. 2nd ed.), pp. 370-72.

include ensuring the domestic security of the country's citizens, while adding the requirement that the Presidium of the USSR Supreme Soviet (and subsequently – the USSR President) had to consult with the relevant republican Supreme Soviet Presidium before taking an action⁶. The Union authorities never actually had a chance to use that power.

A new regime of exception - a 'state of emergency' - was introduced to the USSR constitutional law as a result of the most fundamental constitutional reform of the *perestroika* period. In December 1988, the USSR Law "*On Changes and Amendments of the USSR Constitution (Fundamental Law)*"⁷ changed about a third of the whole text of the USSR Constitution introducing permanently working legislature and other innovations for the Soviet transition to the rule of law. Establishment of a constitutional mechanism of a state of emergency became an integral part of such transition. Similar changes were made to the constitutions of the USSR republics, including the RSFSR Constitution of 1978. As a result of this radical reform of December 1988 and numerous subsequent changes, the Constitutions of the USSR and Russia effectively stopped being 'Brezhnev's' and became the most progressive and democratic constitutional documents in history of the country, including the current Constitution of 1993.

In 1990, further amendments established Presidency in the USSR (in Russia it happened in 1991) and transferred emergency powers of the USSR Supreme Soviet Presidium to the new office. In addition, the President was given the authority to proclaim 'temporary presidential rule' (*vremennoe prezidentskoe pravlenie*) as a form of a state of emergency⁸.

The Act "*On the Legal Regime of a State of Emergency*" (*O pravovom regime chrezvychainogo polozhenia*)⁹, was adopted by the USSR Supreme Soviet on 3 April 1990, to fill an apparent legal vacuum. Its seventeen articles defined the nature of a state of emergency, and provided enabling legislation that gave the Union authorities the operational language, definitions, and procedures for using emergency powers, as Article 1 stated, "in accordance with the USSR Constitution".

Interpreted strictly, the law on a 'state of emergency' could not be invoked against peaceful demonstrations or other legitimate actions. In reality, however, as Gorbachev made clear in his comments on the situation

7 Vedomosti Verkhovnogo Soveta SSSR, No.49, 1988, item 727.

8 For a commentary on 'temporary presidential rule', see Elizabeth Fuller and Stephen Foye, "Special Status, State of Emergency and President's Rule", 3 Report on the USSR (Radio Liberty /Radio Free Europe, Munich), No.5, 1991, p.33-35.

9 Vedomosti S'ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR, No.15, 1990, item 250.

in Lithuania, he put so broad a construction on the 'safeguarding of citizens' security' that the letter of the law was essentially vitiated. In general, the act allowed the central authorities to override the constitutional and legal protection of Soviet citizens. A number of Soviet and foreign legal and political experts disagreed with the official interpretation of the act as the "extreme legal form for ensuring the safety of citizens and normalising conditions"¹⁰. They called the 1990 Act 'draconian', and concluded that "a measure that should provide a legal basis for the actions of the government in the event of a natural disaster or of large-scale public disorders has been formulated in such a way as to give the authorities *carte blanche* to flout basic human rights"¹¹.

Ironically, the Act was used against its strongest supporter – USSR President Gorbachev himself, in August 1991 on the verge of signing a new Union Treaty, and in the wake of a 10 per cent reduction of GDP (in the first half of 1991), and a more than 50 per cent growth of prices for food and the most basic consumer goods. An extra-constitutional Committee for the State of Emergency (GKChP), headed by the USSR Vice-President Gennady Yanaev 'temporarily' replaced Gorbachev and announced a state of emergency in Moscow and 'some areas' of the country for a period of six months¹².

Nevertheless, adoption of special legislation on emergency powers and a state of emergency was a sign of serious political changes in the Soviet Union, a breakthrough on the way of Soviet transition to the rule of law. Legislation on emergency powers and states of emergency could not be drafted and adopted before the beginning of *perestroika*, because there was no necessity of a *legal* regulation of such questions in the authoritarian regime of 'de facto emergency' that existed in the former Soviet Union for about seven decades.

Just like it happened with introduction of Presidency, adoption of a special USSR act on a state of emergency created a precedent that was

10 See V.N. Grigor'ev, "Pravovoy rezhim chrezvychainogo polozhenia" [Legal Regime of a State of Emergency], *Pravovedenie*, 2 (1991), p.87.

11 Paul Goble, "Draconian State of Emergency Law", Report on the USSR (Radio Liberty / Radio Free Europe, Munich), 4 May 1990.

12 For opposing views on the 'putsch' see, e.g., Mikhail S. Gorbachev, *Avgustovskiy putsch. Prichiny i sledstvia* [August Putsch: Reasons and Consequences] (Moscow: Novosti, 1991); *Uroki avgusta 1991 goda. Narod i vlast'* [Lessons of August of 1991: People and Power] (Moscow: Yuridicheskaya literatura, 1994); Alexander Lebed', "Spektakl' nazyvalsya putsch" [The Farce Was Called Putsch], *Literaturnaya Rossiya*, No.34-36, 1993; Oleg Shenin, Vladimir Kryuchkov, Valentin Varennikov, *Process po delu GKChP* [The Case of GKChP] (Mahachkala: 'Golos Pravdy', 1995).

13 *Vedomosti S'ezda Narodnykh Deputatov RSFSR*, No.22, 1991, item 773.

followed by the largest of the Union republics – Russia. On 17 May 1991, the Russian Federation Supreme Soviet passed its own act, “On a State of Emergency” (*O chrezvychainom polozhenii*)¹³. Observers of the New York-based Lawyers’ Committee for Human Rights (now Human Rights First) acknowledged that “like many other laws” adopted by the Russian parliament in 1990-1993, the Emergency Law “relied heavily on international human rights norms, and in particular on the International Covenant on Civil and Political Rights”¹⁴.

Very symbolic is the fact that the Law was drafted by the parliamentary Committee on Human Rights rather than by the Committee on Law and Order, or by the Committee on Defence and Security, or, for that matter, by some executive agency. Indeed, the Russian Law of 1991 was probably one of the most liberal acts in this sphere in the world. The act introduced strong safeguards against its possible abuse by either branch of the government, especially in case of a collision between the branches themselves.¹⁵

As required by international law instruments, no regime of emergency powers can be instituted unless it is ‘necessary or even indispensable’ to the preservation of the state and its constitutional order. Given the danger, it is demanded that emergency powers should be the last resort and that the executive should bear the burden of showing this kind of necessity. As it was shown before, an absolute majority of constitutions include clauses for determining when these powers can be triggered. Though these ‘trigger clauses’ are often not drafted with clarity, the concepts of ‘imminent danger’ and ‘self-defence’ are universally present either implicitly or explicitly.

The 1990 Soviet legislation defined a state of emergency as “a temporary measure declared, in accordance with the USSR Constitution and the present law, in the interests of safeguarding the security or safety, *bezopasnost*, of the USSR citizens in the event of natural disasters, major accidents or catastrophes, epidemics, outbreaks of epizootic disease, and also mass disorders” (art.1).

Article 1 proclaimed that the goal of a state of emergency was “the swiftest possible normalisation of the situation and the restoration of legality and law and order”. In other words, following the letter of the law, explicit goals of state of emergency in the country could be not preservation of the state itself and constitutional order (or restoration of constitutional normalcy),

14 Human Rights and Legal Reform in the Russian Federation (New York: Lawyers Committee for Human Rights, March 1993), pp. 80-81.

15 It was no surprise then, that in September-October 1993, an emergency regime (which included dissolution of the Russian parliament and a partial suspension of the Constitution), and de facto state of emergency, were imposed by President Yeltsin not in accordance with the 1991 Russian Law, but rather in violation of it.

but rather 'security' (or 'safety'), 'normalisation of the situation', 'legality' and 'law and order'. More notably absent was any provision limiting declaration of emergency powers to situations of an imminent danger.

In contrast, article 56 of the 1993 Russian Constitution provided that emergency powers could be declared in order to "ensure the safety of citizens and the protection of the constitutional system"¹⁶. By including language about preserving the Constitution, Article 56 could be considered a major step forward from the 1990 Soviet legislation. However, absent again was any provision limiting declaration of emergency powers to situations of imminent danger.

For comparison, let us briefly consider the French legal experience in this sphere. Constitutional Law of France holds special relevance to this analysis since the USSR Presidency (introduced by a constitutional amendment in 1990) was based mainly on the French model. Article 16 of Constitution of France (of the Fifth Republic, 1958) requires that the President may exercise his emergency power only when "the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments" are threatened in a "grave and immediate" manner and the "proper functioning of the constitutional governmental authorities" is interrupted (sec.1). In addition, the same article provides that the goal of such emergency powers must be to "ensure within the shortest possible time that the constitutional governmental authorities have the means of fulfilling their duties" (sec. 3).

In 'defence' of the Soviet legislation, one may argue that although the French Constitution uses more definite and precise language and limitations in declaring emergency powers, it is still rather open ended. The meaning of 'institutions' of the republic and 'international' commitments seems rather vague and open to great latitude of interpretation. However, the danger of uncertainty of the language of the French norm is minimised by provisions requiring consultation with the Prime Minister, Constitutional Council, and chairs of chambers of the parliament (sec.1), immediate meeting of the parliament *ipso jure* (sec.4) and a ban on dissolution of the National Assembly (sec.5).

One of the most important conclusions of Clinton Rossiter's classic

16 "The Constitution of the Russian Federation" (adopted by referendum on 12 December 1993), in: *The Constitutions of the World* (Dobbs Ferry, NY: Oceana Publications, Inc., 1970-1997. Albert P. Blaustein & Gisbert H. Flanz, eds.). Volume 16 (Release 94-3, May 1994), p.14.

17 Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), p.299.

study of emergency powers was that “the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator”¹⁷. Rossiter was not alone in this respect. The same position was expressed by Carl J. Friedrich: “There should be clear and adequate provision for constitutionally safeguarded emergency powers. These powers should be exercised not by those who proclaim the emergency, but by others, duly designated in the basic law”¹⁸. In other words, the right *to declare* a state of emergency should not belong to those who will be authorised *to exercise* emergency powers. Apparently, this kind of limitation may be able to compensate for a more vague ‘trigger language’. If, for instance, only the legislature can introduce a state of emergency, then it might have the same kind of limiting effect as a narrowly drafted trigger clause.

Article 2 of the 1990 USSR legislation specified three kinds of states of emergency.

- The first one could be declared “on the territory of a Union or autonomous republic or in various locations” by the legislature of a Union or autonomous republic (ASSR) with a notice being given to the USSR Supreme Soviet, the president of the USSR, and, in the case of an ASSR, to the legislature of the Union republic concerned.
- The second one could be declared by the USSR President in “various locations” of the USSR “upon a request or with a consent” of the Supreme Soviet Presidium of the respective Union republic. If necessary, a state of emergency can be introduced without such ‘consent’ by a two-thirds majority of the USSR Supreme Soviet over the objections of the republic involved.
- The last one was an all-Union state of emergency, which could be declared only by the USSR Supreme Soviet.

At first glance, one could argue that Article 2 compensated for the extreme vagueness of Article 1. However, this argument would assume a separation of powers. In reality, back in 1990 (especially before elections in the USSR republics), it would be difficult to suggest that the Supreme Soviet (especially the USSR Supreme Soviet which was formed as a result of partially free and fair elections of 1989) was really independent of the USSR (Gorbachev’s) presidency.

According to Article 3, the declaration of a state of emergency was to

¹⁸ Carl J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* (Providence, RI: Brown University Press, 1957), p.117-118.

be accompanied by an announcement specifying: the reasons (*motivy*) for the measure, the period it was to last, and the area to which it was to apply. The article, however, created a massive loophole and provided that each of those conditions could be modified at its discretion by the body that had declared the state of emergency, thus seriously diminishing the value of this provision.

Under Article 16, the USSR Ministry of Foreign Affairs was to “immediately inform” the UN Secretary-General of an introduction, extension or termination of a state of emergency.

In contrast, under the Russian 1991 law, a state of emergency could be introduced by either executive or legislative branches of government - the President and the Presidium of the Supreme Soviet - with the “immediate notification” of the other of such act (art.5). The act introduced an effective mechanism of checks and balances. If a state of emergency had been imposed by the President, the Supreme Soviet was to review the decree within 24 hours if in session, or within 72 hours if not in session. The Supreme Soviet was to approve the decree by resolution, or the decree would automatically lose its force (art.11 and 12). The President could not extend a state of emergency beyond the stated time periods without the Supreme Soviet’s authorisation. The law set forth maximum time limits for a state of emergency, such as 30 days for the republic as a whole, or 60 days for a portion of the republic. Those periods could be extended only by a new authorising resolution of the Supreme Soviet (art.13).

Once a state of emergency was declared, an important question arose regarding *how* and *to what extent* the government might legitimately re-constitute itself. Article 5 of the 1990 Russian Act stated that the higher organs of state power were empowered to “revoke any decision of lesser organs operating in localities where a state of emergency” had been declared. It also gave broad power to the “higher-level authorities” to set up alternative administrative bodies (‘special temporary agencies’) “to coordinate” the situation, thus effectively suppressing normal operations of republican and local governments. Unfortunately, the statute failed to indicate any limits to the jurisdiction of these ‘agencies’ or to explicitly specify if their existence was limited by the duration of the state of emergency.

The new Russian Constitution of 1993 took an altogether different and more vague approach to institutional adaptation during a state of emergency or martial law. The constitution is silent on the creation of ‘special temporary agencies’; and it is certainly a step forward that it forbids the president to dissolve the Duma during a state of emergency. However, the

constitution, by its silence, appears to leave wide open exactly *what* changes in governmental and constitutional structure the president can make. The document states only that “the regime of martial law shall be defined by the federal constitutional law” (art. 87(3)) and that a state of emergency is to be instituted “in accordance with the procedure stipulated by federal constitutional law” (art. 88). Yet, the Constitution fails to define, or simply hint at, what such ‘regime’ and ‘procedure’ should be. To evaluate these provisions in a vacuum, outside the *realpolitik*, they seem to be extremely vague and open ended.

Also absent from the 1990 Act, and the 1993 Constitution, is any provision like Article 150(7) of the 1977 Malaysian Constitution, which requires that: “At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period”¹⁹.

This kind of provision can be really important in limiting a possible abuse of emergency powers by the executive, especially in a legal and political system that lacks strong federal legislature, as in Russia since 1993. While illustrations from nations like the United States show that the judiciary is not always willing to invalidate government abuses in times of dire emergency²⁰, such courts will not usually tolerate gross excesses in situations of non-emergency. The kind of ‘restoration provision’ found in the Malaysian Constitution would be extremely helpful to such courts to restrict enforcement of emergency powers in ‘normal times’.

The 1990 USSR legislation made an attempt to specify rights and guarantees that were subject to derogation during a state of emergency. Article 4 established a list of twenty measures that could be applied “depending on the concrete circumstances, the organs of state power and

19 See S. Jayakumar, “Emergency Powers in Malaysia: Development of the Law 1957-1977”, The Malayan Law Journal, January 1978, p. xxiv.

20 The U.S. Supreme Court’s refusal to hold unconstitutional - in *Hirabayashi v. United States* (320 U.S. 81 (1943)), *Korematsu v. United States* (323 U.S. 213 (1944)), *Duncan v. Kahanamoku* (327 U.S. 304 (1946)) - the government’s internment of 119,803 Japanese-Americans (70,000 of whom were full-fledged U.S. citizens) during World War II is one of the most graphic illustrations of this observation. Rossiter prophetically observed: “The next time it may be a slightly larger minority group. Whatever it was for its citizens of English, German, Jewish, or Chinese descent, the government of the American Republic was a naked dictatorship for its 70,000 Japanese-American citizens of the Pacific Coast” (Clinton L. Rossiter, op.cite, p. 283). For details see, e.g., Jacobus tenBroek, Edward N. Barnhart and Floyd W. Matson, *Prejudice, War and the Constitution: Causes and Consequences of the Evacuation of the Japanese Americans in World War II* (Berkeley & Los Angeles: University of California Press, 1970).

administration". Taken together, and even more so by extension, they gave the authorities the power to take over virtually all institutions in the territory affected: to suspend activities of any "political and social organisations, mass movements" (sec.18), impose quarantines (sec.13), introduce censorship and restrict or ban use of audio and video equipment, copying machines (sec.14, 15), prohibit assemblies, meetings, demonstrations and strikes (sec.6, 10), seize resources (sec.9), exercise business reorganisation (sec.8) and shift workers from one area to another (sec.11), engage in search-and-seizure operations without a warrant (sec.20), temporarily deport population (sec.2), enforce protection of certain objects and areas (sec.1), temporarily confiscate weapons and other materials (sec.5), restrict movement and transportation (sect. 3, 16), and to ban any "armed formations" (sec.19).

Article 6 empowered the authorities to transfer workers and employees "without their consent", and Article 7 specified that a total curfew may be imposed. In addition to a regular criminal liability, Article 8 prescribed administrative fines (of up to 1,000 roubles) and detention (of up to 15 days) for violations of Article 7 and sections 3, 4, 6, 10, 12-16 of Article 4.

The next two articles introduced more severe penalties for "dissemination of provocative rumours, actions that provoke a disruption of law and order or that stir up national discord and the active hindering of citizens and officials in the exercise of their lawful rights and the performance of their duties, as well as persistent failure to obey lawful orders or demands" by members of law-enforcement agencies, "or any other actions of this sort that violate public order or tranquillity" (art.9). Such persons could be fined up to 1,000 roubles or held for up to 30 days. Finally, persons involved in "leading a banned strike" or "otherwise preventing" an emergency regime from "operating normally" were announced liable to criminal penalties, including fines of up to 10,000 roubles, two years of 'corrective labour', or three years of imprisonment. Besides, Article 14 allowed the central authorities to change the territorial jurisdiction in all civil and criminal cases.

The USSR and Russian acts on a state of emergency have certain similarities. Both of them (art.11 and 21, respectively) permitted the use of military personnel, as well as the military formations of the Ministry of the Interior and KGB upon a decision of the USSR Supreme Soviet or the USSR President (in Russia's case - RSFSR Supreme Soviet or Russian President). Articles 12 and 18 of the USSR and Russian laws (respectively) provided for the establishment of a joint command in such situations. In addition, Article 13 of the 1990 Law empowered the USSR Minister of Defence to draft specialists in the reserves for up to two months to deal with natural disasters or accidents. He was presumably not permitted to do so in cases of public

unrest. Article 15 of the Russian law provided for compensation to victims of disasters.

While there were no additional provisions in any other Soviet legislation of that period shedding light on emergency powers in the USSR, as they were laid down in the 1990 Act, one could certainly argue that the statute contained an exhaustive list of restrictions and limitations (especially those in Articles 4 and 9 of the Act) that could be imposed in a state of emergency. The problem was that, even though 'exhaustive', the list was very broad. It is hard to imagine what rights and freedoms could not be affected if the government would have decided to use that legislation. The phrasing of a provision prohibiting any "actions" that could "provoke a disruption of law and order" seems to be especially vague and ripe for use as a vehicle for abuse (art.9).

Perhaps the most dubious provision of the USSR 1990 Act was contained in Article 16, which specified that "in cases where the organs of state power and government are not functioning properly in places where a state of emergency has been declared, the president of the USSR can introduce temporary presidential rule".

Under the provisions of the article, the president of the USSR could 'suspend' the authority of regional bodies and appoint an alternative power structure that would exercise all the powers specified in Article 4. Moreover, this body, and presumably its creator, could make proposals for changing virtually everything in a republic and could take direct control over any enterprises, institutions, and organisations in the relevant area. The only restriction on this virtually unlimited grant of power to the president was a provision saying that he couldn't violate the "sovereignty or the territorial integrity of the Union republic concerned".

Although the Russian law of 1991 specified the same restrictions (as the USSR act of 1990) that could be imposed on Russian citizens in a state of emergency - special regime of exit and entry; increased security; restrictions on assembly and the right to strike; restrictions on transportation; a curfew and restrictions on the press and media, etc. (art.23 and 24), - there was a major and principal difference between the Russian and USSR laws. The Russian Act clearly and in explicit terms proclaimed that a state of emergency could not be the basis for derogation of "fundamental" rights protected by the ICCPR, including the right to be free from torture; cruel, inhuman, or degrading punishment; or freedom of thought, conscience, or religion (art.27). In fact, the 1991 Russian Act "*On a State of Emergency*" became the very first law among any other similar legislation in the 15 constituent republics of the USSR that included a 'non-derogable clause'.

The Russian law set other limits on the state of emergency:

- prohibiting introduction of emergency courts (art.34) and death penalty (“the death penalty may not be imposed during the state of emergency, or for 30 days after its conclusion” (art.36));
- making changes to the Constitution or to electoral laws, prohibiting elections or referenda until the end of a state of emergency (art.38);
- in accordance with the ICCPR, obliging the President to inform the UN Secretary-General (within three days of the imposition of a state of emergency), to provide the latter with the detailed information about the reasons for an introduction of a state of emergency and about the restrictions that were to be imposed in the republic (art.41).

Thus, the Russian 1991 act represented an outstanding legal development and a remarkable improvement over the USSR legislation.

The 1993 Constitution has kept and repeated the best provisions of Part 5 ‘Guarantees of Rights and Responsibility of Citizens and Officials in a State of Emergency’ of the 1991 Russian law. Article 56 enlists the rights and freedoms that cannot be affected by a state of emergency and deserves a title of the ‘non-derogable clause’ of the Russian Constitution.

Specifically, Article 56(3) mentions sixteen rights that “shall not be subject to restriction”. Included in this list are: the right to life (art.20); protection of human dignity and ban on “torture, violence or any other harsh or humiliating treatment or punishment... medical, scientific or other experiments without his or her free consent” (art 21); “right to privacy, to personal and family secrets, and to protection of one’s honour and good name” (art 23(1)); prohibition to “collect, keep, use and disseminate information on the private life of any person without his consent” (art.24(1)); freedom of information (art.24(2)); freedom of conscience and freedom of religious worship, “including the right to profess, individually or jointly with others, any religion, or to profess no religion, to freely choose, possess and disseminate religious or other beliefs, and to act in conformity with them” (art.28); right to occupation (art.34(1)); right to housing (art.40(1)).

The article also includes the most basic and fundamental criminal procedural rights: “everyone shall be guaranteed protection of his or her rights and liberties in a court of law” (art.46); “no one may be denied the right to having his or her case reviewed by the court and the judge under whose jurisdiction the given case falls under the law” (art.47); right to legal counsel from the moment of detention or indictment (art.48); presumption of innocence (art.49); prohibition to be repeatedly convicted for the same offence and right to have the sentence reviewed by a higher court (art.50);

right not to testify against himself or herself, for his or her spouse and close relatives (art.51); protection of the “rights of victims of crimes and abuses of power” (art.52); right to compensation by the state for the “damage caused by unlawful actions (or inaction) of state organs, or their officials” (art.53); prohibition of retroactive force for laws “instituting or aggravating the liability of a person”; no one may be held liable for an action which was not recognised as an offence at the time of its commitment” (art.54).

Naturally, not all rights and freedoms can be protected in a state of emergency. Among the rights which are not given this constitutional protection are freedoms of speech, association, democratic elections, and various social and economic rights, including social security, education and health care.

However, as with other provisions in the Constitution, the problem is that the President is the body that has the right to declare a state of emergency under Article 88, and under Article 80(2) he is also the one who serves as the “guarantor of the Constitution of the Russian Federation, and rights and freedoms of man and citizen”. According to the latter article, it’s the President again who “shall take measures to protect the sovereignty of the Russian Federation, its independence and state integrity”.

Without a well-established system of checks and balances and separation of powers, as is the case in the post-1993 Russia, one has to seriously question the enforceability of all the rights and freedoms guaranteed in Chapter Two of the Constitution, including Article 56 that proclaimed that “in the period of martial law citizens enjoy all rights and freedoms established by the Constitution of the Russian Federation except those rights and freedoms that are restricted by this Federal Constitutional Act and other federal legislation” (Art.18(1)).

§ Part II

In the last two decades, states of emergency and emergency regimes have been introduced by the USSR and republican authorities approximately thirty times. In general, emergency powers have been invoked at three different levels of the constitutional systems of the USSR and former Soviet republics.

An invocation at the *all-union level* occurred in Lithuania when, on 11 March 1990, this Baltic republic declared its ‘independence’ from the USSR. President Gorbachev first unsuccessfully appealed to the leadership of the unruly republic not to violate its constitutional subordination within the Union, and then invoked his new constitutional power to impose an economic

embargo, a form of political coercion, on the secessionist republic. The embargo was in effect for several months in 1990. On 7 January 1991, the President of the USSR ordered Soviet airborne troops into Lithuania (as well as into Latvia, Estonia, Armenia, Georgia, Moldavia and some areas of Ukraine) to 'enforce the draft', and on 13 January 1991, the Soviet army assisted a shadowy Lithuanian 'National Salvation Committee' in taking over several strategic buildings in Vilnius, the Lithuanian capital. Reports indicated that 13 or 14 people were killed, and some 100-150 others wounded. In characteristic fashion, Gorbachev denied that he had given prior authorisation for the crackdown in Lithuania, but defended it as a 'necessary defensive action' and denied any responsibility for the events in Vilnius.

At the union republic level, on 22 September 1988 the USSR Supreme Soviet declared a 'state of exception' (*osoboe polozhenie*) and curfew in the Nagorno-Karabakh Autonomous Oblast' (NKAO) and district (*agdam raion*) of Azerbaijan (east of Karabakh), which by then had been rent by interethnic conflicts for months²¹. On 23 November 1988, the Presidium of the USSR Supreme Soviet issued a decree '*On Immediate Measures for the Establishment of Public Order in the Azerbaijan SSR and Armenian SSR*' extending the state of exception to Baku, the capital of Azerbaijan, some other cities and districts of the republic, as well as to Yerevan, the Armenian capital. Simultaneously, federal Ministry of the Interior troops were deployed to Yerevan, Baku, and Karabakh. These measures failed to produce the desired results, and "in view of the continuing tension in interethnic relations in and around NKAO and in order to prevent their further aggravation and to stabilise the situation in the region", the Presidium of the USSR Supreme Soviet on 12 January 1989 decreed the introduction of a 'special form of administration' in accordance with Article 119(14) of the USSR Constitution. All government powers over the autonomous region were transferred to the Committee for the Special Administration of the NKAO headed by Arkady Volsky²², a member of the CPSU Central Committee of Gorbachev's draft (since 1986), and a former economic aide to CPSU General-Secretaries Yuri Andropov (1983) and Konstantin Chernenko (1984). In May 1989, federal Army troops were deployed in Stepanakert, the Karabakh 'capital'.

Although the very first paragraph of the decree of 12 January 1989

21 NKAO is a predominantly Christian Armenian enclave within the borders of Azerbaijan, which is predominantly Muslim. In February 1988, the NKAO Supreme Soviet called for its transfer to the jurisdiction of Armenia under the slogan of the 'right to self-determination' of ethnic Armenians in NKAO. Gorbachev and the governments of the USSR and Azerbaijan based their opposition to internal border changes and the annexation NKAO by Armenia upon Article 78 of the USSR Constitution which stated that 'the territory of a union republic cannot be changed without its consent'.

22 Vedomosti Verkhovnogo Soveta SSSR, No.47, 1988, item 711; No.3, 1989, item 14.

23 See Sovetskaya Kirgizia, 8 June 1990.

described the measure as 'temporary', it set no time limit upon the measure. In several cases, this distressing tradition continued even after adoption of the parliamentary statute in 1990. For instance, a decree of the Presidium of the Supreme Soviet of the Kirghiz SSR of 7 June 1990 declaring a state of emergency in Frunze, capital of Kirgizia, did not specify how long the state of emergency was to last²³. This was an obvious violation of Article 3 of the 1990 USSR Law.

Looking back, it would be fair to say that quite often (if not usually) the imposition of a state of emergency was a reaction to civil unrest and other forms of internal strife that had led to grave violations of human rights. In some cases, the declaration of a state of emergency provoked clashes between the civil population and illegal paramilitary formations on the one side, and internal troops and/or the army on the other. 'Black January' in Azerbaijan is a typical example of such a situation. Responding to an official declaration (on 1 December 1989) by the Armenian Supreme Soviet that Azerbaijan's province of Karabakh was an 'integral part' of Armenia, the Popular Front of Azerbaijan (PFA), then a nationalist opposition party with armed militia units, began a railroad blockade of Armenia and NKAO, severely restricting the delivery of food and fuel. On 13-14 January 1990, anti-Armenian violence broke out in Baku, where the PFA was in control, and resulted in between 60 (the official figure) and 100 deaths. Radical PFA members led attacks on the Communist Party and government buildings in Baku and other cities, and outposts of the USSR border guards were attacked on the Soviet-Iranian border. On 15 January, the USSR Supreme Soviet Presidium continued its experimentation with its emergency powers and introduced a new regime of exception (the third in the space of 16 months), this time a 'state of emergency'²⁴. Among other measures, the Union authorities declared a curfew and dispatched thousands of federal troops to Baku to restore normalcy and ensure safety in the region. Their attempts to disarm militia and dismantle barricades and other makeshift devices proved to be ineffective. According to official reports, 124 people were killed and

24 Vedomosti Verkhovnogo Soveta SSSR, No.3, 1990, item 40.

25 In her report to U.S. Congress C. Migdalovitz gave excessive numbers of victims: 150 dead and "thousands" wounded (Carol Migdalovitz, Armenia-Azerbaijan Conflict (CRS Report for Congress IB92109; Washington, D.C.: Congressional Research Service, The Library of Congress, updated 16 June 1994), p.3). By mistake, Migdalovitz called a state of exception (*osoboe polozhenie*) imposed in Karabakh "martial law", but she was absolutely right in her conclusion that it was "Michail Gorbachev's policy" that "unleashed long-suppressed hostility between Armenia and Azerbaijan, and between each republic and Moscow" (p.3).

26 El'chibey's government ended in chaos, when in June of 1993 he fled to a remote village in the mountains and was stripped of presidential powers by the parliament. On 29 August 1993, more than 90 percent of the electorate reportedly turned out for a national referendum, overwhelmingly expressing a lack of confidence in El'chibey's rule.

some 700 wounded²⁵. What was viewed as a 'Soviet intervention' further alienated the Azeri population from Moscow, and later helped the Popular Front leader Abul'faz El'chibey temporarily come to power in the republic²⁶.

As an example of a regime of exception within a union republic, we should consider the state of emergency that was introduced on 12 December 1990 within the territory of the 'South Ossetian Autonomous Oblast', an autonomous region of Georgia with a large concentration of non-Georgians. The imposition was carried out in accordance with Article 113(7) of the 1978 Georgian Constitution.

The disintegration of the USSR in December 1991 along administrative demarcation lines, which are often illusory, rather than *state* (national) borders, led to the division of several ethnic groups living on the territory of the Soviet Union amongst new 'independent' countries. The Ossetian nation, in this respect, was divided between the Russian Federation (North Ossetia) and Georgia (South Ossetia). Interestingly, the *Wall Street Journal* committed an error when claiming that South Ossetia (and Abkhazia, another region of Georgia) had broken away from Georgia in wars that followed the collapse of the Soviet Union in 1991²⁷. In reality, the conflict in South Ossetia had deeper roots, and was caused by a general discriminatory policy of the government of Georgia against its ethnic minorities. The Ossetian side claims, for instance, that while in the 1920s there were as many Ossetians in North Ossetia as in South Ossetia, by 1991 there were 350,000 Ossetians in the North, leaving only 68,000 in the South. Many had moved to Northern Ossetia from the South to avoid the discriminatory treatment of the Georgian authorities.

The situation was exacerbated more than two years before disintegration of the Soviet Union by the Language Act (adopted in August 1989) that made Georgian the only 'official' language in the republic, including within schools and other educational institutions. There were plans of further 'Georgianization' of the region. Attempting to prevent this, the South Ossetia Oblast (Council) requested the Georgian Supreme Soviet to grant South Ossetia the status of an 'autonomous republic' which implies a higher level of self-administration than an 'autonomous oblast'. The leader of the Georgian nationalists, Zviad Gamsakhurdia, replied by calling the South

27 Hugh Pope and Guy Chazan, "Georgia Sets Path of Confrontation. New President Saakashvili Angers Russia, Courts U.S. With Caucasus Ambitions", *Wall Street Journal*, 6 August 2004.

28 Members of the current government of President Mikhail Saakashvili continue referring to South Ossetia as the 'Tskhinvali region': "Georgian Prime Minister Zurab Zhvania rejected any attempts to interfere with the Georgian-South Ossetian relations from the outside. 'It's nobody's business what military units Georgia will deploy to the Tskhinvali region'". (See, "Georgia to Deal with Rebellious Autonomy Alone?", *RIA Novosti*, 2 June 2004).

Ossetians 'ungrateful guests' of Georgia, alluding to the claim that they have lived in the area for 'only a few centuries'.

As a next step, the Georgian government refused even to use the name 'South Ossetia', and began referring to the region as 'Samochablo' (an older Georgian name for the region) or the 'Tskhinvali Region' (after the regional capital city Tskhinvali)²⁸. In November 1989, groups of Georgian youth held a 'march on Tskhinvali'. Arrival of some 15,000 armed men on trucks, buses and cars led to severe clashes and the injuries of hundreds of people. In September 1990, the government of South Ossetia proclaimed the independence of the 'Soviet Republic of South Ossetia' (within the USSR), and in October boycotted the Georgian elections that brought Gamsakhurdia and the 'Round Table Free Georgia' coalition to power.

On 11 December 1990, the Gamsakhurdia government stripped South Ossetia of *any* autonomous status, and a day later, imposed a state of emergency on the stated ground that two Georgians and one Ossetian had been murdered in Tskhinvali under mysterious circumstances²⁹. Deployment of 3,000 to 6,000 Georgian militia to Tskhinvali, ostensibly 'to maintain order' in the region, was viewed by the South Ossetians as an 'intervention' and 'occupation'. The resulting resistance led to three weeks of all-out urban warfare, until the Georgian militia was pushed out of the city. Initially declared for a period of one month in the city of Tskhinvali and Javsky district, the state of emergency was repeatedly extended. The continuous struggle that included armed clashes and the shelling of Ossetian villages, and the economic and military blockade of the area, made thousands of Ossetians flee the region and find shelter in North Ossetia, located within the territory of the Russian Federation.

A *coup d'état* staged in Gamsakhurdia (December 1991 - January 1992) by Edward Shevardnadze and his allies, which included the notorious convicted criminals Tenghiz Kitovani and Jaba Ioseliani, did not succeed in changing the nationalities policy of Georgia. In fact, as revealed in a report of a Swedish-American fact-finding mission to Georgia, more people were killed in South Ossetia after Shevardnadze's accession to power than during the earlier phase³⁰. A peacekeeping mission of the Organisation for Security and Cooperation in Europe (OSCE) has been deployed in South Ossetia since 1992. However, several rounds of talks between Georgian and South

29 The Emergency Proclamation was published in *Molodezh' Gruzii*, No.49, 14 December 1990.

30 *Georgia on Our Minds* (Report of a Fact-Finding Mission to the Republic of Georgia, July 1994, under the auspices of the Psychologists Against Nuclear Arms for Peace and Ecological Balance and the Transnational Foundation for Peace and Future Research), p.17. For the background of the Georgian-South Ossetian conflict, *see, e.g.*, Ronald Grigor Suny, *The Making of the Georgian Nation* (Bloomington, IN: Indiana University Press, 1988).

Ossetian representatives have made little progress toward an agreement on South Ossetia's future status.

Similar to the Armenia-Azerbaijan conflict over Nagorno-Karabakh, the territorial problem relating to South Ossetia still lingers in Georgia. Since the latest coup in Georgia, directed against Shevardnadze, and the election in January 2004 of president Mikhail Saakashvili, the South Ossetian situation has shown the tendency of going from bad to worse.

§ Part III

Since the adoption of the Law "On a State of Emergency" of 1991, this special regime has been declared in Russia (or the RSFSR) thrice; in Chechnya in November 1991, Ossetia-Ingushetia in 1992-1995, and in Moscow in October 1993.

On the first occasion, it was introduced by President Yeltsin by way of Decree No.178 of 7 November 1991, intending to "put an end to mass disturbances, accompanied by violence, [and] stop activities of illegal armed formations, in the interests of guaranteeing safety of citizens and protection of constitutional order of the republic". A state of emergency with all its elements (including a curfew, the confiscation of weapons, and a ban on meetings, demonstrations and strikes) was to come into effect at 5 a.m. on 9 November and last for 30 days. In reality, it turned out to be the shortest emergency imposed within the territory of Russia, as the Russian Supreme Soviet refused to ratify it³¹. Setting aside the discussion concerning the political circumstances surrounding the introduction and termination of the emergency (the lack of coordination between branches of government, different interpretations of events in Chechnya, etc.), and the question of which decision was correct, this was the only instance where the Russian Parliament effectively exercised a 'termination clause' of the legal mechanism of a state emergency. However, it would be fair to say that an abrupt termination of emergency in 1991, just two days after its introduction by the Russian President, caused what may be termed 'Chechen syndrome', and became one of the reasons for the future reluctance of Russian federal authorities to use the 1991 law.

The longest state of emergency was in effect in parts of North Ossetia (the official name of the republic is 'North Ossetia - Alania') and Ingushetia between November 1992 and February 1995.

The imposition of a state of emergency for two-and-a-half years in the region resulted in the prevention of open fighting. In the first months after

31 Vedomosti S'ezda narodnykh deputatov RSFSR i Verkhovnogo Soveta RSFSR, No.46, 1991, items 1546, 1550.

the introduction of the state of emergency (November-December of 1992) only 26 persons were killed in the region, compared to 478 before 2 November 1992. In 1993, the number of victims was 124, including 40 Ossetians, 33 Ingush, 21 of 'other nationalities' (mainly Russian peacekeepers), and 30 of 'unknown nationalities'. In the first half of 1994, the number was reduced to 16. That was probably the most important result of the emergency regime.

Overall, the imposition of a state of emergency and its operation in parts of North Ossetia and Ingushetia between November 1992 and February 1995 was moderately effective in stopping armed fighting and preventing the worst scenario, open warfare between two ethnic groups. However, it proved to be unsuccessful in solving the underlying problem and eradicating the roots of the conflict, which were the territorial claims of Ingushetia upon Prigorodny district of North Ossetia.

Amongst all the instances of the imposition of the state of emergency within the territory of the former Soviet Union, observers can hardly identify a more dramatic and more significant emergency regime than the one imposed by President Yeltsin on 4 October 1993, after brutal suppression of the first democratically elected Russian Parliament³². The event truly became *a defining episode* in contemporary Russian politics.

On 21 September 1993, President issued Decree No.1400, which had the paradoxical title '*On the Gradual Constitutional Reform in the Russian Federation*' (*O poetapnoy konstitutsionnoy reforme v Rossiyskoy Federatsii*). By way of the Decree, the Congress of People's Deputies (the upper tier of parliament) and the Supreme Soviet (the permanently working legislative body) were declared dissolved and their activities "interrupted" (Art.1)³³. When the Parliament declared Yeltsin's actions a coup, the executive ringed the parliamentary building (White House) with police cordons, cut off telephone services, water, electricity, heating, and the emergency systems, as well as the telephone line of Chairman of the Constitutional Court in the Court's building.

The necessity to dissolve the Parliament, as it was stated in Decree 1400, was justified by the allegations that the Supreme Soviet had lost its

32 Democratic character of the first Russian parliament is beyond any doubt. According to the Central Election Commission, on 4 March 1990, 6,705 candidates ran for 1,068 seats in the Congress of People's Deputy (CPD) - an average of more than six per district. About 300 electoral districts had a race between more than four candidates; 24 electoral districts - more than twenty! (See, e.g., Human Rights and Legal Reform in the Russian Federation (New York: Lawyers Committee for Human Rights, March 1993), pp. 44-45).

33 Sobranie aktov Prezidenta n Pravitel'stva Rossiyskoy Federatsii, No.39, 1993, item 3597.

“ability to be a representative body”, and that “the security of Russia and its people” was “a higher value than formal observation of discrepant norms”, introduced by the Parliament. The problem with this explanation is that the Russian legislation adopted in 1991-1993 was signed into effect by the President himself. On a few occasions, he exercised his veto power. In instances where legislation was not vetoed, he accepted responsibility along with Parliament for all “discrepant norms”. In the final analysis, the very creation of the presidency in Russia in 1991 was also a ‘norm’ introduced by the Parliament. The extent to which the Supreme Soviet ‘represented’ Russian society, its wishes and interests, was demonstrated by Russian voters in the next parliamentary elections of December 1993, when 85 per cent of them voted *against* pro-Yeltsin’s ‘party of power’ (Egor Gaidar’s ‘Russia’s Choice’).

‘Gradual Constitutional Reform’ was aimed not against the legislative branch of the Russian government alone. In Article 10 of his Decree No.1400, Yeltsin also “advised” the Constitutional Court “not to convene” until after the December 1993 elections. The Constitutional Court did not follow that ‘advice’, which was a blunt violation of the separation of powers and an infringement of the court’s independence. In an emergency session that took place the same night³⁴, it voted 9 to 4 that the President’s action violated eleven articles of the Russian Constitution. The most important of those 11 counts was a violation of Article 121-6, one of the key provisions of a chapter on the presidency in the Russian Constitution. Originally, it was an article of the Law “*On the President of the RSFSR*” (*O prezidente RSFSR*) of April 1991, which introduced the presidency in Russia; later (in May 1991) the provision was included in the Constitution. According to the article, the President could not use his powers “to dismiss, or suspend the activities of, any lawfully elected agencies of state power”. Violation of the article would not merely subject the President to a long ‘impeachment’ procedure, as it is known in the U.S. and elsewhere. Article 121-6 was a much more powerful constitutional check on the authoritarian tendencies of the executive, which provided that in the case of a violation, the President’s powers were to be “discontinued immediately”.

In accordance with the Constitution, the tenth CPD convened in the White House, and with its Resolutions No.5780-1 and 5781-1 discontinued

34 Vestnik Konstitutsionnogo suda, No.4, 1994.

35 Rossiyskaya gazeta, 23 September 1993.

36 Next day Yeltsin issued two supplementary decrees: No.1578 “On Urgent Measures for Ensuring the Regime of a State of Emergency in Moscow” and No.1580 “On Additional Measures for Ensuring the Regime of a State of Emergency in Moscow”, and one more on October 9: No.1615 “On Extension of a State of Emergency in Moscow” (See Sobranie aktov Prezidenta n Pravitel’stva Rossiyskoy Federatsii, No.40, 1993, items 3748, 3751; No.41, items 3909, 3923).

the Presidential powers of Boris Yeltsin (at 10 p.m. on 21 September 1993) and named Vice President Alexander Rutskoi 'acting President'³⁵.

At 4 p.m. on 3 October 1993, Yeltsin signed Decree No.1575 '*On Introduction of a State of Emergency in Moscow*'³⁶. This decree was far from being perfect in terms of legislative technique overall, and few of Yeltsin's decrees have been as poorly drafted as Decree No.1575. Although the decree appealed to several provisions of the Act "*On a State of Emergency*" of 1991, and although the declared regime was called a 'state of emergency', it was introduced in violation of both the Constitution and the 1991 Russian Law.

The decree appealed to a number of provisions of the Russian Act of 1991 (Arts.22-24; allowing suspension of certain rights and freedoms), but it lacked an exhaustive list of such suspended rights, as prescribed by the same Act "*On a State of Emergency*" (Art.10). The decree failed to give exact reasons that had made Yeltsin introduce a state of emergency, as prescribed by Article 4(a) of the 1991 law. The decree appealed to Article 24 of the law that named measures that might be undertaken under an emergency regime, even though according to the act such measures could be undertaken only when the emergency is caused by a natural disaster (and not by disturbances and political unrest, as was the case in October 1993). Yeltsin exceeded his powers and grossly violated the Russian legislation when he suspended the norms of laws on the status of parliamentarians and lifted their immunity. The President did not have a right to ban public organisations, seize their bank accounts, headquarters and property; this could be done only after giving 'a preliminary warning' to such organisations. Article 21 of the 1991 law allowed use of troops only with the consent of the Russian Supreme Soviet, and exclusively when an emergency was caused by natural disasters ('military aid to civil ministries', 'military aid to the civil community', and 'military aid to the civil power', as it is known in Britain), and not to shoot protesters. In error, the Russian law of 1991 was itself called an act of the "Russian Federation", whereas technically it was an RSFSR act. Finally, the emergency declaration was not approved by Parliament (for it had been dissolved and soon would be physically destroyed), and therefore what was introduced in Moscow was a *de facto* state of emergency - in the best tradition of juntas and similar dictatorial regimes - not *de jure*, as it should be in states governed by law.

Tanks were called in to shell the White House and burn it down, and

37 Nezavisimaya gazeta, 19 October 1993. British magazine The Spectator wrote about "1,000 arrested" ("Portrait of the Week", The Spectator, 9 October 1993, p. 4).

38 "Massovye narusheniya prav cheloveka v Rossii" [Mass Violations of Human Rights in Russia], Nezavisimaya gazeta, 23, 26 July 1994. One of those who was severely beaten by Moscow OMON (Special Police Unit) was a parliamentarian and Secretary of the Constitutional Commission Oleg Rummyantsev - "Russian James Madison", as David Remnick called him in The Washington Post in 1990.

in the days after the introduction of the state of emergency, scores of people were arrested. Approximately 35,000 were detained for violation of curfew regulations (curfew was declared at 11 p.m. on 4 October), and more than 54,000 were detained for 'administrative misdemeanours'. 9,779 persons were accused of violating the internal passport system and deported from Moscow³⁷. According to a Report of the Human Rights Commission, mass beatings of the detained were a common practice³⁸.

On 7 October 1993, Yeltsin signed Decree No.1612 '*On the Constitutional Court of the Russian Federation*'³⁹, stripping the court of its key powers. The only fault of the court was that it obeyed the Constitution, and it "ended up on the losing side when Yeltsin emerged victorious from the bloody events of October"⁴⁰. It was only 18 months later that the new Constitutional Court of Russia was able to resume its normal work.

Communist, nationalist and patriotic organisations were banned and barred from participation in the forthcoming elections⁴¹, and censorship was introduced. On 13 October, all the opposition dailies were banned, and criminal investigation was initiated against the editors of 15 periodicals.

The number of victims of those days of 'civil war' in Moscow vary from the 'official' number of 147 killed (half of whom were teenagers) and more than 700 wounded to an estimated "1500 killed". The precise numbers of those who were beaten and wounded "has not been reliably determined"⁴².

The evaluation by an authoritative human rights organisation concludes that: "The state of emergency... was a major blow to human rights... The state of emergency violated Russia's own domestic rules regarding states of emergency. It also violated the standards provided in Article 4" of ICCPR. "Among the non-derogable rights that were violated was the right to life... Moreover, the extent to which derogable rights, such as freedom of speech, were restricted also went beyond the boundaries of the covenant... A wide range of measures taken during the state of emergency involved discrimination solely on the ground of race or colour - all violations of the covenant... As the Russian human rights NGO *Memorial* has documented, the number of

39 Ibid, No.41, 1993, item 3921.

40 Justice Delayed. The Russian Constitutional Court and Human Rights (New York: Lawyers Committee for Human Rights, 1995), p. 6.

41 Sobranie aktov Prezidenta n Pravitel'stva Rossiyskoy Federatsii, No.43, 1993, item 4080.

42 Boris Kagarlitsky, Square Wheels. How Russian Democracy Got Derailed (New York: Monthly Review Press, 1994), p.218. As an eyewitness Kagarlitsky testified in his book that the official figure of victims (142 killed) "was a mockery - the real number of dead had to have been several times greater" (*ibid.*).

43 Information Prepared for the Human Rights Committee on the Periodic Report of the Russian Federation Under Article 40 of the Covenant on Civil and Political Rights by the Lawyers Committee for Human Rights (New York: Lawyers Committee for Human Rights, 1995), p.4.

cases that have been pursued by the Procurator's Office is insignificant, particularly when compared to the scope of violations"⁴³.

§ Part IV

A Draft Constitution was quickly prepared to seize the moment and make Yeltsin's 'victory' even more monumental. The President offered a draft on 10 November, just a month before the referendum. Discussion of the draft in the mass media was prohibited, "hardly a sound precedent of democratic practice", as British analysts wrote⁴⁴. Further, for the very first time in Russian history since 1917, the minimum voter turnout needed for a valid parliamentary election was reduced from 50 to 25 per cent. The new Constitution, whose *actual* adoption by the Russian population is highly doubtful, provided for one of the strongest presidencies in Europe, "superpresidentialism" or "a modern-day czar", and was described as placing Russia once again under something similar to authoritarian rule.

As a 'victor's Constitution' (rather than a consensus- or social contract-based constitution), the 1993 Fundamental Law substituted the separation of powers and checks and balances with presidential supremacy, and placed the Executive above other branches of government⁴⁵. Among other things, the 1993 Constitution granted jurisdiction to the President over several areas which had traditionally been the preserve of the courts, such as the protection of civil rights and freedoms, and proclaimed him the "guarantor of... the rights and freedoms of the human being and citizen" (Art.80(2)). "Such delegation of authority to the Executive to protect constitutional rights "not only violates the doctrine of separation of powers, but also may give the President a justification, albeit tenuous, to usurp the Court's jurisdiction, and suspend judicial review in a time of crisis"⁴⁶. This unhealthy concentration of authority in the hands of the Executive took place in the context of emergency powers as well.

The Constitution provides for the adoption of a number of Federal Constitutional laws that would supersede some outdated acts. Article 88(2) of the Constitution specifically declared the necessity to adopt a new Federal

44 Stephen White and Ronald J. Hill, "Russia, Former Soviet Union, and Eastern Europe", in *The Referendum Experience in Europe* (London: Macmillan Press Ltd, 1996. Michael Gallagher and Pie Vincenzo Uleri, eds.), p.163.

45 In an alarming conclusion of another American scholar, Yeltsin "demonstrates how attempts to copy the American system are likely to end up in dictatorship, as they have so often in Latin America" (Robert V. Daniels, "Yeltsin's No Jefferson. More Like Pinochet", *The New York Times*, 2 October 1993, pp. 23).

46 See Amy J. Weisman, "Separation of Powers in Post Communist Government: A Constitutional Case Study of the Russian Federation", 10 *The American University Journal of International Law & Policy* (Summer 1995), p.1397.

constitutional law “*On a State of Emergency*” (*O chervychainom polozhenii*). The act was eventually adopted and signed into effect by President Putin on 30 May 2001 (No.3 – FKZ).

The first and the second State Dumas (elected in 1993 and 1995) made several attempts to pass that important piece of legislation (especially in the period of a state of emergency in North Ossetia and Ingushetia), but none of those attempts came to fruition. In 2000-2001, the State Duma considered two bills on the state of emergency. While one was introduced by President Yeltsin in 1997, the other draft was an ‘initiative bill’ endorsed on 11 April 2000 by a group of liberal State Duma deputies: Edward Vorobyov, Victor Pokhmelkin, Sergei Stepashin and the late Sergei Yushenkov.

The initiative bill (consisting of 6 chapters and 36 articles) was obviously inferior to the President’s bill, and was seriously and deservedly criticised by other Duma deputies as well as by legal experts (from the State Duma’s Law Department, and the Institute of Legislation and Comparative Law) for its poor legal quality. Subsequently, the authors of the initiative bill agreed with the criticism and recalled their bill. Therefore, the work in the State Duma concentrated on improving the remaining presidential draft.

The bill was eventually passed by the State Duma on 26 April 2001, and the Federation Council considered the Act on 16 May 2001. Despite its apparent significance to the country and its legal and political system, as well as to rights and freedoms of its citizens, only three deputies of the upper chamber of the Russian parliament actually raised any questions regarding some of the Act’s provisions.

The visible support extended to the act by two profile committees of the chamber pre-determined the decisive results of voting in the Federation Council. The act was passed by 154 votes in favour to just one against, with one abstention.

The new Federal Constitutional law “*On a State of Emergency*” maintains the main principles of the previous act of 1991, which was praised by the U.S. Lawyers’ Committee for Human Rights as relying “heavily on international human rights norms, and in particular on the International Covenant on Civil and Political Rights”.

The law (consisting of 7 chapters and 43 articles) defines the goals of a state of emergency, and the conditions attached to its introduction. According to Article 2, a state of emergency is aimed at “elimination of conditions that caused introduction of a state of emergency, maintenance of human rights and civil freedoms and defence of the constitutional regime of the Russian

Federation”. Emergency can be introduced only under conditions posing an “imminent threat to life and security of citizens or the constitutional regime of the Russian Federation”. The act divides such conditions into two groups. The first one includes attempts to effect a violent change in the constitutional regime of the country, armed mutiny, regional conflicts, etc. The second group encompasses non-political emergency situations like natural disasters, technological catastrophes, or epidemics (Art.3).

In legal terms it is an error, albeit a common one, when Russian and foreign reporters use the terms ‘state of emergency’ (*chrezvyhainoe polozhenie*) and ‘emergency situation’ (*chrezvyhainaia situatsia*) interchangeably, as the Russian legislation makes a distinction between them. Unlike a ‘state of emergency’, which is declared for “protection of human rights and civil freedoms, defence of the constitutional regime”, etc., an ‘emergency situation’ occurs as a result of a natural or technological disaster or a catastrophe that “can lead or has led to human casualties, a damage to human health and environment, significant material losses and interruption of functioning of essential spheres of life” (Federal law No.68-FZ of 21 December 1994, art.1; Resolution of the RF Government No.516 of 30 April 1997, Art.1). Another federal law more precisely identifies one such technological disaster as being the collapse of a “hydrotechnological construction” (Federal law No. 117-FZ of 21 July 1997, Art.1).

Resolution of the RF Government No.1094 of 13 September 1997 introduced a classification of emergency situations depending on their magnitude, which may be assessed by taking into account the number of people affected, the extent of material loss or the size of the affected territory. An emergency situation can get the highest (‘federal’) status if it satisfies any of the following criteria: if it has led to “sufferings” (*postradali*) of more than 500 people; if it has caused the interruption of functioning of essential spheres of life of more than 1,000 people; if on the first day of an emergency situation, material losses exceeded 5 million minimum standard salaries (MROT); or if it has affected more than two regions of the Russian Federation (Art.2).

A state of emergency may be introduced by a Presidential decree affecting the whole territory of the Russian Federation for a period not longer than 30 days, or in certain localities for a period not longer than 60 days (Art.9(1)), with the possibility of an unlimited number of extensions by way of a new decree (art.9(2)).

For comparison, Article 201 of a similar American law (the National Emergencies Act of 1976) empowers the President of the United States to introduce a national emergency for 6 months, with the possibility of its

extension an indefinite number of times (50 U.S. Code 1621). This special regime was introduced by President Bush on 14 September 2001 by his 'Declaration of National Emergency by Reason of Certain Terrorist Attacks'. The declaration introduced a national emergency "by reason of the terrorist attacks on the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States" (Proclamation 7463). The proclamation was accompanied by an executive order calling the ready reserve of the U.S. Armed Forces to active duty "for not more than 24 consecutive months" (Executive Order 13223)⁴⁷.

The new Russian law does not oblige the President to hold consultations with subjects of the Russian Federation prior to issuing a decree on a state of emergency, but the decree must be approved by the Federation Council. The upper chamber of the Federal Assembly is to be convened "as soon as possible, without a special call" (Art.7(1)), within 72 hours following the decree's publication (*obnarodovanie*) (Art.7(3)). If not approved within three days, the decree automatically ceases to operate. As mentioned before, Bernard Siegan in his 'emergency clause' recommended that an emergency proclamation of the President should require parliamentary confirmation "within five days"⁴⁸. Russian law-makers appear to have been even more restrictive, and limited the term of the decree's effect without the Federation Council's authorisation to three days.

Drafters of the act may be praised for another major achievement. The act can be considered a major step towards the creation of the legal institution of a 'federal intervention', or 'president's rule in the states' as it is known in India. The author of this article began writing about the necessity of introducing this legal mechanism back in 1994-95. That position was endorsed by the Council for Foreign and Defence Policy, an influential Russian think-tank, that published the author's report under its auspices⁴⁹. Its shorter version was also published by *Nezavisimaya gazeta*, one of the most well-informed Russian newspapers at that time⁵⁰. A year later, that approach was strongly supported by a deputy chairman of the Federation Council Ramazan Abdulatipov (also in a full-page article in *Nezavisimaya*

47 Federal Register, 18 September 2001 (Vol.66, No.181). Presidential Documents. Page 48199.

48 Bernard H. Siegan, *Drafting a Constitution for a Nation of Republic Emerging into Freedom* (Fairfax, VA: George Mason University Press, 1994. 2nd ed.), p. 87.

49 Alexander Domrin, *Federal'noe vmeshatel'stvo v dela sub'ektov federatsii. Opyt pravovogo regulirovaniya i praktika primeneniya v zarubezhnikh stranakh* [Federal Interventions Worldwide: Transnational Law and Practice of Its Implementation] (Moscow: Council for Foreign and Defence Policy, [February] 1995).

50 Alexander Domrin, "Federal'noe vmeshatel'stvo v dela sub'ektov federatsii. Opyt pravovogo regulirovaniya i praktika primeneniya v zarubezhnikh stranakh" [Federal Interventions Worldwide: Transnational Law and Practice of Its Implementation], *Nezavisimaya gazeta*, No.36, 28 February 1995.

gazeta)⁵¹. In 1998, the absence of legal regulation of a federal intervention was recognised as one of the major ‘deficiencies’ of Russian Constitutional Law. Seven years, historically speaking, is not a very long period of time for the journey from the first publication dedicated to the issues surrounding a federal intervention, to the actual introduction of such a legal mechanism in Russia.

51 R.G. Abdulatipov, “Tol’ko zakon mozhet ostanovit’ bezzakonie. Ob institute federal’nogo vmeshatel’sva v dela sub’ektov federatsii” [Only Law Can Stop Lawlessness. On the Institution of a Federal Intervention], *Nezavisimaya gazeta*, 16 July 1996.