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The Expired Iodine Tincture

THE SWISS RECEPIE FOR PUTTING BUREAUCRACY UNDER CONTROL

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*"...A fat red-faced man
sits behind a desk
and repeats over and over,
'I'm a serious man,
I'm a serious man!'
But in fact
he is not a man:
he is a mushroom."*

The **Little Prince** by Antoine de Saint Exupéry

The more the idea of powerful state wins over both the rulers and the ruled, the more the intelligentsia, once called the "rotten stratus of society", gets agitated and starts timidly to ask: sorry to intrude, but would it be possible at all, meaning no offence, to put, say, a human face on it?

At the same time, our liberal dreams notwithstanding, we crawl before any official, proffer, red-faced, a bribe to a taxman, and slavishly pander to every whim of a government clerk. In other words, we put each day yet another shovel of dirt on the grave of our untimely deceased child: the rule-of-law state.

Meanwhile, there lives among us an unsung hero, who not only does not give up without a fight, but fights for all of us. "A powerful state is not the one that employs a myriad of bureaucrats, but

the one where laws are observed without needing them”, says Karl Eckstein. He is called the “fighter against *spravka*¹”, and the goal of his life is to equalize the citizen and the state in their rights. Is he a utopian? No, just a Swiss. It turns out that in his native Switzerland they have had it for a long time.

A doctor of jurisprudence, and a human rights expert, Karl Eckstein came to Russia 19 years ago, and, yes, you have guessed it right, because of Elena, with whom he has now two daughters, Sasha and Alina. He took Russian citizenship and considers himself a Russian patriot. But more than that, he took upon himself the task of making Russia a rule-of-law state. He has created a public foundation called “Constitution” to promote legal knowledge (www.konstituzia.ru) and has conducted law literacy seminars in Cheboksary, Novgorod, Krasnoyarsk, Vladivostok, Petropavlovsk-Kamchatskiy, Yuzhno-Sakhalinsk, Ekaterinburg, and Samara. Beginning from 1995, he lectures, for free, for students of the Moscow Institute of International Relations on the subject “The State and the Individual: mutual rights and obligations under law”. He founded a law firm “Eckstein and Partners” that helps foreign businessmen invest money in Russia. He writes textbooks on human rights for lawyers, high school and college students. He also thinks that business climate in Russia has been getting worse lately. As to the President’s policy of building up the state, Eckstein says:

”With the 1993 Constitution, Russia had good chances, providing it had been implemented. We are now getting farther and farther from it, despite Putin’s assurances about fighting bureaucracy. A police state is being built. A police state should not be confused with a rule-of-law state: the latter cannot do without strong policing, but there the police force is used to safeguard rights of citizens and to uphold law, strictly in the framework of the Constitution. This is why democracy could be called “dictatorship of law”. By contrast, in a police state, law enforcement agencies do whatever they like, and are not constrained by law or anything else.

"Here is an example: a group of my friends from Sweden were twice held for ransom by the Moscow police in the space of 15 minutes, once when they were leaving a restaurant, and once when they were entering their hotel. The policy to keep police (and the court system) on a starvation diet does not save money for the state, quite to the contrary. Talking of the traditions like this one, I would say: no other country in the world works so hard to impede its own progress. At the same time, Russia is full of talented people. Believe me, you will never find so many smart people in the flourishing West, there are more here by an order of magnitude. If

¹ *spravka* can be translated as *reference*, usually from an official body, in this context. An official paper issued to the applicant to confirm certain information about the applicant (marital status, employment, living arrangements, property owned, health, relatives and dependents, information on the dependents, confirmation that the utility bills have been paid, etc.).

only energies of the Russian people could be used for “peaceful purposes”! But, so far, in Russia, all the citizens and the state do is cheat on each other the best they can.

“I am not saying that all is well in the West. Swiss are no more honest and are no better than Russians, but they have managed to put their bureaucracy on a leash. In Russia now there are so many laws that contradict each other, and consequently there are as many holes in them. There is an antidote to that: in a rule-of-law state the basis is not laws in themselves but principles of their application. But when one tries to make a law for everything, the holes multiply. This is called “technical positivism”, to put everything on a string. This is exactly how every dictatorship functions. This is what had led to fascism, which, from a technical, legal point of view is based on the principle “never trust nobody”.

“Besides, all this innumerable laws are inaccessible to people. In a rule-of-law state, each official body has to maintain a website that makes information on itself available, so that any citizen could pop in an Internet cafe to look up any particular law and find out which bureaucrat is responsible for its application and how to find him or her. But here even the White House, where the Russian government sits, hides its phone numbers! Sure, it is difficult to achieve legal transparency. But why don’t we start here, at your place, in Petersburg? Especially, since this is one of a few regions in Russia where lawmaking and executive powers are separated, where a space has been created to realize political opportunities. These opportunities should be used to reduce bureaucracy per capita ratio!”

This is the proposal that Karl Eckstein had put forward at a workshop organized by the Strategy Foundation, the event that attracted the brightest of Petersburg. The proposal evoked a range of reactions. The City Council' expert on education and culture and, as we hope, the future city ombudsman for human rights, Leonid Romankov, pointed to its innovative character: “So far, we have been fighting arbitrariness, have been trying to regulate everything to a tee by making more city laws. And all of a sudden we hear preaching of letting bureaucrats sail freely under guidance of basic legal principles. This is really interesting.”

A representative of the Petersburg’s Constitutional Court², Aleksey Liverovskiy, agreed: “The example with crossing on red light, when no other cars are there, in application of law would make our lawmakers dizzy.”

² A judicial body elected by local legislature to hear challenges as to compliance of the local administration and lawmakers with the city’s (or the region’s) constitution (charter).

The head of “Paramita”, the Research Institute for Crisis Management and New Technologies, Ilya Barskiy, supported Eckstein’s proposal by noting: “After all those revolutions, the revolution of 1917, of 1991, and of 1993, after the putsch of 2000, when special and intelligence services put their man in power and even managed to legitimize his rule, it is time to try and switch to evolutionary way of development. This would not be easy considering that state feudalism is a fundamental feature of the Russians state.”

All agreed with Karl Eckstein that the country’s misfortune is poor familiarity of the citizens with its advanced Constitution. Not only workers and peasants, but professors and lawyers as well do not know their constitutional rights and are blind to their violations. Even the highest courts’ judges are yet to memorize what these rights are! As a result, no body of judicial precedents in defending constitutional rights has developed, and either all issues arising out of violations of these rights are resolved by bribes, or people go to court basing their claims on a concoction of various laws, and not having thought of invoking constitutional guarantees of their rights.

Besides, many constitutional guarantees are not concrete enough. For example, one would run into difficulties, if attempts to realize his or her right to leave the country freely: you will need a passport, which you cannot get without getting first the residence permit from the police, which, in turn, you cannot obtain without going through innumerable bureaucratic procedures not based on any law.

This is why Karl Eckstein, Professor of Law, proposes for Russia his astonishing law “On the Principles of Relations Between State Agencies and a Citizen”, written by him on the basis of laws that successfully function in his native Switzerland. Karl Eckstein tells that in the West, in 1950es, there also was no codified rules what the state can and cannot do. But then the army of bureaucrats had begun to grow and it became necessary to take steps to defend citizens from their arbitrary rule. From the early 60es, there began to appear, in the Western countries, “Laws on Administrative Procedure”, in which constitutional guarantees were adapted to guide interaction between the state and the populace. Since then, bureaucrats cannot constrain rights and liberties of people more than is reasonable and absolutely necessary. This is called “the principle of not using a sledgehammer to crack a nut”, in other words, means must be proportionate to the ends, and the Federal Court of Switzerland has repeatedly stated that this principle embodies one of the basic constitutional rights. How come then it is not in the Swiss Constitution? Simple: $2+2=4$ is not in the Constitution either, but is true nevertheless.

Karl Eckstein likes to repeat that the Russian Constitution, article 55, says that its list of constitutional rights is not exhaustive, and that it also recognizes other universally recognized rights and freedoms. So we should understand that European law that has been developing for two thousand years contains many principles so widely accepted and respected that there was no need to spell them out in the Constitutions. Courts nevertheless treat these principles on equal footing with those that actually are in the Constitution. For example, the Swiss Constitution of 1874 does not speak of inviolability of private property, simply because in those pre-socialist times it had not occurred to anybody that this sacred truth needs to be put down in writing. This norm just operated continuously as an unwritten principle, until 1969, when it had to be put in the Constitution.

There are many other unwritten principles developed already by the Ancient Rome jurists, called sub-principles. One of them says that any law should be interpreted teleologically, that is based not on the letter but on the spirit of the law, on intentions of the lawmaker, not latching on possible flaws in the wording of the law.

For citizens' convenience and to protect them from the state, courts have been divided into those dealing with quarrels between private individuals and into special administrative courts. To the same end, not just lawyers, but any capable citizen is allowed to appear before the court.

Challenge to a judge (or an expert, or a government official), unlike it is done in Russia, is heard not by the same judge who is being challenged, but by different people.

Incidentally, Karl Eckstein proposes to relinquish our right to sue any police officer or a government clerk. There is no point in suing them, since, while the courts get bogged down with thousands of petty cases, convicting a clerk does not change the policy of the department he or she represents. In Switzerland, after a complaint has been lodged with two higher bodies, then it will be no clerk, but the head of the department who will answer the court, which may lead to change in the policy of the department, as the result of just one court hearing.

Karl Eckstein told about the principles embodied in the draft of a bill that he is promoting.

Incidentally, he has discussed it with prominent jurists and the draft has met with their approval.

1. The principle of equality. All similar cases are treated equally, that is an administrative body must make similar decisions in regards to similar cases. But this should not be taken to an

extreme: for example, the court has ruled that differences in conditions of confinement of convicted prisoners and of those awaiting trial does not violate the equality principle.

2. The principle forbidding mindless application of prescribed procedures. For example, a woman who got married and needed to change her surname on her driving license was made to submit 12 different *spravkas*, including a *spravka* that she is not pregnant.

3. The principle of prohibiting arbitrariness. For example, the traffic police cannot conduct a campaign of blanket and indiscriminate roadchecks without first obtaining a court's permission.

4. Prohibition against abuse of law. For example, a policeman conducts a roadcheck and finds nothing out of order. Then the face of the policeman lights up: he has found, in the first aid kit, an expired iodine tincture bottle. "You are in violation!"

5. Public interests do not outweigh private interests.

6. Administrative bodies cannot invent norms that are not stemming from federal laws. For example, the Ministry of Communications of the Russian Federation has recently issued a directive to permit special services to listen on every telephone conversation and to read e-mails. The decree was issued in recognition of the statutory purpose of the special services: "safeguarding internal security of the country". The court had no choice but strike down the directive, since a reference to a constant norm cannot justify a sudden assault on citizens' rights.

7. The principle of justified trust. Should the administrative body decide to change a customary procedure, it gives an advanced notice to all concerned. If a citizen feels the change is not justified, he or she can lodge a protest, while continuing to follow the old procedure. This is of extreme importance, since an administrative body enjoys trust of the citizens only if its actions are predictable. For example, a violinist goes on a tour abroad. All of a sudden, she is told at the customs: "You can go, but the violin stays. You have the permit form HCh-23 to take the violin out of the country, but this is history. Starting today, the valid form is HCh-24". The customs are wrong: they should have informed everybody concerned, through the Ministry of Culture, which issues the permits, "Attention, the form will be changed, obtain new permits!"

And here is an example from Eckstein's own experience in Russia. "For several years, I had been driving the same route and had been always making the same right turn, until one day a policeman jumped out on me from the bushes and demanded a fine for the traffic violation. It

turned out that the road sign had been changed to prohibit the right turn. In any other country, the driver would be alerted to the change well before coming to the intersection by large signposts, not by a policeman hiding in bushes!”

8. The principle that the larger includes the lesser (in majore minus). Citizens should not be required to perform several transactions, if the issue can be resolved by a single, encompassing one. For example, a person paid more taxes than he or she actually owed, due to a mistake of a tax inspector. The person asks for return of the overpaid amount, but is told first to pay the correct amount, and then he will be given back the amount he paid originally. In Europe, the court would take the side of the taxpayer, since the action performed included the action required.

9. Formalistic approach is prohibited. For example, in an inheritance case, the *spravka* on the former place of residence of the deceased is valid for two months, and then has to be renewed, as if the deceased is expected to rise and to resettle.

10. The principle of forwarding to a competent body. “I have learned the Russian expression ‘to kick back the ball’”, says Karl, “but instead of returning a complaint to the sender, if it has been sent to a wrong department, it should be forwarded to the body competent to deal with the issue, and the sender should be informed where it has been forwarded to.”

11. The principle of “single window”. The government has to decide which of its departments will be responsible for coordinating bureaucratic procedures involving several administrative bodies. A citizen has to apply to this department, and it will be not the citizen’s, but the department’s responsibility to see to it that proper procedures are carried out. For example, it will coordinate actions of the Internal Revenue and Welfare departments in response to a citizen’s request. In contrast, it took a pensioner in Krasnoyarsk 3 years to apply to 28 different administrative bodies, but he still has not succeeded in privatizing his garage.

12. A reply of an administrative body should refer to the specific law applied to the case.

13. The decision on the case should explain how it could be appealed, where, and until when.

14. The burden to investigate. When a citizen realizes his or her constitutional right, such as the right to have a passport, it should not be the responsibility of the citizen to prove that he or she

really exists and is entitled to a passport by furnishing the state with the *spravkas* issued by the same state bureaucracy. It is not the citizen's function to carry documents back and forth between various administrative departments, he is not their courier. If one administrative body needs information from another, they should sort it out between themselves and give the citizen what he or she is entitled to by law. The only responsibility the citizen has is to provide the information required, not prove its veracity, and he or she may be criminally liable if it turns to be false. In Switzerland, it takes 10 minutes to exchange passport, and it can be done by mail. And if the government clerk has doubts, then he himself makes the inquiries, checks databases, etc. The right of the citizen to have passport should not depend on whether he can get a *spravka* from Magadan that he was married there, and the *spravka* from Tajikistan that he was born there.

It should be the same as in the criminal procedure: the investigator does not ask the suspect, "Bring me the *spravka* confirming how much you have stolen". He understands that his is the burden to investigate, to find out the circumstances of the case, to decide whether to believe the suspect, to search for documents or for witnesses. Recently, retiring weavers at a Russian provincial state owned textile plant went on hunger strike. 10 years prior to that all files kept at the plant perished in a fire and the poor women cannot now prove their right to a pension. Certainly, not those women, but the government should be working to restore the files, or, failing to restore them, collect evidence and testimonies to establish the truth. If the court can convict a criminal on the basis of evidence and testimonies, why should not they suffice to restore rights of the pensioners?

"Where to begin?" asks Karl Eckstein. "The Russian citizens should become conscious of their rights and learn how to react properly to their violation, not by hunger strikes. That is why we created our fund. Only after that, by joint effort, we can successfully fight the deep rooted custom of administrative departments to invent their own procedures and rules, to add endlessly to the lists of required *spravkas*. This is a great evil, considering that each new rule is usually kept secret, and can be learned only after one spends a day waiting in line to hear the clerk bark at him something barely intelligible.

The system is purposely devised so that only somebody who intricately knows the bureaucratic jungles can collect all the required papers within the prescribed time frame. As the result, we see proliferation of intermediaries of various kinds offering their help in solving bureaucratic puzzles.

The intention is clear: to create enough obstacles for applicants to make them ripe for the decision to offer a bribe.

The unnecessary *spravkas* both breed and feed corruption. The worst of it is that both the citizens and the state have got so accustomed to this perverted system that cannot see it in true light, because what is customary is no longer a crime. But there can be no prosperity where arbitrariness of bureaucracy rules. The flow of capital has become the flight of capital. For example, my uncle, a successful businessman, came to Russia thinking of opening a business here. As required, he left his passport at the hotel's reception. On the street, we were stopped by the police and asked to show our papers. Then they took us to the precinct office and demanded \$200, but somehow let us go after we gave them \$20. Having had this experience, would my uncle still want to do business in Russia?

Incidentally, Vladimir Putin often says that small and medium size businesses are the mainstay of the economy. Why then does not he do something to stop the bureaucratic arbitrariness strangling them? Because large companies can live with it: they can afford maintaining a staff of "experts in friendship" with tax inspectors and fire inspectors, and public hygiene inspectors, while the small business spends all its time fighting them, and has no time left for doing business. Should the bill we propose, or a similar one, pass the Duma (and many Duma deputies support it: Pokhmelkin, Grebennikov, Romanchuk, Semyonov, and others), all the bureaucrats that are in the business of government solely for bribetaking would leave, because they are not accustomed to doing their job, while those who stay could be paid more and it could be demanded of them to work for their pay.

In recent years, the bureaucratic apparatus has increased in size by 90% and has become a heavy burden for both the populace and the state. I am sure many can be made to leave of their own accord, and this is how we will get rid of them and of their arbitrary rule.”

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