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THE ROLE OF CONSTITUTIONAL JUSTICE IN RUSSIA IN THE
PROCESS OF INTERPRETATION OF EUROPEAN VALUES AND
THE PROMOTION OF EUROPEAN CONSTITUTIONALISM

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European Values and the Promotion of European Constitutionalism*

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Abstract

This paper conducts a critical analysis of selected cases of the Russian Constitutional Court and High Arbitration Court involving the interpretation of constitutional values underlying the Russian legal order, in this way investigating the role of constitutional justice in Russia in promoting a European type of constitutionalism. The judicial practices of the Constitutional Court are brought into the broader context of the process of transition, state- and nation-building in the Russian Federation.

According to the new Russian 1993 Constitution and the 1994 Law on the Constitutional Court, the Constitutional Court of the Russian Federation is the main interpreter of constitutional developments and reforms and therefore a mirror of the constitutional transformation of the country. The Court, by linking its case law to that of the European Court for Human Rights and to the principles developed by the Council of Europe acts as a transmitter of European ideas and norms.

Therefore, its jurisprudence can be seen as a channel for the introduction of European Constitutionalism in Russia. Moreover, this case law represents an attempt to reconcile the obligations under the European Convention for Human Rights with the peculiarities of the Russian legal situation. In this sense, the jurisprudence of the Constitutional Court is an interesting case study of implementation and interpretation of European values and norms on Russian ground.

To what extent are the Soviet past or even pre-Soviet ideas and values present in the current social and normative practices? In this paper this question is investigated by analysing the interpretive practices of the Constitutional Court of the Russian Federation.

Keywords

Constitutional justice in Russia, constitutional court, European constitutionalism, European values, Europeanization

Introduction

Over the last twenty years, considerable critical attention has been given to the transformation and democratisation mechanisms in the post-communist countries, and in Russia in particular.¹

In this literature, transformation in Eastern Europe has mainly been understood as a process of convergence with Western European principles, norms and constitutional models, in which the constitutional models of established democracies of the West were transplanted to the newly-emerged states. Georgiev describes “its external or its international dimension” as one of the most important aspects of the perception of the idea of the rule of law in Eastern Europe during the historic transition of the 1980s and 1990s.² As he notes, “society...had to be based on the idea of law – not any law, but one conforming to certain principles, requirements and standards, which existed *outside* that particular society in the international sphere, in countries perceived as “normal”, as models of the *Rechtsstaat*”.³

The success of these reformation processes and the forces involved differ from country to country. In addressing the questions of whether a piece of legislation can be an important factor in the creation and maintenance of democracy and whether the maintenance of democracy is a necessary condition for the functioning of the market, Ajani argues that differences in legal cultures and traditions affect “the effectiveness of transplants”, so for example “distrust towards Western ideas and solutions, recurrent in the Russian culture” is an important factor influencing the effectiveness of transplanted models.⁴ He refers to an “international traffic of legal ideas” which reflects “the belief that with the introduction of the formal elements of democracy and of legal pillars of market economies a “happy end” to the transition would have followed.”⁵

1 The topic of reformation and democratization in general and in Russia in particular gained much attention from the late 80-s onwards both in Russia and abroad, and the literature on the topic is quite impressive. To mention some books on the subject:

O'Donnell, Guillermo, Schmitter, Philippe, Whitehead Laurence (eds.), Transitions from Authoritarian Rule: Comparative Perspectives, Baltimore, MD, John Hopkins University Press, 1986; *Sakwa, Richard*, Russian Politics and Society, Routledge, 1993; *Yakovlev, A.* Striving for Law in a Lawless Land: Memoirs of a Russian Reformer, New York: M.E. Sharpe, 1995; *Frankowski, Stanislav, Stephan B.Paul (eds.)*, Legal Reform in Post -Communist Europe. The View from within. Dordrecht, 1995; *Kraus, Michael, Liebowitz, Ronald. D (eds)*, Russia and Eastern Europe after Communism: the search for New Political, Economic and Security Systems, Boulder, Colo.: Westview, 1996; *Hahn, Jeffrey W. (ed.)*, Democratization in Russia: the Development of Legislative Institutions, Armonk, N.Y., M.E. Sharpe, 1996; *Diamond, Platter, et al (eds.)*, Consolidating the Third Wave Democracies: Themes and Perspectives, John Hopkins University Press, Baltimore and London, 1997; *Rose, Richard, Mishler, Richard, Haerper, Christian*, Democracy and its Alternatives: Understanding Post- Communist Societies, Baltimore and London: The John Hopkins University Press, 1998; *Sergeev, V.*, The Wild East: Crime and Lawlessness in Russia, Armonk, New York: M.E.Sharpe, 1998; *Abdieh, Robert*, Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy, University park, Pennsylvania University Press, 1997; *Sajo, Andras*, Limiting Government, Budapest: Central European University Press, 1999; *Hesse, Joachim Jens (ed.)*, Verfassungsrecht und Verfassungspolitik in Umbruchsituationen. Baden-Baden, 1999; *Solomon, Peter H.*, Courts and Transition in Russia. The Challenge of Judicial Reform, Boulder, Col., Westview Press, 2000; *Schwarz, Hermann*, The Struggle for Constitutional Justice in Post- Communist Europe, The Chicago University Press, 2000; *Zelonka, Jan*, Democratic Consolidation in Eastern Europe, Oxford; *Feldbrudgge, Ferdinand, Simons, B. William*, Human Rights in Russia and Eastern Europe, The Hague, Kluwer Law International, 2002; *Calhoun, N.*, Dilemmas of Justice in Eastern Europe's Democratic Transitions. New York: Palgrave Macmillan, 2004; *Diamond, Larry, Morlino, Leonardo*, Assessing the Quality of Democracy, Baltimore, 2005; *Stan, Lanvinia (ed.)*, Transitional Justice in Eastern Europe and the Former Soviet Union. Reckoning with the Communist Past. BASEES, Routledge Series on Russian and East European Studies. 2009

2 *Georgiev, Dencho*, The Collapse of Totalitarian Regimes in Eastern Europe and the International Rule of Law, in: *Krygier, Martin, Czarnota, Adam (eds.)* The Rule of Law after Communism. Problems and Prospects in East-Central Europe, Ashgate, Dartmouth, USA, 1999. P.329

3 *Georgiev, Dencho*, Ibid.

4 *Ajani, Gianmaria*, By Chance and Prestige: Legal Transplants in Russia and Eastern Europe. The American Journal of Comparative Law. Vol. 43, No.1 (Winter, 1995), pp.93-117. p.97-98

5 *Ajani*, Ibid. p.96

The general appropriateness of Western liberalism and stable constitutional order for Russia has been questioned by many scholars.⁶ Russia is often criticised as a weak democracy and slow to transfer European principles and models into its own legal system. For example, Mommsen and Nussberger describe *democracy "a la ruse"* as a restrictive attitude towards fundamental democratic values. Political discourse in Russia, the authors state, interprets democracy as an order corresponding with traditions and habits. Political leadership in Russia is not ready to sacrifice either formal legal order, or economic stability, which has been acquired with difficulty, for an open democratic process. According to Mommsen and Nussberger, stability and integrity of the state are values which are much more important for Russian political leaders than the democratic process itself.⁷

Why has transformation in Russia often not followed the plan of its theoreticians and practitioners? As Knabe states, this is an open question.⁸ The explanations could be, as Knabe suggests, insufficient financial help from foreign countries or the absence of a "Marshall plan" for Russia. Welfens mentions "wrong and inconsistent policy strategies for Russia (including government failure to pursue a convincing reform and restructuring policy)", "serious misinterpretations and inadequate policy support, pursued by the IMF" and the "lack of a broader reform and transformation discussion in Russia" as causes of the unsuccessful reform process.⁹ With regard to the political institutions of transition, Sakwa notes that during perestroika new institutions "which could give voice to some long-suppressed aspirations of the society" were created. These new institutions, however, as Sakwa argues, "lacked the legitimacy or ability to resolve any of the key problems facing the country".¹⁰

The successful reception of Western models depends very much on incentives and institutions which act as promoters of transformation in the countries of Central and Eastern Europe and the former Soviet Union. The influence of the European Union in pushing forward transformation in Central and East-European States cannot be overestimated. The conditionality of EU membership has had a striking impact on the rapid transformation of legal systems and economic reforms in the accession countries of Central and Eastern Europe. In the case of Russia, Europeanization could not follow the path of EU political conditionality since Russia has no prospect of obtaining EU membership. However, in Russia, innovation can mainly be traced to the Council of Europe and to international law, above all due to the influence of the European Convention on Human Rights and Main Freedoms.

There are various explanations for more or less successful adaptation to European ideas and norms.

Only a few authors who discuss the results of the transformation process in Russia have paid attention to the specifics of the domestic situation and even fewer have properly taken into account the difficulties involved. So, for example, Johnsson describes the former Soviet and post-communist countries as "grey-zone states" and argues that the combination of a weak state, poor legitimacy among the population and "problems to introduce democratic standards and values" could be explanations of unsuccessful social change and democratization in these countries.¹¹ As Johnsson adds "if democracy is hard to define, it is even more problematic to agree on what democratic culture actually is".¹²

6 Holmes, Stephen, Conceptions of Democracy in the Draft Constitutions of Post- Communist Countries, in: "Markets, States and Democracy: The Political Economy of Post- Communist Transformation", Crawford, Beverly (ed.), Boulder, Colo.: Westview Press, 1995

7 Mommsen, Margarita, Nussberger, Angelika, Das System Putin. Beck. Muenchen,. 2007. Pp.26-27.

8 Knabe, Bernd, Systemtransformation und Gesellschaftlicher Wandel in Russland. Berichte des Bundesinstituts fuer Ostwissenschaftliche und Internationale Studien. 57-1994. P.8

9 Welfens, J.J.Paul, EU Eastern Enlargement and the Russian Transformation Crisis. Springer, 1999.

10 Sakwa, Richard, Russian politics and Society. Routledge. London and New York. 1993. p.37.

11 Johnsson, Jessica, Democracy in Weak States. Broadening the Understanding of Democratization Mechanisms. Department of East European Studies. Uppsala University. Working Papers. No.83. August 2004. p.26

12 Johnsson, Ibid. p. 21

When speaking of transformation in the former socialist countries, institutions of democracy and constitutional design are mainly studied.

There are some explicit channels for transformation through European values. The new democratic legal order in Russia was formally designed in 1993 with the adoption of the new Russian Constitution. This initial act involved an all-embracing reform of the legal system, which is still in progress. The 1993 Russian Constitution initiated a path towards democratization, establishing democratic institutions and incorporating democratic values and norms as they are known in Europe. Secondly, The Russian Federation as a Member of the Council of Europe, and as such being bound to the European Convention for the protection of Human Rights and Fundamental Freedoms has to follow the principles developed by the Council of Europe and the interpretations of the European Court for Human Rights. Thirdly, within the domestic institutional system, the Constitutional Court of the Russian Federation can be regarded as particularly close to European principles and the European model.

In addition to focusing on institutions themselves, however, there is a need to pay attention to democratic practices, and in this sense to address Europeanization through the study of social and normative values. What seems to be important, but has not received sufficient study, is the fact that legal innovation and new legal transplants must be introduced and accepted by the domestic legal culture. Values underlying the legal order and legal culture determine social choices and can therefore provide insight into the difficulties and constraints linked to the transformation process: in other words, they help to understand how Russian society is responding both in a normative and non-normative way towards an ongoing globalisation and transformation process. As Sadurski notes, any constitutional system is “deeply embedded in fundamental choices about moral and ideological values to which constitutional norms respond”.

Democratisation, through the introduction of European values, represents in the present author’s opinion, a perspective which makes it possible to study the appropriateness and effectiveness of new political and legal mechanisms for a recipient country, and their application in practice; in other words, such a perspective sheds some light on democratic culture in a recipient country and provides a better understanding of the peculiarities and problems of integration into the European constitutional space¹³.

The case law of the Russian Constitutional Court is a particularly valuable source of information for investigating the reception of European norms and models within the Russian constitutional order. It shows that European models and principles are being adopted, but in such a way as to take into account the specifics of the Russian domestic situation and transition. This paper will attempt to show how the Constitutional Court is incorporating European norms and principles into the Russian legal order while necessarily balancing different interests and needs in a state of transition. It will do this by examining several cases which refer to European and Russian constitutional values, and discuss their role and place within the Russian legal order.

The rest of the paper will proceed as follows: section 2 discusses the channels for the promotion of European ideas in Russia; in section 3 the transitional character of the Russian legal system will be addressed; in section 4 six cases are examined and their role in the promotion of new democratic values is analyzed.

Section 5 summarizes the general tendencies of the cases which are examined in the light of the relevant critical literature in the legal field and then gives a broader inter-disciplinary perspective.

¹³ European constitutional space, for the purposes of this paper, is understood in a broader sense as a normative system including the norms of the Council of Europe and the European Convention on Human Rights and Main Freedoms, as well as the democratic foundations and main principles of European Union law. This question is discussed in more detail in section 2 of this paper.

Channels for the promotion of European constitutionalism in Russia

European constitutionalism as a normative system has been attracting more and more interest in recent years.¹⁴ Although opinions on exactly what European constitutionalism is differ, there is a certain recognition that there are principles and norms which contribute to building a common European constitutional space.

For the purposes of this paper, European constitutionalism is understood in a wider sense as a normative system covering both the Council of Europe and the European Union.

Sadurski speaks of “European constitutional identity” as an integrated model: the European constitutional tradition constructs European constitutional norms and identifies the sources of valid law within the EU.¹⁵ He notices that a “common constitutional tradition” is not merely an “academic and intellectual construct”; it is used in European Union primary law, as in Article 6, 2 of the Treaty on European Union.¹⁶

The set of “European” values is mentioned in Article 2 of the Treaty on European Union: The European Union is “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

European norms, values and principles can be seen as promoters of change in the post-communist countries, and therefore as an incentive for transition towards the rule of law, democracy, guarantees of human rights and main freedoms, the accountability of public institutions, and the liberalisation of the economy.

Making the transition from a communist model to a democratic one after 1989 required an attractive image of a possible future. Europe in general, and the EU in particular, has become such a model in most of the countries of the former Soviet block. For certain East and Central European countries, the clear goal of EU membership and support on the part of the EU for structural changes in society has served as an effective promoter of transformation.

Other countries, like Russia, which do not have clear prospects of EU membership have different ways of adapting towards a European constitutional system. In Russia, several channels for adaptation towards the system of European constitutional norms can be identified: these are primarily external channels, such as membership of the Council of Europe and of the The European Convention for the Protection of Human Rights and Fundamental Freedoms; the foundational status of the 1993 Russian Constitution¹⁷ for the internal legal order, and the existence of constitutional justice, which explicitly takes European values into account.

Many other “soft” influences, which are not discussed in this paper, for example, the EU programme for support for democracy and human rights, and seminars and exchange programmes for judges and Duma deputies also have an impact on the political liberal transition in Russia.

This section will examine the main means of promotion of European ideals in Russia, which are the 1993 democratic Constitution setting a new democratic legal order and institutions, the guiding influence of Council of Europe membership, and the jurisprudence of the European Court for Human Rights.

14 See, for example, *Weiler J. H.H., Wind, Marlene (eds.) European Constitutionalism beyond the state.* Cambridge: Cambridge University Press, 2003; *Walker, Neil, EU Constitutionalism in the state constitutional tradition,* Florence, EUI, 2006; *Tsagourias, Nicholas, Transnational Constitutionalism. International and European Models,* Cambridge, Cambridge University Press, 2007.

15 *Wojciech Sadurski, “European Constitutional Identity?”* EUI Working Papers, Law No.2006/33, p.8

16 *Sadurski* (2002) *Ibid.* p.6.

17 The text of the Constitution was worked out with the help of the Venice Commission [http://www.venice.coe.int/docs/1994/CDL\(1994\)011-e.asp](http://www.venice.coe.int/docs/1994/CDL(1994)011-e.asp)

The 1993 Russian Constitution as a new democratic constitution

Russia, having declared its wish to integrate into the common European space¹⁸ and to belong to the club of civilized nations became an independent state in 1991¹⁹ and began the process of democratic reform in 1993 by adopting a new Constitution.

The values underlying the Russian constitution are reflected in its design, which embodies many features which are standard in other European constitutions. In particular, it provides for the separation of powers (Art.10), constitutional justice (Art. 94) and the rule of law (Art. 1). Furthermore, Art. 2 specifically underlines the importance of the dignity of man and the pre-eminence of human rights.

In several articles, the sovereignty and integrity of the Russian Federation is emphasized; the peculiarity of statehood in Russia is that it is a multinational federation (Art. 4 and 5).

Article 15, in particular, incorporated the value of an open legal order, and therefore can be regarded as a channel for the promotion of European constitutional principles. In fact, it states that “the universally-recognized norms of international law and treaties of the Russian Federation” are “a component part of its legal system”.

Among the often cited weaknesses of the Russian constitutional design are the low level of accountability of the executive, the lack of a clear division of competences between the Federation and its Members and, in general, changing and often incomplete legislation.²⁰

In general, however, commentators on the 1993 Russian Constitution notice that “[in] its structure and content the new Constitution is close to traditional constitutions of developed democratic countries, most of which reflect striving for coordinated activity of all branches of power in a state, at the same time setting the real priorities for each of them taking into account the specifics of formed political traditions and relations at the given stage of state development.”²¹

The Council of Europe and the Jurisprudence of the European Court for Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms²² and the case law of the ECHR are obligatory norms and rules for interpretation in national cases.

According to articles 3 and 6 of the Federal Law on the Judicial System in the Russian Federation, one of the essential characteristics of the judicial system and judicial review is that judicial decisions are obligatory for all institutions and persons. However, the problem of poor implementation of the decisions of the ECHR²³ or of the Constitutional Court is often mentioned.²⁴

Constitutional justice in Russia in the institutional system of the Russian Federation.

According to article 125 of the Constitution and the 1994 Law on the Constitutional Court, the interpretation of the constitutional principles is a competence of the Constitutional Court of the Russian Federation, and in some important judgments the Constitutional Court has addressed the issue of the principles underlying the Russian legal order. I believe the case law of the Russian Constitutional Court constitutes a good case study of the question of “values” because the Constitutional Court, established in 1994, is seen as a new democratic institution, as a symbol of a new order.

18 See for example new policy announcements by Mikhail Gorbachev at: <http://www.gorby.ru>

19 http://gov.cap.ru/hierarchy_cap.asp?page=/196/22347/22348/24718/24722

20 “Problemy razvitija rossijskogo zakonodatelstva”. Materials of the International Workshop 16-17 Dec. 2002, Ryazan. The State Duma Publishers Moscow. 2003.

21 Kommentarij k Konstituzii Rossijskoj Federazii. Moscow, BEK, 1994. Introduction, p. XI

22 Federalnyj zakon ot 30 marta 1998 goda N 54-F3 ”O ratifikazii Konvenzii o zashite prav cheloveka i osnovnyh svobod i protokolov k nej

23 <http://www.hrw.org/eurocentral-asia/russia>

24 See for example *Edidin B.A.* Ispolnenie reshenij Evropejskogo Suda po pravam cheloveka: problemy teorii i praktiki. Available at: <http://www.lawmix.ru/comm.php?id=2335> or *Entin M.L.* *Mezhdunarodnyje garantii prav cheloveka: opyt Soveta Evropy.* Moscow. 1997; *Tumanov V.A., Entin L.M.* Kommentarij k Konvenzii o zashite prav cheloveka i osnovnyh svobod i praktike ee primeneniya. Moscow. 2002

Although the legal nature of the decisions of the Constitutional Court is not explicitly prescribed either in the Constitution or in the federal law, these decisions assume a particular place in the constitutional order because of provisions concerning the Court's status, competences, and their legal consequences.

The Constitutional Court is the main body of constitutional jurisdiction and its role as interpreter of the constitutional order has been confirmed in many judgments. The decisions of the Constitutional Court have normative, not just doctrinal, interpretational character: they build precedents and are compulsory.²⁵ Changes to the 2001 Law on the Constitutional Court²⁶ partly incorporate these positions, so there is now an obligation for all state organs to change laws and other normative acts according to the Constitution following decisions by the Constitutional Court. There is a mechanism for constitutional responsibility for the state organs of the members of the Federation. This practice is being increasingly recognized by the Federal legislature, as well as slowly by the members of the Russian Federation. So, for example, according to Article 413 of the new Criminal Procedure Code, a decision of the Constitutional Court on the non-constitutionality of a law is grounds for the reversal or reconsideration of a judicial decision.

Although the judiciary in Russia receives criticism for its dependency and weakness,²⁷ I believe that the constitutional setting of the Russian Federation judiciary in general, and the Constitutional Court of the Russian Federation in particular, can be regarded as one of the most important institutions of transition. As Khrenov argues, the genesis of the Russian national legal system on an equal footing with ongoing judicial and legal reform implies a correlation between Russian legal institutions and international, primarily European, ones in that Russia has chosen a way of gradually entering into the European community.²⁸

Sadurski notices that in the post-communist countries constitutional justice has acquired many functions in the building of constitutional order: decisions not only adjudicate in conflicts between institutions and monitor the coherence of national legislation with international obligations, but also “articulate constitutional rights which are at the very centre of the self-definition of the polity.”²⁹

Thus constitutional jurisdiction constitutes an important component of the transformation of the Russian legal order, and the decisions of the Constitutional Court can be seen as structural steps towards democratic integration, primarily into the legal order of the Council of Europe, but also more widely into the European constitutional order. On the other hand, constitutional jurisdiction brings democratic practices and values as they are known in Europe into the Russian legal order. In this way, the interpretations of the Constitutional Court reflect both the means and the restraints on the promotion of European constitutionalism in Russia.

There are **mechanisms** (the Council of Europe, the Constitution), **actors** (the Constitutional Court), and **incentives** (obligations under the European Convention) able to provide for adaptation to European constitutional principles.

The existence of these mechanisms, incentives and actors, however, does not explain the outcome of this adaptation.

The Transitional Character of the Russian legal system

The adaptation of the Russian legal system towards European constitutional norms and values started in 1993 with the approval of a new Constitution, which initiated a complex reform process of all spheres of the Russian legal order, and in a broader sense of the whole society.

25 Lasarev L., *Ispolnenie reshenij Konstituzionnogo Suda Rossijskoj Federazii*, p.2, available at: <http://www.lawmix.ru>

26 Federal Law from the 21.07.1994 N 1-FKZ, changes from the 15.12.2001 “On the Constitutional Court of the Russian Federation”

27 See for example *Mommsen, Margareta, Nussberger, Angelika*, *Das System Putin*. Beck. Muenchen, 2007, pp. 95- 117

28 *Aleksand Khrenov*, *Pravo Rossii i Evropa: Pravovaja Adaptazija*. “Vedomosti”, 129 (203), 16 July 2007.

29 *Sadurski, Wojciech*, *Constitutional Courts in the Process of Articulating of Constitutional Rights in the Post-Communist States of Central and Eastern Europe*. Part I. Social and Economic Rights. EUI Working Papers. Law. N2002/ 14. p.3.

Rottluethner and Mahlmann point out that “the process of transformation in Central and Eastern European countries since the end of 1980 is without doubt and in contrast to some historical constructs fundamental: the constitutions, the whole political system, the economic structures, the civil society, and the elites have been the object of radical change.”³⁰

What does this kind of fundamental reform mean in regard to the intended social changes? What are the mechanisms of transition and how are legal reforms able to initiate deeper structural changes of values and beliefs in society?

At a fundamental level, as Lavinia Stan points out, “in post-communist countries democratisation has turned into an effort to envision a better future and to navigate an uncertain present as much as investigate, reevaluate, and redress the mistakes of the ancient regime. The experience of new democracies suggests that the process of assuming the dictatorial past represents the key to building a stable, legitimate democracy. Democratization cannot be successfully effected without an honest reevaluation of the past.”³¹

The question of *reevaluation of the past* and therefore the *attitude towards the past* seems to me to be a key question if successful political, social and legal transformation is to be achieved. In Russia this question can be conceived in terms of a specific paradigm, which influences the transition towards, and the possible reception of, European constitutional ideas. This paradigm consists of the following oppositions which have a strong normative connotation.³²

State-society

The existence of a bureaucratized state, and on the other hand its low normative leverage and the predominance of informal practices characteristic of a weak civil society, can be explained by a differentiation in values between the main population and the elite. For example, in 1918 Muraviev pointed out the historically determined division between the intelligensia and folk in Russia and consequentially its influence on state activity: Peter the Great was the initiator of the Europeanization of Russia – after him educated groups started acquiring Western ideas; the folk in contrast lived traditionally. But as Muraviev writes “power cannot substitute for the folk educated social groups. Power cannot compensate for an absence of public opinion”. If the intelligentsia does not express the people's opinion, the state as a whole stops being receptive towards progressive ideas.³³

East-West

The East-West opposition has had many facets in the course of Russian history. One of them which relates to the legal sphere is the attitude towards the organization of power and the separation of powers within the state.

A strong constitutional order and guarantees for human rights and fundamental freedoms, the possibility of taking part in the legislative process instead of a reliance on the strong personal power of the head of state (be it either a sovereign or a president) as characteristics of the European legal culture have been difficult to take over in Russia. Thus, for example, Solonevich writes in 1949 that in 1814 Russian tsar Alexander the First fulfilled all liberal goals personally: he was “the League of Nations” himself.³⁴

30 Rottluethner, Hubert, Mahlmann, Matthias, Models of Transition – Old Theories and Recent Developments, in Rethinking the Rule of Law after Communism, Czarnota, Adam, Krygier, Martin, Sadurski, Wojciech (eds.), Central European University Press, Budapest, New York, 2005, p.191.

31 Stan, Lavinia (ed.), Transitional Justice in Eastern Europe and the Former Soviet Union. Reckoning with the Communist Past. BASEES, Routledge Series on Russian and East European Studies. 2009, p.1-2.

32 I am aware that more or different oppositions can be identified, but I am restricting investigation to these most obvious ones due to limitations of space.

33 Muraviev, V.Rev Plemeni. In : “Iz Glubiny. Sbornik Statej o Russkoj Revoluzii”. Moscow. Novosti, 1991. p.222-224.

34 Solonevich I.L. Nasha strana XX vek. Moscow. 2001.p.79.

That reliance on strong presidential power remains a characteristic of the Russian situation nowadays is backed up by statistical surveys.³⁵

“Great nation” - the rest of the world

The idea of Russia as a country with a special mission in world history has engaged many Russian thinkers.³⁶ The question of Russian national identity has expressed itself in a vision of a multi-national powerful Russian state unifying different national groups. So, for example, in 1921 Ustryalov wrote about the importance of a great Russian state and Russian culture: “Those who consider the territory as a “dead” part of the state are making a mistake. Precisely the territory is the most essential part of a state.”³⁷ Ustryalov compares territory with the body, and notices that “only a physically powerful state can have a powerful culture,” so the mission of a state is reflected in its territorial organization. State power in his opinion is the most important “crystallized” expression of the spirit of the folk.³⁸

Europeanization by Peter the Great initiated a deep cultural change and reinforced the the Russian elite’s fixation on the state, as Mackow writes.³⁹ Russia's expansion and annexation of non-Russian territories went in line with a Russian “national legitimization” to unify all the Rus- states, so two wishes, namely to have a Russian nation-state and to become an empire were parallel. This polarity has been formative in the shaping of Russian identity.⁴⁰ Nowadays, this opposition influences relations between different folk groups and relations between the centre and members of the Russian Federation.

My assumption is that the above oppositions are strongly influencing the transformation process in Russia and its integration with Europe. They relate to the past and represent social, cultural and legal values and therefore their influence can be found in judicial interpretations.

As for the institutions of transition, Renata Uitz points out the fine difference between two possible constitutional standards with regard to their respective pasts in transitional democracies: the difference in effect between taking the inherited state of affairs as a fact and deriving legal rights or constitutionally protected interests from it is fundamental. “In the former case the past or the remnants of the past gain consideration among other facts and may shape constitutional standards accordingly. In the latter case, however, the institutional structures inherited from the previous regime become part of the normative order of the new constitutional regime under construction.”⁴¹ The same can be said about the values underlying the constitutional order: normative values as constitutional fundamentals and normative guidelines not fixed as more concrete legal rules. These values, when interpreted in constitutional practice, can take on different overtones and have different intensity depending on the role that the past and tradition play in the modern reality of the state. A strong presence of tradition and the past in judicial interpretation can effectively divorce the law as it is written from constitutional and social practices.

To what extent are the Soviet past or even pre-Soviet ideas and values present in social and normative practices nowadays? We can investigate this question by analysing the interpretive practices of the Constitutional Court of the Russian Federation. The assumption underlying this investigation, that specific aspects of the history of the Russian state and the normative culture of the past are still playing an important role in legal and social practices, can explain the difficulties in the transition

35 See www.levada.ru

36 See for example: *Danilevskij N.J.* *Rossija i Evropa*. Moscow, Kniga. 1991, *Leontjev K.N.*, *Vostok, Rossija i Slavjanstvo*. Respublica, 1996.

37 *Ustryalov.N.V.* *Patriotica* in: “V poiskah puti: Russkaja intelligenzija i sudjby Rossii”. Moscow. 1992. p.257.

38 *Ustryalov*. *Ibid.* p.259

39 *Mackow, Jerzy*, *Am Rande Europas? Nation, Zivilgesellschaft, Integration in Belarus, Litauen, Polen, Russland und der Ukraine*. Herder. Freiburg- Basel-Wien. 2004. pp.127

40 *Mackow*, *Ibid.* p.128

41 *Uitz, Renata*, *Constitutional Courts and the Past in Democratic Transition*, in: *Rethinking the Rule of Law after Communism*, *Czarnota, Adam, Krygier, Martin, Sadurski, Wojciech (eds.)*, Central European University Press, Budapest, New York, 2005, p. 254

towards the rule of law and a “qualitative democracy”⁴² in a European sense, to the extent of actually calling into question the appropriateness of the latter for Russia.

In the following part of the paper the transitional character of the Russian legal order is investigated through the analysis of five cases heard before the Constitutional Court and one case heard before the High Arbitration Court. Two criteria were followed for the choice of the cases: cases 1 and 2 address constitutional values explicitly; the other four cases relate to three weak parts in the Russian constitutional design: (a) its federal structure; (b) the separation of powers; (c) the relation between state and civil society. Case 3 is a famous case which deals with amendments to the law concerning the appointment of Heads of Government in the Members of the Russian Federation; this case relates both to the federal structure and the separation of powers. Cases 4, 5 and 6 have to do with different aspects of state- society relations. In this second group of four cases the question of how values are evoked in order to address the weak parts of the Russian constitutional design will be addressed.

The Constitutional Court as a promoter of new democratic principles?

This section examines, first of all, how *values* in general are interpreted in the judicial practice of the Constitutional Court of the Russian Federation, in other words what “value” means within the Russian constitutional order, and secondly the extent to which *European values* are integrated into the practice of the Constitutional Court. As mentioned above, these two questions will be examined by looking at five examples of cases in the Constitutional Court and one case in the High Arbitration Court which also relates explicitly to values.

1). One clear example of interpretation of “values” regards the **decision of the Constitutional Court of 23 January 2007 “On the Constitutionality of article 779, 1 and article 781, 1 of the Civil Code of the Russian Federation”**⁴³ in which the Constitutional Court interprets the provisions of the Civil Code on the compensatory rendering of services in connection with legal advice in civil cases. The main question put before the Court was whether payment for a legal consultant can be made conditional upon a positive result of the court hearings. The Court ruled that a positive result for a plaintiff of judicial hearings was not included by the Federal legislature among the essential elements of a civil contract. Moreover making an honorarium conditional upon a certain resulting judicial decision is not possible because a judicial decision cannot appear as an object of anyone’s civil rights.

The Court ruled that the legal regulation of social relations in the rendering of legal services must be carried out taking into account the *due balance of such constitutionally protected values* as the independence of the judiciary, a guarantee of qualified and accessible legal advice, and freedom of contract in civil cases. The constitutionally protected freedom of contract cannot lead to the denial or restriction of other constitutionally protected principles, for example of human rights and main freedoms. Thus freedom of contract is not absolute and can be restricted on constitutional grounds. The legal regulation of legal services must be carried out with *respect to the due balance of different constitutional values*, such as the right to legal help and freedom of contract.

Judge Kononov, in a dissenting opinion, made reference to Russian practices before the 1917 Revolution and the EU Code of Practice for Lawyers, both of which accept “an honorarium of success” concept.

In the second dissenting opinion, Judge Bondarj noticed that in concrete terms an honorarium of success can be considered acceptable in certain cases if based on a principle of fairness, which in normative terms can be found in concrete in foreign practices, for example in Lithuanian, Portuguese, and Swiss law. The Judge referred to the part of the decision which argues for due balance of different constitutional values and gave a concentrated definition of what “value” is. He pointed out that *the*

42 *Sadurski, Wojciech, Morlino, Leonardo*, Improving the Quality of Democracy in Central and Eastern Europe Through the EU: Position Paper. 2007

43 Postanovlenije Konstituzionnogo Suda RF ot 23.1.2007 N1-P “Po delu o proverke konstituzionnosti polozhenij punkta 1 statij 779 i punkta 1 statiji 781 Grazhdanskogo Kodeksa Rossijskoj Federazii v svyazi s zhalobami obschestva s ogranichennoj otvetvetstvennostju “Agenstvo korporativnoj bezopasnosti” i grazhdanina V.V.Makeeva

balance of constitutional values appears as a conceptual nucleus of the decision, which is often used in the practice of constitutional justice *as a constitutional principle and methodological tool* in resolving constitutional disputes. The aim of the federal legislator *is to regulate and to balance different social values*, taking into account the historical and social conditions of the state.

The Judge pointed out that *constitutional values are not just constitutional imperatives for legal regulation, but act as concentrated characteristics of the legal nature of a legal relationship*. Since social relationships are different, *the correlation between different constitutional values in every relationship is neither universal nor uniform*, which allows a different approach in every case.

Thus, this decision represents an interesting case because it takes notice of international and pre-Soviet Russian practices and directly reveals the function and role of constitutional values in constitutional design. The Constitutional Court used the concept of constitutional values as a *fundamental method of interpretation*. However, as with most methodological tools, the concept of “values” employed is flexible in nature. These values are seen as *normative principles* and as an essence of the groups of relations which are regulated by the Constitution and other laws. The central *idea* of the constitutional order is to balance different values, if possible without contradiction between them, and to balance public and private interests. The Constitution set up the organizational mechanism for the implementation of constitutional values. The balance between different values should be put into practice by institutions: by the Federal legislator and, if necessary, by the Constitutional Court.

To better understand the extent to which the European tradition is present in this case, I would like to now turn to another case which also directly refers to values, but regards how they were integrated into the Soviet legal order.

2) An interesting contrast to the above-mentioned decision by the Constitutional Court can be found in Soviet practices. Soviet legislation or, rather legislation adopted “in the shadow of the collapsed Soviet Union” provides a very interesting comparison to my mind: rather than discussion about what values are and how they are balanced, in such legislation one finds clear definitions and a very strict division of different fields.

To illustrate this, I would like to examine the recent **decision of the Federal Arbitration Court of Volgo-Vyatskij Region** N A43-27881/2005-37-524, which had to decide upon a case related to a law of 1992⁴⁴. In summary, the case deals with the payment of taxes by a non-governmental organization, the “Society for Russia -Chechnya Friendship,” on grants for charitable activity which were received from the National Foundation for the Support of Democracy (USA) and from the Commission of the European Community. Such financial help if provided for charitable activities is not subject to tax. The Russian tax authorities did not consider the activity of the Society as charitable and demanded the payment of tax. The Court decided that the activity of the Society had some extremist characteristics and therefore could not be considered as charitable and cultural activity; therefore the financial resources received by the Society could not be considered a “grant”, as regulated in article 251 of the Tax Code. In the lists of grant-providers set up by the Government of the Russian Federation, the EC Commission is listed but the National Foundation for Support for Democracy is not. The resolution of an arbitration court of first instance was confirmed by the appeal court.

In this decision, the Court made reference to the provisions of the Tax Code and of the Law on Culture. According to Chapter 25 of the Tax Code, the term “grant” shall mean “financial resources which are granted on a non-commercial basis for programmes and activities in the field of education, arts, culture, and environmental protection and for concrete scientific projects”. “Cultural activity according to article 3 of the Foundations of Law of the Russian Federation on culture N3612 from 09.10.1992 is an activity of preservation, creation, distribution and “cultivation” of *cultural values which are moral and aesthetic ideals, norms and patterns of behaviour, languages, dialects, national traditions and customs, historical toponyms, folklore, handcraft, objects of art and culture, the results*

44 Reshenie Feeraljnogo Arbitrazhnogo Suda Volgo-Vyatskogo Rajona N A43-27881/2005-37-524

and methods of scientific research, buildings having historical significance, objects and technologies, regions having unique historical and cultural significance.”

Thus the 1992 Law provides a clear definition of cultural values by listing them.

I argue that the very fact that values are not defined and not fixed by a state power is a sign of a democratic and pluralist society.

The next four decisions give examples of the concrete application of observed interpretational principles. The selected cases relate to problematic areas of the Russian constitutional design and sensitive historical questions, and they are fruitful for the study of how values can be invoked in addressing such questions.

3). The decision of the Russian Constitutional Court on 21.12.2005. N13-P on the compatibility of the Law on the general principles of organization of legislative and executive organs in the members of the Russian Federation with the Constitution of the Russian Federation.⁴⁵

This case relates to two important questions in the Russian legal order and Russian legal history: the horizontal and vertical separation of powers. Furthermore it also contains explicit reference to European constitutional principles.

According to the 2004 amendment to the earlier 1999 law regarding the appointment of the heads of government in the Member-States of the Russian Federation, heads of the executive power in the members of the Russian Federation are no longer to be elected but have to be appointed by the legislative organ of a Member on recommendation by the President of the Russian Federation. This case was brought before the Constitutional Court.

In its reasoning, the Court referred to the articles of the Constitution establishing a democratic federal state with the rule of law (Art.1, 1), where the sovereign power of the multi-national people is exercised through free elections and referenda (Art.3, 1, 2, and 3). These principles are reflected in the corresponding organizational mechanisms which grant competences to state organs.

Making reference to possible sources of interpretation of the amendment, the Court noted that neither the Russian Constitution, nor international law explicitly consider free elections as the only possible way for providing competences to the Head of Executive of a Member of the Federation. The Court stated that elections are not among the main principles of international law, so “it is not a necessary element of the constitutional right to elect”. Furthermore, the Court referred to the case law of the ECHR and stated that “the European Court for Human Rights recognizes as well the wide limits in regulation of the right to free elections”.

In the absence of clear international obligations, the Court gave priority to the due balance of different values according to domestic constitutional principles.

What are the right to free elections and the stability of the federal structure?

As long as the organization of state organs at the level of the Members of the Russian Federation is a shared competence of the Russian Federation and its Members, and the Constitution provides for common rules concerning the organization of executive power throughout the federal system, the right of the President to appoint heads of the executive in the Members of the Federation does not violate federal principles or the principle of the separation of powers. Moreover legislative organs of the Members of the Russian Federation take part in the procedure by appointing the executive, so the due balance of shared competence is observed.

The Court underlined the fact that the federal system in Russia is based upon the sovereignty of the whole people and it is not the sum of the sovereignties of its subjects taken individually, and therefore the competence to form state organs belongs to the Russian Federation as a whole. Taking into account the *necessary balance between constitutional values and national interests at every stage of state development*, the Russian Federation *corrects the mechanism* of unity and the separation of powers between the Federation and its Members.

45 Postanovlenije Konstituzionnogo Suda RF N -13P ot 21.12.2005 Po delu o proverke konstituzionnosti otdelnyh polozhenij Feedraljnogo Zakona Ob obschih prinzipah organizazii zakonodateljnyh (predstaviteljnyh) i ispolniteljnyh organov gosudarstvennoj vlasti subjektov Rossijskoj Feerazii v svyazi s zhalobami ryada grazhdan

In this judgment concerning a crucial problem related to the Russian constitutional design, namely the vertical and horizontal separation of powers, the Constitutional Court interpreted a *constitutional value as not absolute, but a correlating element of a constitutional structure*: in the absence of clear international obligations and norms and in the absence of clear directives from the European Court for Human Rights, values assume a dynamic and historical character and are closely related to state interests.

Federalism represents a complex, changing phenomenon in legal history with many possible variations and models. The peculiarity of the Russian model can be explained by the fact that the Federation is based on the constitution and not primarily on a constitutional treaty, and by the fact that although it is called “the Russian Federation” the Russians do not have their own state within the Federation and the Federation is based on the common sovereignty of all Members. This model helps to explain the strongly vertical nature of state power. These peculiarities explain the restrictions on Russian adaptation towards European principles.

Mishin⁴⁶ refers to the complexity and differentiation of federal forms which cannot be reduced to one single pattern. Then argues that federalism in general can never be seen as “a fait accompli”⁴⁷ and should be understood “as an ongoing, complex and dynamic system of relations, involving the interplay between the institutions and processes seeking to achieve a precarious but workable balance between the preservation of state unity and integrity, the division of power between centre and periphery; the protection of distinctive regional characteristics, values and interests; and the regulation and solution of conflicts”. Speaking about state integration and asymmetric federalism in Russia in particular, he notes that an obvious problem of the semi-presidential system adopted by the 1993 Russian Constitution is that “in the absence of stable majorities in the parliament, a strong president can effect urgent decisions only through the use of unlimited power”. The 1993 Constitution, he argues, effectively institutionalizes what might be called a “bipolar executive in a permanent state of emergency.”⁴⁸ As Then claims, in such a political system, the president's power is enhanced if there is no will to cooperate and compromise among the parliamentary fractions; and if there is no agreement between the president and the government or the parliament, the president's will prevails over the parliament or government. In such a system, personal access to the president becomes the most important factor in the political process and the importance of interest groups and bureaucracy cannot be overestimated.

The following three judgments of the Russian Constitutional Court relate to different aspects of state-society relations and illustrate how national values and European constitutional principles can be evoked when cross-referencing in the process of judicial interpretation.

4) In Judgment 15.12.2004 on religious political parties,⁴⁹ the Constitutional Court referred primarily to the democratic nature of the right to association as a basic value of a society and state founded on the rule of law, corresponding to the International Pact on Political and Civil rights, and to the European Convention on Human Rights. The freedom to build political parties as an instrument of the consolidation of political interests, as the Court later said, promotes the expression of the political will of the people and is therefore guaranteed by the state.

The Court referred to the pluralistic competition of political parties as a necessary condition for guaranteeing a democratic environment which enables the sovereign Russian people to choose the right direction in social and state development.

46 *Mischin A.A.* Konstituzionnoje (gosudarstvennoje)pravo zarubeshnyh stran . Moscow. 1999. S.85.

47 *Rolf H.W.Theen*, Quo Vadis, Russia? The Problem of National Identity and State-Building in: State-Building in Russia. The Yeltsin Legacy and the Challenge of the Future. M.E.Sharpe. Armonk, New York, London, Angland, 1999. p. 73

48 *Theen*, Ibid. p.70

49 Postanovlenie Konstituzionnogo Suda RF ot 15.12.2004 N.18-P Podelu o konstituzionnosti punkta 3 statji 9 Feedraljnogo zakona “O politicheskikh partijah” v svyazi s zaprosom Koptevskogo rajonnogo suda goroda Moskvy, zhalobami obscherossijskoj politicheskoy organizazii “Pravoslavnaja partija Rossii” i grazhdan I.V.Artemjeva i D.A.Savina gorod Moskva

The second part of the judgment interprets the appropriateness of religious political parties for Russia.

First of all, the Court referred to the Russian constitutional design. According to the Constitution, Russia is a secular state where on the one hand a religious union cannot substitute a political party, “because it is above parties and above politics”, and where on the other hand a party, given its political nature, cannot be a religious organization, as it is “above and out of any confession.” As the Court stated, a political party is not created for the expression of religious interests.

Secondly, the Court provided an interpretation of the peculiarities of Russian religious and political history, which make separation between political and religious spheres highly significant, and which directly refer to social values. It observed that “the foundations of the constitutional order related to pluralist democracy, the secular state and multi-party political functioning cannot be interpreted without consideration of the historical development of Russia, outside of the context of its national and confessional structure, outside of the particular interaction between the State, political power, ethnic groups and religious confessions.”

The history of the Russian state is reflected in its present constitutional design. The Court referred to the Constitution of the Russian Federation, which assigns the role of bearer of sovereignty and the only source of power to the multi-national people of Russia. Following on from this premise, the Court distanced itself from European society with its developed pluralist tradition and history of ethnic and religious tolerance by saying that such a developed society allows some countries to organize political parties founded on Christian democratic ideology, “because the title “Christian” in this particular case goes far beyond confessions and means *belonging to the European system of values and culture*”.

The Court approached the peculiarities of the national religious and political history of Russia by saying that in a multi-national and multi-confessional Russia – due to the peculiarities of the function of the main religions (Orthodoxy as the main Christian religion on the one hand and Islam on the other) and to the way in which these religions influence both social life and political ideology – notions such as “Christian”, “Orthodox”, “Muslim”, “Russian”, “Tatar” etc. are historically very closely associated in the public consciousness with national and ethnic factors and with concrete confessions and nations, rather than with any *system of values which is common to the Russian people all together*”.

According to the Court, differences of this sort between developed European countries and those in a state of transition makes it impossible to apply “the principle of a secular state in the understanding which has been built up in the countries with developed traditions of religious tolerance and pluralism automatically to the Russian Federation”.

This historical argument is supported by a political one: since Russia finds itself in a state of transition, “political parties and religious associations have not yet gained a stable experience of democracy”. The Court argued that “in this situation political parties built on national or religious grounds would inevitably protect the rights of corresponding religious or national groups”. The Court refers to the transitional character of Russian society and the non-stabilized political process by saying that competition amongst religious political parties could lead “instead of consolidation, towards the stratification of society and the domination of these or other ethnical or religious values instead of *common national values*, which would be in contradiction with the Constitution of the Russian Federation”.

The state of transition reveals itself in the fact that building political parties based on religious grounds would also lead to a “politicization of religion, fundamentalism, and ultimately would lead to the rejection of *religion as a certain form of social identity* and therefore undermining its function as a factor serving social consolidation”. Thus, according to the argument of the Court, the constitutional principle of a secular democratic state, as built up within the concrete historical reality of the Russian Federation as a multi-national and multi-confessional state, does not allow political parties founded on national or religious grounds: “In a situation of continuing tension in ethnic and confessional relations and also the growing political claims of religious fundamentalism, it could lead to differentiation within the nation as well as to social separation and stratification in society”.

This decision provides a clear interpretation of the differences between the Russian legal order in transition and the European constitutional order with its established practices and common values: Russia's political and religious history does not allow it to absorb European constitutional values without considering how they will be accepted on the national ground, so the national past sets restrictions on globalization and on the Europeanization of the legal order.

Some further decisions of the Constitutional Court not only refer to European values as motivations for decisions, but explain what these values are. These interpretations give an idea of the *role the values play in the constitutional structure*. In these decisions the Constitutional Court views values as a kind of dynamic mechanism for developing and transforming the legal order. The difficulty of this situation is that values seen as a force or method for transforming the legal system do not have their own content and do not answer the question of what is "freedom, tolerance, security and prosperity". Their role, instead, is *to lead towards* what is considered freedom, tolerance, security and prosperity.

The following two decisions deal with state–society relations: one representing a new area of business activity which emerged after the fall of communism, the second focusing on pensions - a traditional area of social security, which had been at the core of socialist policy.

5). The decision of the Constitutional Court 18.07.2008⁵⁰ on the constitutionality of certain provisions of the federal law regarding the protection of enterprises by the state control agency deals with the regulation of the private sector and its independence. This is one of the new regulatory areas in Russia which emerged after perestroika, and therefore represents, in my opinion, an interesting case study of the role European models are playing in developing the Russian legal order and in regulating state-society relations.

The content of the case is the following: state organs charged a fee for the examination of non-standardized fuel. The owner of the fuel station was ordered to pay an administrative fine and, in addition, to pay the costs of examination. The entrepreneur contested having to pay double.

The Court ruled as follows: Russia being a democratic state with the rule of law guarantees as one of the foundations of its constitutional order the free movement of goods, services, and financial goods, and supports free competition and the freedom of economic activity. This means that in the Russian Federation the most favourable conditions for economic activity and the stimulation of free, self-organized business activity and the protection of the interests and rights of enterprises should be provided. This corresponds to the constitutional goal of optimal state intervention in the regulation of business activity. Any state intervention as an expression of the constitutional principle of fairness demands balancing, and the equal protection of all the participants in market activity. According to the Court, the imperative state functions, such as controlling and monitoring, must have financial guarantees in the state budget. examination, which represents a kind of public service in this context, is related to compensatory payment. Such costs are close to procedural costs, which excludes their being interpreted as civil compensation.

As the Court stated, the control functions of a state derive from its regulating influence over social relations. Controlling and monitoring provide for *values having constitutional significance*. Therefore, in a state with the rule of law, the Federal legislature balances the general principles of the legal system with those of concrete branches of the law. In doing so he is entitled to take into account social, economic and other factors, which define the limits of his competences and discretion.

This decision has no direct reference to European principles and does not refer to a European understanding of the "rule of law" and the "free market". It adds, however, to our understanding of values in connection to state powers, and the state's obligations according to the interpretation of the Russian Constitutional Court: since constitutional values are to be guaranteed by the state, a state is entitled with competencies to protect the values having constitutional significance. This builds up, on the one hand a legitimate constitutional order which aims to protect values entrusted by the people of

50 Postavovlenije Konstituzionnogo Suda RF ot 18.07.2008 N 10P Po delu o konstituzionnosti polozhenij absaza chetyrjadzhatogo stajji 3 i punkta 3 stajji 10 Feedraljnogo zakona "O zaschite prav juridicheskikh liz i individualnyh predprinimatelej pri provedenii gosudarstvennogo kontrolya (nadzora) v svyazi s zhaloboj grazhdanina V.V.Michajlova

the country to their government, and is at root a democratic idea. On the other hand, since a “value” cannot be fixed, such a link opens up the possibility of diverse interpretations or even manipulations.

The Court applied the principle of proportionality, saying that the intervention of state organs in the free activity of market participants is restricted by the need and obligation to balance the interests of all participants and is an expression of the value of fairness and equality. Nevertheless, the limits of discretion are not identified very clearly.

6). Decision of the Constitutional Court 10.07.2007 on pensions in the Russian Federation.⁵¹

This decision, contrary to the previous one, deals with a question which relates to core elements of the Soviet legal system and the Soviet paternalistic understanding of state-society relations. How far has the transition gone as regards the issue of social justice and how far has the field of social rights been transformed under the pressure of the liberalized market economy?

In this decision the Court ruled on the question of the incorrect fulfilment of an employer's duties to make insurance payments.

The Court referred to the Constitution of the Russian Federation, calling Russia a social state in which policies should provide conditions which guarantee the free development of a person, provide for the freedom of labour, and also include the right to social insurance and a pension. As the Court pointed out, “the right to a pension has a special significance and *social value in a state with the rule of law*”. The obligations of the state to respect and to protect the rights and freedoms of a person and citizen as *a highest value* presume a legal order which is able to guarantee everyone such protection.

The effectiveness criterion of social insurance includes procedural possibilities for obtaining a pension in full and in time. The Court stated that in the case that the employer has not fulfilled his duty of social insurance payments, the state has to guarantee the social security system and take subsidiary responsibility. The Court pointed out that social security payments by an employer are a necessary condition for a stable and autonomous system of labour pensions, built upon universal principles of fairness and equality.

The Court concluded that the current legal mechanism did not provide for enough guarantees for the protection of the rights and freedoms of employees, and invited legislative intervention.

In this judgment, “value” is interpreted as a contextual category which is connected to obligations on the part of the state, and guaranteed by the Constitution and the whole legal order. “Value” in this sense establishes criteria for action on the part of the state.

Here we can objectively observe, on the one hand a high level of continuity with the Soviet tradition in the field of social rights and social security, and on the other hand that the decision goes along with interpretations of the European constitutional order, in which social rights represent normative values and are guaranteed by the state.

As Kashkin points out, the European understanding of global human values often “successfully borrows values from the former Soviet Union.”⁵²

The Role of values in the case-law examined: discussion and reflections

Looking at the cited case law in the light of Europeanization, we observe that there is a high degree of integration or convergence between European principles and those used in the interpretations of the Constitutional Court. There is, in other words, a visible *intellectual influence and sharing of normative ideas, and even of certain normative rules, between the systems.*

51 Postavovlenije Konstituzionnogo Suda RF ot 10.07.2007 N (P “Po delu o proverke konstituzionnosti punkta 1 statji 10 i punkta 2 statii 13 Federaljnogo Zakona “O trudovyh pensijah v Rossijskoj Feerazii” i absaza tretjego punkta 7 Pravil ucheta strahovyh vnosov, vkluchaemah v raschetnyj pensioonyh kapital, v svyazi s zaprosami Verchovnogo Suda Rossijskoj Federazii i Uchalinskogo rajonnogo Suda Respubliki Bashkortostan i zhalobami grazhdan A.V. Dokukina, A.S.Muratova i T.V. Shestakovoj

52 *Kashkin S.J.*, Ideologija i zennosti prava Evropejskogo Sojuza v svete Lissabonskogo dogovora. Available at: <http://www.rpi.msal.ru>

There are also peculiarities about *the way values are structured into the constitutional order in Russia*. In most of the cases, the Constitutional Court appeals to their “*dynamic character*” and “*historical conditions*”. Furthermore, it often makes specific reference to the “*transitional character of the Russian legal order*”.

Value is thus seen as an international (European) standard: that something is “valued” is taken from international documents like the Convention on Human Rights, but the level of standard is anchored in Russia’s own constitutional practice. Value has a systematic position: it is seen in relation to other values in the constitutional order, which should all be balanced.

The fact that the level of standards of protection often does not correspond to European practice and international requirements puts the real transferability of such standards into question. Thus, for example, Nussberger⁵³ discussing the question of the *transferability of standards* examines the application of the concept of the rule of law in Russia, noting that the reception of universal liberal rights and freedoms shows more continuity with Russian or Soviet models than with the Western model. The Western tradition of the rule of law would try to balance the collision of different rights, but it implies an *interpretation which is not connected to values*. Another interpretation relates to the socialist conception of rights, where the main rights and freedoms had to correspond to the interests of the people. Anyone outside the proclaimed ideology was not protected. Thus, despite the fact that the Russian Constitution mainly imports Western standards and ideas of the rule of law and the protection of human rights, it interprets them *through a certain prism: value-related concepts* of “bad” and “right” predetermine the resolution of constitutional conflicts.⁵⁴

Further on, Nussberger argues that, when deciding upon the balance between different *constitutional values*, the Constitutional Court does not examine *the question of proportionality*.⁵⁵

In my opinion, Nussberger points to an important feature of the European understanding of values, namely their *continuity and uniformity*. As we have seen from the judgements examined in this paper, the Constitutional Court, on the contrary, often underlines the *historical character of the constitutional order and its dynamism*. As also suggested by Nussberger, the success of globalisation and legal transfer appears to be strongly restricted by certain cultural conditions and traditions, which in turn creates a problem for the countries on the receiving end of universal values: in order to be integrated into international society countries may profess certain principles without fully considering them acceptable within their internal legal order.

Conclusions

The success of legal transplants and the transferability of constitutional values to the post-communist countries is often limited by specific aspects of national culture and history. Therefore, in my opinion, a multi-disciplinary perspective could offer some further insights which may be useful to the purely legal approach.

The difficulties of reception of European constitutional values can be explained by considering *the role of cultural tradition in the transformation process*.

In their article “The Russian Elite's view of the West in the Context of Systematic Transformation” arguing in favour of a comprehensive sociological approach, Ryvkina and Kosalis emphasize that positions *pro* or *contra* Europeanization have always been used for political purposes in the course of Russian history: “The Russian elite's relationship with the West is a problem that has already been ongoing for several centuries and has taken on different specific characteristics in the various phases of history, depending on the domestic and international political situation at the time. But for all the changes it has undergone in the course of history, *one thing remained the same*: the question as to the correct relationship with the West has been always linked with the struggle between

53 Nussberger, Angelika, “Der “Russischer Weg” - Widerstand gegen die Globalisierung des Rechts?” in: OstEuropa Recht, Heft 6, 6 December 2007, S.371-386

54 Nussberger, Ibid. p.380

55 Nussberger, Ibid. p.381-382

the various political parties and groups of the day.”⁵⁶ As Ryvkina and Kosalis point out, the political struggle has always come back to the same set of problems – whether to “to learn from the West and to accept its assistance or to go Russia's own special way. The actual root of this problem is the elite's traditional conviction that the historical peculiarities that distinguish Russia from all other nations call for a particular course of development.”⁵⁷

This research offers important insights into the transfer of values from the sociological perspective: western values have been *instrumentalized* by political forces in order to achieve political goals. I would add: in this way losing their credibility as values for civil society. The Russian historian Achizer points out a deeper level of this process, observing how in Russia the liberal tradition has been “removed from its context, lost its core, its moral content becoming a device for resolving practical issues”.⁵⁸ Being instrumentalized by political forces and not integrated into the moral practices of society, liberal Western values are taken out of the process of social communication. As Galtseva and Rodnyanskaja put it: “Instead of a real variety of social opinions and projects, ideally provided by civil pluralism, the pluralist ideology offers an imaginary, an empty variety, because the opinion which has no chance to prove its correctness in front of the highest court of truth, is literally *insignificant*, it has no commonly meaningful grain of value and sense.”⁵⁹

Furthermore, this leads to the inverse situation of an extreme idealistic approach: *in philosophical terms*, Russia, having a different cultural pattern and a different past without an experience of practical ethics will understand “a value” as something absolutely ideal, not related to any practical this-life benefits. The European discourse on values emphasizes the material, practical benefits of its common legal order in terms of security, prosperity and stability, all which are concrete social values. For Russia, in the absence of such an experience of security and stability, the language of values can only remain another political manipulation. “The thought in Russia,” writes the modern Russian philosopher Bibihin,⁶⁰ “has absorbed the built-in metaphysics of the folk, which before every knowledge knows that the earth is not for human self-securing. This knowledge in particular has made our attitude to Europe earnest. We challenge the West with the idea of how it can always turn around - as a purely human business of arrangement on the Earth. That is why it is not a matter of modernization or getting closer to the West or America. We are more ready to see the truth at the end of the world than in arranging our relation to it.”

Discourse on constitutional values and their transferability has, in my opinion, a final and even more interesting dimension: it opens up a new perspective in legal science and in the legal field itself with its changing priorities and new emphases on universal constitutional principles, democratic requirements and the growing protection of the dignity of man. It makes a further step for law along the road from being a positivist science focusing on rules to a science studying human behaviour.

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56 Ryvkina, Rozalina, Kosalis, Leonid , “Ansichten der Elite Russlands ueber den Westen im Kontext der Systemtransformation”. Bericht des BIOst Nr.4/1999. p.35

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