RUSSIA, EUROPE, AND THE RULE OF LAW

Edited by

FERDINAND FELDBRUGGE

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Editor's Foreword

This volume continues the tradition started after the II World Congress for Soviet and East European Studies, held in Garmisch-Partenkirchen (Germany) in 1980, according to which the papers on legal topics were published in the *Law in Eastern Europe* series.[1]

The following volumes have been published:

F. Feldbrugge & W. Simons (eds.), *Perspectives on Soviet Law for the 1980s*, No.24 *Law in Eastern Europe*, The Hague, 1982 (Garmisch-Partenkirchen Congress);

F. Feldbrugge & W. Simons (eds.), *The Distinctiveness of Soviet Law*, No.34 *Law in Eastern Europe*, Dordrecht, 1987 (Washington Congress);

F. Feldbrugge & W. Simons (eds.), *The Emancipation of Soviet Law*, No.44 *Law in Eastern Europe*, Dordrecht, 1992 (Harrogate Congress);

"The 1995 ICCEES Conference Law Papers", Parts I-II, 22 *Review of Central and East European Law* 1996 Nos.3-4, 251-454 (Warsaw Congress);

F. Feldbrugge (ed.), *Law in Transition*, No.52, *Law in Eastern Europe*, The Hague/London/New York, 2002.

The VII World Congress of ICCEES was held in Berlin from 25-30 July 2005; it was organized by ICCEES together with the Deutsche Gesellschaft für Osteuropakunde, under the general title of "Europe–Our Common Home?".

As in the past, the publication in *Law in Eastern Europe* represents only a selection of the law papers presented at the Congress. Some papers will be published in more specialized collections, or in volumes of an interdisciplinary nature, or separately as articles.

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1 This Congress was organized by the International Committee for Soviet and East European Studies (ICSEES), founded in 1974 at the (First) Congress in Banff, Canada. The III World Congress for Soviet and East European Studies took place in Washington, DC, in 1985. After the IV World Congress in Harrogate (UK) in 1990, the name of the organizing body was changed into International Council for Central and East European Studies (ICCEES). The V Congress of ICCEES met in Warsaw in 1995 and the VI ICCEES World Congress in 2000 in Tampere, Finland.

The Procuracy, Putin, and the Rule of Law in Russia

Gordon B. Smith

From the time of its founding by Peter the Great in 1722 through the Soviet and post-Soviet periods, the Procuracy has been a highly politicized institution. The Procuracy's chief function is prosecutorial; but it also goes well beyond prosecuting criminal cases. Prosecutors, like attorneys-general, routinely represent the State's interests in civil matters and issue advisory opinions on normative acts issued by executive and legislative bodies. Like many prosecutors and ombudsmen elsewhere, the Russian procurator also investigates citizens' complaints and grievances under the Procuracy's powers of "general supervision." What distinguishes the Russian Procuracy both today and at earlier points in its history is its use by political leaders as a monitoring agency. Peter charged the Procuracy with supervising the activities of the Senate to protect against abrogation of its decrees and regulations, and supervising the prompt and full execution of its edicts. Catherine II extended procuratorial supervision to regional and local levels where procurators served as the "eyes of the tsar" in monitoring the activity of provincial governors and other officials. Procuratorial supervision of regional and local administration was resented by the provincial governors and was eliminated in the legal reforms of 1864. Nevertheless, the Procuracy continued to function as the premier law enforcement agency up to the Revolution in 1917.

Initially the Bolsheviks shunned formal legal institutions, preferring popular participation in informal revolutionary tribunals. However, by 1922 informal control mechanisms had proved inadequate to check abuses of power and illegal actions of administrative officials, especially at the local level. The Bolshevik government reestablished the Procuracy and invested it with the power to supervise the actions of administrative officials, agencies, and citizens. In his famous letter, "On 'Dual Subordination' and Legality", written to General Secretary of the Party, Stalin, Lenin stated:

> "The procurator has the right and obligation to do only one thing: to watch over the establishment in reality of a uniform conception of legality in the whole republic, notwithstanding local differences and in spite of local influences [...]There is no doubt that we live in a sea of illegality and that local influences are one of the greatest, if not the greatest obstacle to the establishment of legality and culture."[1]

[1] V.I. Lenin, "O 'dvoinom' podchinenii i zakonnosti", reprinted in *Sovetskaia prokuratura: sbornik vazhneishikh dokumentov*, Moscow 1972, 100-102.

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Lenin's words eerily prefigure those of President Putin in his on-going campaign for creating a "common legal space" (*edinoe pravovoe prostranstvo*) in Russia. Several of Putin's reforms, including the creation of seven federal districts headed by presidential envoys and his recent changes to the process of electing provincial governors were aimed at tightening supervision over regional and local officials, reducing their autonomy. And as we will see, his firm support for the Procuracy during current debates over its place in the Russian legal system is due in no small part to the Procuracy's ability to monitor the activities of regional and local officials.

Background to the Current Debate

During the debates over legal reforms in the 1980s sparked by Gorbachev's policies of *glasnost'* and *perestroika*, and again at the time of the drafting of the 1993 Constitution there was considerable discussion and debate over limiting the role of the Procuracy to prosecuting criminal cases and coordinating the fight against crime.[2] Proponents of this position wanted to strip the Procuracy of its traditional broad-ranging powers of supervision (*nadzor*). Some felt that the Procuracy needed to be weakened in order to permit the courts and the Ministry of Justice to assume dominance in the evolving legal system; that as long as the Procuracy retained the powers it enjoyed during the communist era, the courts would never gain supremacy. Rather than tackle these contentious issues, it was decided to leave out of the Constitution any delineation of the Procuracy's powers or functions. These were later addressed in detail in the 1995 "Law on the Procuracy of the Russian Federation".

The functions of the Procuracy designated in the 1995 law include: supervision over implementation of laws by ministries, departments, and their officials; supervision of the protection of rights and freedoms of citizens by all organizations, including private commercial establishments; supervision over the conduct of criminal investigations; supervision over places of detention and correctional facilities; prosecution of criminal cases and appealing decisions on behalf of the state; initiating civil actions, appealing court decisions arising from civil actions, and seeking arbitration decisions on behalf of the state's interests; coordinating the fight against crime; and receiving and investigating citizens' complaints.

Thus, the Procuracy retained most of the powers and functions it enjoyed throughout the Soviet era. The only major function for which it was no longer responsible was supervision of the courts, which was removed and vested in the Ministry of Justice. Supervision over the acts

[2] For example, see V. Savitskii, "Sterzhnevaia funktsiia prokuratury—osushchestvleniie ugolovnogo presledovaniia", *Rossiiskaia iustitsiia* 1994 No.10.

of private business establishments was restricted to actions that violated citizens' or human rights.[3]

Although the Procuracy successfully fended off the attempts by reformers to weaken or severely restrict its powers, the issues are coming back again today. Recent articles appearing in legal journals in Russia have again raised the question of limiting the Procuracy to the prosecution of criminal cases and representation of the State's interest in commercial, civil cases and subordinating it to the Ministry of Justice.

The Procuracy often finds itself at the center of political controversy for a number of reasons. Given the legacy of prosecutorial bias and a *de facto* presumption of guilt in the former Soviet criminal process, it is understandable that legal reformers, defense attorneys and even some judges have taken the lead in proposing changes to limit the influence of the Procuracy in the name of equality of sides in an adversarial procedure. As during Tsarist times, the Procuracy's oversight over the legal performance of local and regional officials is deeply resented. But the distinguishing feature of the Procuracy that may account for its high degree of politicization, is the extent to which the Procuracy is drawn into high-level political disputes. The extent and character of politicization of the Procuracy differs markedly during the El'tsin and Putin administrations.

Politicization of the Procuracy under El'tsin

Throughout President El'tsin's tenure in office, the Procuracy found itself at odds with the President and the Presidential Administration over a variety of issues. In 1992 and 1993, Procurator-General Valentin Stepankov interjected the Procuracy into the on-going battle between the President and the Parliament over the drafting of a new constitution, and it increasingly appeared that he was siding with the Parliament. It is not clear what legal or jurisdictional grounds justified the Procuracy's involvement in what was clearly a question of constitutional construction.

Procuratorial investigations of alleged corruption, however, do fall squarely within the purview of the Procuracy's authority. On 22 April 1992, the prosecutor's office announced that it had brought criminal charges against two of President El'tsin's top associates, State Secretary Gennady Burbulis and Defense Minister Pavel Grachev. The two were

[3] In 1994, the State *Duma* passed legislation to create a special state agency charged with conducting criminal investigations: however, no money was allocated to implement its action. The 1995 "Law on the Procuracy" retains the Procuracy's role in supervising criminal investigations, whether they are conducted by the police, the security police, or the Procuracy itself.

charged with illegally selling military property abroad.[4] Less than one week later, Stepankov addressed the Russian Parliament to urge them to support the creation of a special commission to investigate corruption among government officials. The commission, which was accountable to both the Procuracy and the Parliament, was granted special powers to conduct inquiries, interrogations, searches and the removal of documents from government offices, including those of staff of the President and the Council of Ministers. Stepankov noted that the legislative branch was not immune to corruption, but acknowledged that the commission's attention would focus on the President's Office and other executive branch agencies.[5] The principal targets of the probe were two additional El'tsin aides: First Deputy Prime Minister Vladimir Shumeiko and head of the Federal Information Center, Mikhail Poltoranin.

Stepankov's penchant for grandstanding on political issues eventually undermined his legitimacy and damaged the reputation of the Procuracy. In late May 1993, the Military Collegium of the Russian Federation Supreme Court ruled that Procurator-General Stepankov and Deputy Procurator-General Evgenii Lisov committed "flagrant violations of the law while investigating the criminal case involving the Committee for the State of Emergency".[6] The court indefinitely suspended the trial, pending the assignment of new prosecutors in the case. Stepankov and Lisov had published a book, *The Kremlin Conspiracy: The Investigation's Version*, that appeared prior to the trial, violating the constitutional principle of presumption of innocence. In the autumn of 1993, El'tsin demanded Stephankov's resignation. Within days Aleksei Kazannik, a law professor from Omsk University, was named Procurator-General. Kazannik had no prior experience in the Procuracy, his expertise was in environmental and administrative law. He did, however, have strong ties to El'tsin. In 1990 when regional and local elections were held to newly established legislative bodies, Boris El'tsin narrowly missed being elected to the Russian Supreme Soviet. Kazannik volunteered to relinquish his seat so that El'tsin could become a member. Kazannik's appointment was widely viewed by procurators and legal scholars as a "reward" for this display of loyalty.

The Procuracy was again cast into the midst of a high-level political squabble in early 1994 over the State *Duma*'s decree on amnesty that resulted in the release of the organizers of the October 1993 violence in Moscow. President El'tsin maintained that the action constituted a pardon, which according to the Constitution is a power granted exclusively to the

4 ITAR-TASS 22 April 1993.

5 Reported in *Izvestiia* 29 April 1993, 2.

6 *Izvestiia* 20 May 1993, 5.

President, and directed Kazannik to order the continued detention of the persons charged with organizing the coup. Kazannik responded that the Prosecutor-General's office has no right to interpret legal acts, but must carry them out.[7] Kazannik resigned on 28 February 1994 rather than give in to President El'tsin's wishes. He was replaced by the thirty-six-year old Aleksei Iliushenko. The Federation Council initially refused to accept Kazannik's resignation and twice refused to confirm Iliushenko. Faced with lack of confirmation of his appointment, El'tsin had two options: either to appoint someone else or to permit Iliushenko to serve indefinitely as acting Procurator-General. He chose the latter option. Iliushenko made a name for himself by attempting to rein in Russia's increasingly critical media. In November 1994, he condemned *Moskovskii Komsomolets* for "outright boorishness" and the following year he initiated a criminal investigation against NTV's satirical puppet show "Kukly" for "insulting" portrayals of President El'tsin and Prime Minister Chernomyrdin.[8] Iliushenko was dismissed in October 1995 and later accused of abuse of office and bribe-taking in El'tsin's highly publicized pre-election anti-corruption campaign. Iliushenko was held in detention for two years and then released, but the corruption charges spelled the end of his career in politics. He was replaced with his former first deputy, Oleg Gaidanov. Gaidanov promptly terminated the investigation of "Kukly" and announced a new round of anti-corruption investigations. In particular, he targeted "criminals" who were running for seats in the *Duma*, where they enjoyed immunity.[9] Gaidanov alleged that at least 100 of the candidates in the December 1995 *Duma* elections had criminal records.[10] Gaidanov was replaced by Iurii Skuratov after just sixteen days in office.

Iurii Skuratov, a long time prosecutor in Ekaterinburg and then Buriatia, also made fighting official corruption a high priority. By 1999, his investigation of a Swiss company, Mabetex, reached all the way to President El'tsin and his two daughters, Tatiana D'iachenko and Elena Okulova. Skuratov charged that they had accepted credit cards from Mabetex in exchange for lucrative contracts for Kremlin renovations. President El'tsin first tried to persuade Skuratov to drop the investigation and when he refused, he tried to dismiss him, but the Federation Council refused to approve the dismissal on three separate occasions. Somewhat later, Skuratov was implicated in a sex scandal; a national television network with close ties to the government broadcast a videotape showing Skuratov (or

7 *Izvestiia* 1 March 1994, 2.

8 Reported in *Post-Soviet Media Law & Policy Newsletter* 19 October 1995, Issue 22.

9 See *Russian Reform Monitor* 16 October 1995 No.59.

10 Reported in *The Financial Times* 14-15 October 1995.

someone resembling him) cavorting with two prostitutes in a Moscow hotel room. Skuratov claimed that he was not the person in the video and that the scheme was an obvious attempt to smear his reputation and secure his resignation.[11] Nevertheless, the episode proved damaging to his reputation and ultimately resulted in his dismissal in May 2000.

Politicization of the Procuracy under Putin

Putin's relationship with the Procuracy has taken on an entirely different character than that of President El'tsin. Rather than becoming embroiled in high-level political confrontations between the Parliament and the President, the Procuracy's full investigatory and prosecutorial powers have been employed by President Putin on behalf of the State, but not always in strictly criminal or legal matters.

For example, on 12 August 2000, the nuclear submarine Kursk suffered a devastating explosion and sank in the Barents Sea, taking the lives all 118 crew members. Shortly after the disaster, President Putin asked the Prosecutor-General to launch an investigation into the causes of the accident. While the *Duma* also held hearings and conducted its own investigation, the official governmental investigation of the event fell to the Procuracy. It has become a common practice in Russia for the Procuracy to undertake such investigations, which inevitably raises its visibility, but may detract from its focus on law enforcement. Conducting investigations for the President also reinforces the impression that the Procuracy is the investigatory arm of the President's Administration, compromising its image as an independent law enforcement body.

Dominating the public's awareness of the Procuracy in the administration of Vladimir Putin are the headline-grabbing criminal investigations of the oligarchs, especially Vladimir Gusinskii, Boris Berezovskii, and Mikhail Khodorkovskii. The various criminal proceedings surrounding these men and the state's *de facto* re-nationalization of Yukos oil company have been roundly criticized by international human rights observers and political leaders. While the cases are undoubtedly examples of selective prosecution, few would claim that Gusinskii, Berezovskii or Khodorkovskii were innocent, falsely charged with fraud, insider stock trading or tax evasion. On the contrary, the prosecution of these oligarchs was overwhelmingly popular with the Russian public, which assumed that all of the oligarchs and "New Russians" obtained their wealth through illegal means. The prosecutions made good on Putin's offer to all of the oligarchs soon after assuming the presidency: do not meddle in political affairs, abide by the law, pay your taxes and we will not investigate how you became so wealthy.

[11] See an interview with Skuratov in *Helsingin Sanomat* 20 October 1999.

The involvement of the Procuracy in these cases reinforced its image as a heavily politicized institution—"the eyes of the tsar"—that has been utilized by Putin to further his own agenda. Concerns have also been expressed by jurists, legal reformers, and foreign human rights groups over the practice of selective prosecution and procedural irregularities. The general presumption, thus far unexamined by researchers, is that the Procuracy is doing the President's bidding, rather than involving itself in these politically charged cases on its own volition. The politicization of the Procuracy—whether due to presidential pressure for the Procuracy to become involved in high visibility political disputes or the Procuracy's own tendency to engage in political grandstanding to protect or expand its powers and status—does not bode well for the evolution in Russia of a professional, independent, and respected prosecutorial agency on a par with those in most Western democracies.

The Debate over the Procuracy Returns

With Putin, a trained lawyer and experienced law enforcement official, elected as President some legal reformers again began raising the question of limiting the Procuracy's powers. A new tactic of reform jurists was to question the rightful place of the Procuracy in Russia's constitutional system. According to the logic of some reformers, the Procuracy's functions place it neither in the legislative branch nor the judicial branch, since it does not enact legislation, nor does it adjudicate cases. By process of elimination, proponents of this view conclude that the Procuracy must be an executive branch agency and, thus, belongs under the supervision of the Ministry of Justice. Procurators retort that Article 129 of the Constitution, which focuses on the Procuracy, appears in the section entitled "Judicial Power". Some critics of the Procuracy also cite examples of prosecutorial organizations and attorneys-general in other countries to substantiate their view that the Procuracy's powers should be limited. However, these arguments often miss the mark in glossing over cases in which Attorneys-General routinely engage in a variety of activities well beyond simply prosecuting criminal cases. In most legal settings, prosecutorial officials function in all three arenas: executive, legislative and judicial.

More interesting than the argumentation presented on either side is the fact that yet again, the Procuracy feels it necessary to mount a spirited defense of its existence. In 2003 passing references appeared in the Procuracy's journal, *Zakonnost'*, to a new version of "the Law on the Procuracy" being compiled.[12] Perhaps not coincidentally, throughout 2003

[12] For example, G. Chuglazov, "Prokuratura v sisteme organov gosudarstvennoi vlasti", *Zakonnost'* 2003 No.2, 30-32.

a spate of articles appeared in the Procuracy's journal, *Zakonnost'*, arguing against any diminution of the Procuracy's central role in Russia's legal system.[13] While revising "The Law on the Procuracy" holds the potential for clarifying the questions left unresolved in Article 129 of the Constitution and in the current law, it also creates an opportunity for opponents of the Procuracy to, yet again, seek to limit its powers. An influential article written by G. Chuglazov, Councilor to the Procurator General of the Russian Federation, concludes on an ominous and defensive tone:

> "No reform or revision of procuratorial functions should alter a basic principle: that the Procuracy is independent of all organs of state power, social organizations, and parties. If reform departs from this principle, it isn't reform, but liquidation of the Procuracy as an independent organ of state power."[14]

Once again, it appeared that the Procuracy was confronting pressures for reform that threatened to limit its position in the Russian legal system.

The principal forum in which this bureaucratic struggle first took place was a commission on administrative reform that President Putin impaneled in 2002. The commission was charged with conducting an exhaustive review of some 2,900 government agencies, ministries and offices at the federal level.[15] The review was undertaken with an eye toward reducing duplication, improving performance, and limiting government interference in the realm of business. In early 2003 the review process focused on law enforcement agencies. On 11 March 2003 major structural changes in police and security organizations were made public, including the elimination of the Tax Police. The next day, President Putin, speaking to a coordinating meeting of heads of law enforcement agencies held at the Prosecutor-General's Office, was especially critical of the police and Tax Police. According to a report in *Vremia novostei*:

> "The President harshly criticized their performance, singling out the Ministry of Internal Affairs in particular. Prosecutor-General Vladimir Ustinov also spoke his mind, hurling a whole "package" of accusations at the Internal Affairs Ministry's Investigative Committee. He also read the riot act to the Customs Committee and even to the Tax Police, which is living out its last days. The only people who escaped criticism were representatives of the Federal Security Service (FSB)."[16]

Kommersant's correspondent concluded:

13 For example, M. Orlov, "Net prokuratury—net problemy?", *Zakonnost'* 2003 No.1, 23-26; A. Kazarina, "Obshchii nadzor: vosmozhnosti i predely", *Zakonnost'* 2003 No.7, 5-9; and K. Amirbekov, "Obshchii nadzor v usloviiakh reformirovaniia sudoproizvodstva", *Zakonnost'* 2003 No.9, 2-6.

14 Chuglazov, *op.cit.* note 12.

15 Reported by Konstantin Smirnov, *Kommersant* 15 December 2003, 15.

16 Aleksandr Shvarev, *Vremia novostei* 13 March 2003, 1-2.

> "White House officials have somehow stopped talking about cutting back the functions of the Prosecutor-General's Office. They were doubtless given to understand by the Kremlin that this would not be an opportune time for that."[17]

The visibility of Ustinov in the review process and in publicly denouncing the work of several other law enforcement agencies signals the privileged position of the Procuracy in the Putin Administration. It was also telling that Nikolai Patrushev, director of the *FSB*, went out of his way to stress that his agency has been working very well with other law enforcement agencies, "first and foremost the Prosecutor-General's Office".[18]

Any doubts that the Procuracy had emerged stronger from these bureaucratic struggles were eliminated after the back-to-back Beslan school tragedy and the bombings of two commercial Russian airliners in September 2004. Like the 9/11 attacks in the United States, these events focused attention of the law enforcement agencies and the general public on the imperative of fighting international and domestic terrorism. The Procuracy conducted the investigations into these tragedies and, together with the FSB, has become a central player in the fight against terrorism, which is a major new focus for the Procuracy. Speaking to a conference of prosecutors in early 2005, Putin urged them to intensify counterterrorism efforts. He also reflected on progress in "overcoming narrowly specialized departmental approaches in the work of law enforcement bodies and increasing the coordinating role and functions of the Prosecutor's Office".[19] He went on to refer to the Procuracy as "the coordinating center" of law enforcement and ended with a sweeping mandate:

> "The Prosecutor's Office embodies the power and justice of the state. It is one of the most powerful and influential sections of our law-enforcement system. You have been entrusted with supervising the observance of the Constitution, and execution of the law throughout the entire territory of our country."[20]

Thus, rather than witnessing the diminution of the Procuracy, which prosecutors had feared, the past five years have seen the responsibilities and status of the Procuracy increase due to a combination of factors including presidential support, increased threats of terrorism, pervasive corruption, and the pressing need to rein in oligarchs and political officials.

17 Smirnov, *op.cit.* note 15

18 *Ibid.*

19 Text of Putin's speech is available on *Johnson's List* 21 January 2005, # 9029.

20 *Ibid.*

The Three Faces of Vladimir Putin

President Putin has been frequently portrayed in Western scholarship and media as a "tough cop", responsible for packing the Presidential Administration with "*siloviki*"—former colleagues from the *KGB* and *FSB*, many of whom come from St. Petersburg. The "tough cop" persona of Putin was also evident in the investigation and prosecution of the three leading oligarchs: Gusinskii, Berezovskii, and Khodorkovskii. He has also enlisted the support of prosecutors in aggressively pursuing Chechen and other terrorists. These actions have helped to reinforce Putin's "tough cop" image.

Others see President Putin's latest efforts to recentralize power in the center and in the Executive as a return to authoritarian rule, making Putin a "closet communist." The highly charged prosecution of Mikhail Khodorkovskii and the government's re-nationalization of Yukos and legal maneuvers to squeeze Western oil and gas companies out of business deals in the Caspian Basin signal a plan for the reassertion of state control over Russia's premier economic assets. Reminiscent of Soviet era procuratorial campaigns against lack of uniformity in laws and law enforcement, Putin has also employed the Procuracy in challenging thousands of regional laws and normative acts that contradict federal laws and the Constitution.

While the "tough cop" and "closet communist" images of Putin have dominated Western perceptions of the Russian President, a third "face" is also evident in Putin's interactions with the Procuracy—Putin, "the jurist". A review of Putin's public speeches reveals a notable emphasis on the importance of development of rule of law in Russia. Law is primary in Putin's view not only because it is a prerequisite to attracting foreign investment and stabilizing the economy. It also is a necessary ingredient in stabilizing democracy, insuring due process, reinforcing the state's ability to insure the protection of citizens' rights and physical security, and achieving the larger societal goal of social justice. The Procuracy plays a central role in achieving these goals in Putin's view.

In his remarks to a conference of prosecutors in Moscow in early 2001, Putin observed that the top priority of the Procuracy should be protecting people's rights. He noted with satisfaction that one in four complaints lodged by citizens with prosecutorial agencies in 2000 had been successfully resolved.[21] Every year the Procuracy looks into more than one million such complaints under its powers of general supervision.[22] The following year, Putin again acknowledged the popularity and effectiveness of general supervision: "People go to the prosecutor's office

[21] Reported in *Nezavisimaia gazeta* 12 January 2001, 3.

[22] Cited in *OMRI Daily Digest* 14 March 1997 No.52.

for redress of grievances much more often than they go to the courts, and they get quick assistance there free of charge."[23]

Another emphasis of Putin's early meetings with prosecutors focused on the Procuracy's role in verifying the legality of laws and other normative acts issued by regional and local bodies. In his televised address to the nation upon being named acting President following the resignation of Boris El'tsin on 31 December 1999, Putin observed:

> "Russia currently has more than one thousand federal laws and several thousand laws of the republics, territories, regions and autonomous areas. Not all of them correspond to the above criterion [of constitutionality]. If the justice ministry, the prosecutor's office and the judiciary continue to be as slow in dealing with this matter as they are today, the mass of questionable or simply unconstitutional laws may become critical legally and politically. The constitutional safety of the state, the federal center's capabilities, the country's manageability and Russia's integrity would then be in jeopardy."[24]

President Putin reiterated his call for prosecutors to scrutinize the legality of normative acts of various executive and legislative bodies when speaking to a conference of prosecutors in January 2001. He announced that one of the central tasks of the Procuracy is to take stock of "the legal content and legitimacy of regional laws (including those enacted by agencies of local self-government) and ministry-level instructions".[25] Putin reported that in response to protests issued by procurators, sixty constitutions and charters of subjects of the federation and 2,312 normative acts were brought into line with the Constitution. "It is simply incredible that we can continue to exist in such conditions", he remarked.[26] In total, in 2001 the Procuracy found 5,421 violations of law and 1,856 illegal normative acts of legislative bodies of subjects of the federation, and 12,019 violations and 2,408 illegal normative acts of executive agencies.[27]

In many cases republics and regions have challenged prosecutors' protests in the courts. Gordon Hahn reports that as of February 2001, the Prosecutor General's office had 702 pending complaints against constitutions and charters of republics and regions and more than half (384)

23 Reported by Ekaterina Grigor'eva and Grigorii Punanov in *Izvestiia* 12 February 2002, 1.

24 Vladimir Putin, "Russia at the Turn of the Millennium", 31 December 1999, available on the website of the Government of the Russian Federation, at <http://pravitelstvo.gov.ru/>.

25 Anna Zakatnova in "The Prosecutor General's Office on the Eve of Reforms", *Nezavisimaia gazeta* 12 January 2001, 3.

26 V. Bessarabov and A. Rybchinskii, "Prokuratura Rossii: federalism i konstitutsionnaia zakonnost'", *Zakonnost'* 2001 No.7.

27 Reported in I. Sokolova, "Otsenka sootvetstviia regional'nykh pravovykh aktov Konstitutsii RF", *Zakonnost'* 2002 No.8, 14-17.

were under review by courts.[28] Cases are referred to the courts both by federal prosecutors to force compliance with federal laws and in other cases by regional officials wishing to challenge (or delay) the harmonization of legislation with federal laws and the Constitution. Not only is the harmonization campaign initiated by Putin realizing his goal of creating a "common legal space" throughout the Russian Federation, it is creating a growing demand for law and, in the process, enhancing the status of the courts and legitimacy of judicial review.

Putin's commitment to progressive legal reform was also evident in his active support for a new Code of Criminal Procedure. On 22 November 2001, the *Duma* gave final approval to a new Criminal Procedure Code of the Russian Federation (*UPK*). Despite the active resistance of law enforcement agencies, most notably the Procuracy, the legislation was signed by President Putin on 18 December and went into effect on 1 July 2002. The new code severely restricts the powers, privileges and influence of the Procuracy in criminal investigations and prosecutions, reaffirms the presumption of innocence, requires the participation of defense counsel and prosecutors in all criminal cases, limits interrogation of suspects without an attorney present, restricts the power of law enforcement bodies to detain suspects, expands jury trials, prohibits double jeopardy and the common practice of returning cases to the prosecutor for further investigation, and assigns to judges the responsibility to authorize detentions, arrests, searches and seizure of property, records or other material evidence.

Given the thrust of the new Code of Criminal Procedure it is somewhat surprising that President Putin so actively worked for its passage over the opposition of law enforcement agencies, including the Procuracy. In November 2000, Putin named Dmitrii Kozak to head up a working group within the Presidential Administration to focus on drafting new laws governing the judicial system. According to Elena Mizulina, a member of the *Duma*'s working group on the *UPK*, the two panels closely coordinated their efforts. Mizulina notes that Putin personally intervened with the leaders of various "interested departments" that had scuttled reform efforts in the past.[29] In subsequent speeches to procurators since the passage of the new code, Putin has emphasized the significance of its implementation. In his annual address to prosecutors in early 2004, the President spoke at

[28] Gordon M. Hahn, "The Impact of Putin's Federative Reforms on Democratization in Russia", 19 *Post-Soviet Affairs* 2003 No.2, 135.

[29] Elena Mizulina, "A New Criminal Procedure Code: Russia's Path Toward Justice", *Russia Watch* March 2002 No.7, 15-17.

length, hailing the new code and noting that its implementation should be of primary importance to prosecutors:

> "First is the new criminal and criminal procedural legislation and how it affects the prosecutors' work. Now that this new legislation is in force all of the provisions of the Constitution relating to people's rights and freedoms in criminal legal proceedings have finally taken effect. Courts now do not have the right to carry out an accusatory function and it is obligatory for prosecutors to take part in court proceedings. This has changed the Prosecutor's Office's procedural status. The prosecutor, acting on behalf of the state, now bears responsibility for proving and justifying the charges made."[30]

The President went on to recognize that the new code "demands a qualitatively new level of work" by prosecutors. He decried the "archaic institution" of sending cases back for additional investigation. He noted:

> "The Prosecutor's Office's supervision of investigations and inquiries is a key element in outside control over the law enforcement agencies' activities. It is essential in ensuring the quality of preliminary investigations. This is crucial because it is unacceptable to have situations where investigations have lasted months and people have been kept in custody and then the accusations simply fall apart in court. This does not mean that you should defend the honor of your profession at any cost and let people languish behind bars. What it means is that investigations need to be of a higher quality."[31]

Finally, much attention was devoted in the Western media to Putin's 2005 "State of the Nation" address, in which the President criticized tax and customs offices for "terrorizing" private businesses and advocated reducing the statute of limitation from ten years to three years for prosecution for various illegal commercial transactions. He added:

> "Ways of repaying tax debts for past years should be found so as to ensure the state's interests without destroying the economy and without driving business into a dead end."[32]

The concern with protecting private business and stabilizing the legal system in order to attract foreign investment is not new in Putin's thinking.

Speaking to a conference of prosecutors in January 2001, the President put particular emphasis on the need to protect private property and the rights of entrepreneurs, adding that "the development of the Russian economy is going to depend on our prosecutors and courts".[33] Approximately one year later, speaking to an expanded meeting of the collegium of the Prosecutor-General's Office, the President admonished prosecutors

30 Text of Putin's speech is available on *Johnson's List* 1 February 2004, # 8043.

31 *Ibid*.

32 For the text of Putin's speech, see *BBC Monitoring* 25 April 2005, available on *Johnson's List*, # 9130.

33 Reported in *Nezavisimaia gazeta* 12 January 2001, 3.

not to crack down on business without "very good cause".[34] As a result of the 2003 shake-up of law enforcement and other federal agencies, the Ministry of Internal Affairs, the Ministry for Emergency Situations, the State Construction Committee and the Ministry of Labor were stripped of their powers to close commercial enterprises for various unsubstantiated violations of trade, tax, fire safety or employment regulations. Thanks to the President's intervention, action to force the closure of private businesses for such violations must now be undertaken through the courts. In his annual speech to prosecutors in 2005, Putin urged prosecutors to devote more effort to protecting the business community from pressure from criminal groups and corrupt government officials.[35]

Putin's record of supporting procuratorial handling of citizens' grievances, supervision over the conformity of law and other normative acts passed by regional bodies with federal laws and the Constitution, adherence to provisions of the new Code of Criminal Procedure, and emphasis on protecting private property and the rights of entrepreneurs offers a alternative "face"—Putin, the jurist—that has largely been ignored by Western commentators and media. Putin's progressive stance on these issues is not only good news for the institutional interests of the Procuracy; more importantly, it furthers the development of rule of law in Russia.

34 Reported in *Izvestiia* 12 February 2002, 1.

35 Reported in *Izvestiia* 24 January 2005, 1, 4.

Law, Citizenship, and Rights of Non-Russian Nationalities, Past and Present

Susan Heuman

Introduction

The quest for a rule-of-law state in the Russian Empire at the beginning of the twentieth century continues a century later as Russia reconstitutes itself into an independent democratic federal state after the fall of Communism. In both eras there has been a profound interest in establishing a legally based government in which the population functions as citizens rather than subjects.

As cultural and political nationalist movements developed among the peoples of the Habsburg and Russian Empires in the nineteenth century, nationalism started to evoke conflicting images. For minorities in multinational states, nationalism represented the liberal ideas of human rights, self-determination, freedom of religion, as well as freedom of conscience and expression in one's native language: for dominant ethnic groups, nationalism meant spreading their national identity in the name of freedom and power for the national-state. Liberal nationalist movements concentrated on creating identities for social and cultural entities which shared language, customs, religion and respect for diverse nationalities which had been politically subsumed within the national framework of an Empire. In their quest for national cultural self-determination, vocal non-Russian peoples such as Ukrainians, Kazakhs and Jews fostered a broad decentralizing force that challenged the more traditional nationalism represented by the Tsarist Russian orthodox model for a unified Russian Empire. The making of a population of active citizens was in the minds of many legal theorists and activists at the end of the nineteenth century and the beginning of the twentieth century.

Citizenship can be considered as membership in a particular nation which is recognized under the tenets of international law. Both rights and obligations are an integral part of the personal status known as citizenship. However, citizenship is a problematic concept when it is applied to Imperial Russia and other governmental orders in which residents were considered subjects rather than citizens. It can be defined as active rights that refer to a person's civil rights and participation in the political affairs of the nation. It might also be a series of obligations under a particular regime; a person forced to take part in the process of enforcing democratic rights might consider this a type of legal duty that infringes on the democratic rights that are part of citizenship. A situation in which persons were forced to act in a particular fashion in civil society to be classified as

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 15-28

citizens makes citizenship an obligation rather than a right. Would that type of citizenship still be democratic or does it constitute a new form of authoritarianism? Citizenship rights, as Jürgen Habermas has pointed out, are only worth as much as the population makes of them.[1] But then one has to determine the foundations of citizenship in a particular country. Is it tied to national identity, religion, regional or territorial boundaries or is it based in the codes of a law based state, and are the citizenship laws inclusive or exclusive of certain residents?

This chapter will address various approaches and problems involved in the formulation of citizenship laws for Russians and non-Russians; it is an exploration into the development of the laws governing citizen participation and the effect of citizenship laws on national groups in the Russian Empire, the Soviet Union and the post-Soviet era. When the Soviet Union collapsed fifteen states were created out of its carcass, and each one of them had to officially define their nationhood through the citizenship laws. Some of the elites who found themselves at the helm of the new ships of state were lost without directives from the former central government in Moscow. The breakup of multinational states, such as the Russian Empire, the Habsburg Monarchy and the Soviet Union, caused revolutionary changes in their political systems, creating new states and most often substituting governments that were nominally liberal democracies but generally lacked adequate roots—or emerging constitutional democracies that had their healthy roots severed.

Pre-Revolutionary Russia

In the era just before the 1905 Revolution, Russian civil society was developing within the emerging classes and political organizations which were pressing for representation. Many political observers noted how segments of the population learned about being members of civil society, gaining functional citizenship by participating in the governmental and judicial organs first set up with the Great Reforms of the 1860's and later in the Constitutional Monarchy formulated after the 1905 Revolution.[2] The events of 1905 gave impetus to the development of liberal opposition movements throughout the empire. One of their hopes was that decentralization into a federal state would provide nationalities with their national rights and interests. At one gathering organized by the Union of Nationalities to fight for national rights, 115 delegates attended a congress

1 J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe", in R. Beiner (ed.), *Theorizing Citizenship,* Albany, NY 1995, 255-283, and 263.

2 D. Yaroshevskii, "Empire and Citizenship" in D. Brower and E. Lazzerini (eds.), *Russia's Orient*, Bloomington, IN 1997, 73.

representing Belorussian, Ukrainian, Baltic, Polish, Jewish, Caucasian Tatar, and Kazakh interests.[3] There were also Muslim conferences between 1905 and 1906 with representatives coming from Central Asia and as far east as Irkutsk.[4]

The Constitutional Democrats (the *Kadet*s), were initally among the major supporters of the rights of nationalities. However, the interest in equality of all nationalities did not remain a major interest point for either the *Kadet*s or other political groups. Once the non-Russian nationalities appeared to interfere with implementing measures to increase the democratic base of the whole country including the effective mobilization and entry into the First World War, the issue of national rights receded into the background for many parties.

Transforming subjects to citizens became a public project among political parties and lawyers. Books, articles and other publications for self- improvement organized by the *Komissiia po organizatsii domashnego chteniia* started to appear. In 1910, for example, the lawyer and human rights advocate Bogdan Kistiakovsky developed a program for educating people on the state, government and constitutional forms as well as citizenship. In the section entitled "*Shto chitat'*", the pamphlet also suggested reading materials and gave short reviews of books on government, parliamentary systems and the judicial system. Only with this information would it be possible for people to participate in civic matters. Later, in addition, political activists expanded their understanding of citizenship by participating and observing the operations of political parties and the *Duma*.

Citizenship, Rights and Obligations

In late Imperial Russia, citizenship had many meanings and the debates on this issue have set up an extensive dialogue in recent historical literature. Some scholars emphasize the existence of rights and a developing sense of law in the pre-revolutionary era,[5] others focus on the ways the state intervened in the individual's life by reinforcing obligations involved in being a citizen of the Russian Empire, while another group concentrated on ways to define and realize the ideals of universal civil rights–human rights. As Eric Lohr explains in his recent article in *Kritika*, citizenship in the Russian Imperial setting most often focused on the citizen's duties toward the state rather than citizens' rights. Recent writings on pre-

3 *Semirechenskie vedomosti* 7 October 1917, 223.

4 R. Pipes, *The Formation of the Soviet Union,* New York 1968, 1-42; A. Kappeler, *Russland als Vielvölkerreich*, Munich 1992, 230-262.

5 W. E. Butler, "Civil Rights in Russia: Legal Standards in Gestation" in O. Crisp and L. Edmondson (eds.), *Civil Rights in Imperial Russia*, Oxford 1985, 1-12.

revolutionary Russia by Yanni Kotsonis,[6] Dov Yaroshevskii and Mikhael Dolbilov focus on the state's methods of taking away individual autonomy and leaving people with less protection from the state. At the turn of the last century, non-Russian pre-revolutionary authors writing on the pages of the short lived journal published in 1915 *Natsional'nye problemy,*[7] asserted that citizenship was, in fact, an official strategy of integrating the non-Russian peoples into the state.

Citizenship forced the population to understand and support the concept of the public good—and that meant good for the Russian State; it was referred to as *grazhdanstvennost'*.[8] There was a focus on the collective and the community rather than individual rights in the Western sense where the individual became the building block on which the society was constructed.

Others worked on the theory of citizenship and human rights. Turn of the century legal minds such as Vladimir Gessen[9] and Bogdan Kistiakovsky focused on citizenship as the ideal of individual rights that actually was an idealistic form of citizen's rights. In Kistiakovsky's view, these rights were human rights that encompassed economic, political and national rights.[10] His concept of citizenship reflected the Western European political tradition focused on revitalizing the civil order, establishing associations that would develop out of participation in local self-government and reconstructing the governmental and judicial system. However, the Tsarist government did not consider the population capable of making decisions about policy. In fact the Autocracy was threatened by the vocal presentations by non-Russian national representatives.

In the First *Duma*, the unanimous condemnation of the Bialystok Jewish pogrom was a publicized event. There was, however, a conservative outburst against the revolutionary character of the First *Duma*. Members of the *Russkii Natsional'nyi Soiuz* blamed the *inorodtsy* delegates—primarily

6 Yanni Kotsonis, "No Place to Go: Taxation and State Transformation in Late Imperial and Early Soviet Russia", 76 *Journal of Modern History* 2004 No.3, 53-77, and *idem*, "Face-to-Face: The State, the Individual and the Citizen in Russian Taxation, 1863-1917", 63 *Slavic Review* 2004 No.2, 221-246; Geoffrey Hosking, *The Russian Constitutional Experiment; Government and Duma, 1907-1914,* Cambridge 1973. See articles by M. Dolbilov, and E. Lohr, in 7 *Kritika* Spring 2006 No.2, *Cf. amplius* note 8.

7 *Natsional'nye problemy*, Vols.1-4. See B.A. Kistiakovskii, "Chto takoe natsionalism", in 1 *Natsional'nye problemy* May 1915, 2.

8 E. Lohr, "The Ideal Citizen and Real Subject in Late Imperial Russia", 7 *Kritika* Spring 2006 No.2, 178. D. Yaroshevskii, *op.cit.* note 2, 61.

9 Lohr, *op.cit.* note 8, 182-194.

10 S. Heuman, *Bogdan Kistiakovsky and the Struggle for National and Constitutional Rights*, Cambridge, MA 1998, 59-74.

the Jews, for the destructive character of the First *Duma*. They argued that Vinaver, Iakobson, and Ia. Gertsenshtein had proved that the *inorodtsy* were Russia's enemies, a type of "inner strangers" for it was deemed impossible to make them Russians.[11]

> "Be what you call yourselves, namely Poles, Jews, Latvians, Armenians, Georgians. In that case, there will be no place inside the political temple of the Russian nation. You are not allowed in our parliament and power. You must stay outside. We will be Russians, but you will remain what you are, namely the tribes conquered by Russia, whom we agree to consider as Russian citizens but not earlier than you yourselves become them. For the time being, you are only Russian subjects and that is not the same as being Russian citizens [...]. Excepting the participation in the government, Russia will give you all rights including self-administration, will even not touch your religion, language, nationality, giving time and reasonable sense to smooth differences." [12]

Hence, the Tsar and his ministers changed the electoral laws for the Third *Duma* to make it "Russian in spirit" and placed restrictions on the number of non-Russian representatives there would be in future *Duma*s. Even if the Tsarist Regime had been serious about formulating a legal system that would encompass the multi-faceted worlds of the pre-revolutionary Russian Empire, the process of building a cohesive legal artifice presented a task filled with enormous, nearly insurmountable problems.

Soslovie: The Estate System

In the pre-Revolutionary era, the legal status of all persons in the Russian Empire was determined by the estates into which they were born. The first estate was the nobility; secondly came the clergy followed by separate estates for town dwellers, peasants and others in society. Each of the estates had its own legally defined rights and obligations. At the end of the Empire, as class relations were changing, the state reacted to the increase in social and political unrest by reinforcing the existing system. New class groups, such as workers, professionals, and the intelligentsia had no place in the *soslovie* system; so it became difficult to decipher the newly emerging groups in legal or social terms.[13] The estate system did not include nomadic peoples and the Jews who were classified as *inorodtsy*; they were subject

11 Gulnar Kendirbai, "The Evolution of the Muslim Movement in the Period of 1905-1917", paper presented at the 2004 Boston Convention of American Association for the Advancement of Slavic Studies, 2004, 15.

12 M. Menshikov, *Natsiia–eto my*, Ekaterinoslav 1907, 6-8.

13 Francis Wcislo, "*Soslovie* or Class? Bureaucratic Reformers and Provincial Gentry in Conflict, 1906-1908", 47 *The Russian Review* 1988, 23; G. Freeze, "The *Soslovie* (Estate) Paradigm and Russian Social History", 96 *American Historical Review* 1 March 1986, 11-36. See, also, A. Rieber, *Merchants and Enterpreneurs in Imperial Russia*, Chapel Hill, NC 1982.

to laws distinct from those governing the territories in which they lived. *Inorodtsy* were treated as second class citizens and gradually this carried over to include all non-Slavic peoples. There were attempts within the First and Second *Duma*s in 1906 and 1907 to abolish the *soslovie* system. As the Tsarist Minister of Interior, Petr Stolypin explained:

> "For the full development of the principle of legal equality and individual freedom in the state, it is necessary to abolish the soslovie system, that is, the division of the population into groups solely according to the principle of common origin, as a result of which members of soslovie corporations possess political and other rights (established by law and transmitted by heredity), which are unequal for various groups."[14]

The process of formulating a legal system that would fully encompass the multifaceted worlds of the Russian Empire and establish rights of citizenship for all required the elimination of the traditional *soslovie* system. This would allow the complex mix of emerging class, and national identities to become the basis for the practice of citizenship.

Siberia: The Frontier

In Siberia, at the turn of the twentieth century, a unique type of Russian society was developing without the imprint of the estate system that had helped establish the hierarchical power structure in Western Russia. The leading people in the Eastern part of the Empire were farmers and merchants who achieved their success by dint of their labor rather than their birth into the proper estate. Noble landowners did not live in Siberia where the spirit was that of the rugged individualist society of a frontier territory. Without a nobility, which would represent the autocracy's interest, who could protect the *zemstvo* from becoming a real organ of local interest? Some Siberians were eager to establish regional autonomy and federalism for the region. Nikolai Iadrintsev, a geographer, ethnographer, historian and archeologist was the early proponent of such autonomy in his 1882 book *Sibir' kak koloniia* (Siberia as a Colony); he described Siberians as a unique ethnic type that derived from the mixing of Russian and native peoples of Siberia. In fact, Iadrintsev pointed out that Siberians were individualists who understood the concept of freedom unlike the European Russian who were not used to freedom in a real sense; Siberians considered them as foreigners.[15]

[14] *Gosudarstvennaia duma, Vtoroi sozyv, Zakonodatel'nye materialy*, St. Petersburg 1907, 265. See Lohr, *op.cit.* note 8, 176-177 and Alfred Rieber's excellent article "The Sedimentary Society", 16 *Russian History* 1989 No.2-4, 353-376. For the regime's policy, see Jane Burbank, *Russian Peasants Go to Court: Legal Culture in the Countryside (1905-1917)*, Bloomington, IN 1994.

[15] N.M. Iadrintsev, *Sibir' kak koloniia,* St. Petersburg 1882, 10.

In Siberia as well as other parts of the Russian Empire, the freedom to use one's own language was of central importance in questions of customary legal practices and cultural identity. Russification was a policy forced on peoples whom the Russian officials wanted to integrate into their world. This included the Ukrainians who were prevented from using their language in publications, schools and theaters after the 1876 Tsarist *Ukaz*. The Buriat-Mongolian language was hindered less because of the *inorodtsy* status of the Buriat people; their position allowed them greater autonomy in cultural, linguistic and legal matters. Furthermore, the customary laws written in Mongolian script made it extremely difficult to find Russian officials who could decipher the materials.

The vastness of the Russian Empire became a major factor in the attempts to institute a viable, integrated legal system. Russian statutory laws according to the standards of the 1864 reforms did not reach Siberia until 1896-1897 when a special Tsarist order was issued to facilitate the process. The introduction of *zemstvo*s and the modern courts, as well as the exercise of some aspects of citizenship were bound to help integrate far off Siberia into the Russian Empire.

The prevailing laws up to that time were the 1822 reforms formulated under the leadership of Speranskii, the governor general of Siberia and the spirit behind the reforms. Speranskii was an unusual governmental official, for he allowed judiciary autonomy among the Siberian peoples who were allowed to lodge complaints and conduct their negotiations in the Buriat language and have their own native institutions. [16] Speranskii hoped for a way to combine the cultural values of the native and Russian populations of Siberia.

Citizenship and Empire

In *Russia's Orient*, Yaroshevskii describes the resistance to the empire's citizenship policies of the 1890's, which were not as considerate of the cultural peculiarities as Speranskii's policies 70 years earlier. There were temporary statutes in 1868 in the Kyrgyz Steppe and a second experiment in 1897 in the Transbaikal *oblast* where the Tsar's bureaucrats set up administrative reforms for the Buriats. But the Buriats disabled the Russian citizenship drive by setting up a system of "invisible taxes" (*temnye sbory*) that were a way of using financial resources for what the Buriats considered the public good. They also avoided military conscription in the 1880's and used a system of bribes to get things done.

At the end of the nineteenth century, the Great-Russian population was less than the combined number of the other nationalities. Those who

16 See M. Raeff, *Siberia and the Reforms of 1822,* Seattle, WA 1956.

were grappling with the nationalities question had to face not only the gap in the economic and cultural development between the various nationalities, but this numerical inequality as well. Then too, some nationalities lived in defined areas while others lived in areas inhabited by other nationalities. The people of the Caucasus, for example, Armenians, Georgians, Caucasian Mountain peoples and other European and indigenous peoples created a nationalities problem in parts of the Russian Empire resembling that of the Habsburg Empire.

The coming of World War I intensified the drive to present Russia as a nation state rather than a multinational state. As Peter Struve expressed it, it was preferable for Russia to be a nation state rather than a multinational state during the war time. [17] The efforts of non-Russian peoples to articulate their demands were cut short. Their conferences and passionate articles about the plight of non-Russians such as Buriats, Ukrainians, Uzbeks and Jews in *Natsional'nye Problemy* (which only survived for four issues) were to no avail. Even mass uprisings such as that of the Kazakh people in 1916 which resulted from the harsh Russian treatment of non-Russians during the First World War were brutally put down and the protests were silenced.

The Soviet Era: Nationality and Citizenship

In 1922, the newly formed Union of Soviet Socialist Republics was a compromise between the Bolshevik efforts to create a powerful, unified and centralized state and the rights of nationalities. By creating a federation, the Soviet Union paid attention to the nationality question and gave the nationalities certain rights, but the leadership was committed to creating a Soviet State. The USSR allowed certain cultural and national rights to be exercised in the republics as long as that did not interfere with the plans for Sovietization, a process of ideological nationalization. However, the Russian ethnic-territorial state in the middle of the Soviet Union was so powerful and large that it either dominated the Union or made it malfunction. The Russian Republic—the RSFSR (The Russian Soviet Federative Socialist Republic)—contained ninety percent of the land and seventy-two percent of the population of the Union of Soviet Socialist Republics. The federal structure was unmistakably Stalinist, for the Party, the armed forces and the economic structure of the new entity were very

[17] P. Struve, "Raznye temy", 1 *Russkaia mysl'* January 1911 No.1, 184-187. See M. Von Hagen, "The Russian Empire", in K. Barkey and M. Von Hagen (eds.), *After Empire: Multiethnic Societies and Nation-Building*, Boulder, CO 1997, 58-60. See, also, S. Heuman, *Kistiakovsky: The Struggle for National and Constitutional Rights in the Last Years of Tsarism,* Cambridge, MA 1998, 129-146.

centralized. It would take a very serious organized reaction to stop the RSFSR and the Russians from totally dominating the Union.[18]

At the same time the individual citizen was ideologically protected by a constitution which promised to protect citizens from cradle to grave with free health care and free education, and employment. The Soviet State, at least on the paper that the constitutions were written on, was at the service of the people living within its borders. While each person was a Soviet citizen, each person was required to state his or her nationality. Early in the Soviet period, in 1926 a census was taken and it was decided that the answer to the question of nationality (*natsional'nost'*) was a matter of self-definition.

But, beginning in 1928, a Soviet citizen's national identity was not only a matter for the census taker and the map maker. After 1928, a person's nationality was added to all legal documents including marriage certificates, birth certificates as well as internal documents. In marriages of people of mixed national backgrounds, it was up to the parents of a child to decide the nationality to be used for legal documents. But complications ensued. The Census Bureau had made the right to national self-definition a formal part of the census process—as if it were a right of the population. By 1938, the *NKVD* Department of Passport Registration issued a decree that curtailed national self-definition and demanded that the passport for a person should be issued with the nationality of that person's parents.[19] It was no longer self-definition, it was by blood-listing either one or both parents' nationalities. In part this was a result of the Nazi German policy of researching the bloodlines of its citizens to see if they were appropriate citizens. It was also a reaction to the aggressive stance of the Germans and the fear that people of Polish or German background might not be loyal citizens. It was at this time that deportations took place to secure the borders and insure the perimeters of the country against attack.

Two approaches to citizenship that were in fact contradictory were in place. The attempt to tighten the concept of the Soviet State was a centrifugal force, while the reinforcement of differing national backgrounds in the structure of the federal Soviet Union (the use of national origin as a mandatory category in internal passports and other documents) created a centripetal force. One thing was clear:

18 G. Hosking, *Rulers and Victims: The Russians in the Soviet Union*, Cambridge 2006, 73.

19 F. Hirsch, *Empire of Nations: Ethnographic Knowledge and the Making of the Soviet Union,* Ithaca, NY 2005, 294.

> "As people used nationality-based institutions and demanded national rights—and as Soviet experts created official histories for all of the Soviet nations—'nationality' became the most important official category of identity for Soviet citizens." [20]

The USSR Constitution provided that each individual in the Soviet Union was both a citizen of the union and a citizen of his or her Union Republic. Gaining or losing citizenship was governed by the 1979 Law on Citizenship of the USSR. Marriage or divorce with a foreigner did not change the Soviet citizen's status; however political activities could result in loss of citizenship—though this would be carried out only by a decision of the Presidium of the USSR Supreme Soviet. [21]

The Soviet Constitution made it clear that Soviet citizens were equal before the law irrespective of racial, national or social origins. While the Constitution made it clear that rights of peoples to use their own languages was guaranteed under the Constitution, there was also the ongoing contradictory goal of building Soviet national pride and patriotism as well as international socialism.[22]

Citizen Initiatives

Though for many years research on the Stalin era focused on the Terror as well as the network of prison camps known as the *Gulag*, recent scholarship is showing that under the Soviet regime there were several areas in which citizens could demonstrate individual initiatives. These studies are not an attempt to minimize the Stalinist terror, but they do add reality to the sometimes overly rigid vision of Soviet life that was presented in the Cold War era. Ideally, Soviet citizens could be guardians of legality through a complaints procedure; these allowed people to make written or oral appeals to state and social agencies that concerned the improving of their functions and to complain about actions of officials in social agencies. This is articulately described in Golfo Alexopoulos's work on the complaint system and the risks involved with exercising this right.[23] Clearly citizens' rights were not the centerpiece of the Soviet system, though they did exist and were exercised in some areas as is evidenced

20 *Ibid*., 324.

21 W.E. Butler, *Soviet Law*, London 1988, 2nd ed., 150.

22 *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics*, Moscow 1979, 55.

23 G. Alexopoulos, "Exposing Illegality and Oneself: Complaint and Rist in Stalin's Russia", in P. Solomon (ed.), *Reforming Justice in Russia, 1864-1996: Power Culture and the Limits of Legal Order*, Armonk, NY 1997, 168-191. See, also, G. Alexopoulos, *Soviet Outcasts: Aliens, Citizens and the Soviet State, 1926-1936,* Ithaca, NY 2003 and S. Fitzpatrick (ed.), "Petitions and Denuncitations in Russian and Soviet History", Special issue of 24 *Russian History* 1977 No.1-2.

later as the dissident movement became a public phenomenon. They were the so-called *pravozashchitniki* or *zakonniki*, a group of intellectuals who were physicists, mathematicians, and linguists, among others who studied the fine points of the Soviet Constitution and the Code of Criminal Procedure in a citizen-initiated quest for a rule-of-law society. As Benjamin Nathans is pointing out in his research on the dissident movement, these amateur attorneys became "legal dissidents"[24] who worked parallel with members of the legal profession, formulated and practiced Soviet law so that it could be effectively presented in courtrooms.

These efforts did not cause the fatal blow that caused the Soviet system to collapse. However it does remind one that in parts of the Soviet Union there was a vibrant social fabric with a growing sense of civil society, particularly in the post-Stalin era.

The Post-Soviet Era

Soviet nationality policies had contributed to national consciousness among its own citizens who carried with them their own sense of nationality and national myths. Though the new states had mixed populations that made the concept of citizenship a politically charged subject, the broad outlines for the boundaries of the post-Soviet successor states were based on the existing federal units from Soviet times. The economic dissolution was far more complicated than the political breakup since the economies of the successor states had been integrally tied to the center. In addition, each country had to rethink the foundations of its legal structure in non-ideological, *i.e.*, non-Marxist-Leninist terms. Basically as the new states created their citizenship laws, they used a combination of borrowed western concepts of legality combined with historically formed national ideas.[25]

Federal Constitution

In December 1993, a federal constitution was established and it was proclaimed that "Russia is a democratic federative rule-of-law-state". The right to secede was a central provision of the 1992 Federal Treaty that had been signed by nineteen of the twenty-three republics; that Treaty guaranteed rights to self-determination that were no longer part of their rights in the 1993 Constitution. Consequently many of the ethno-repub-

24 B. Nathans, "Lawyers and Socialist Legality under the Thaw", paper presented at the 2004 Boston Convention of American Association for the Advancement of Slavic Studies. See, also, *idem*, *Beyond the Pale,* Berkeley, CA 2004.

25 R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge, MA 1992, 3.

lics rejected the new Constitution as an abrogation of autonomous rights that were part of the Federal Treaty. When the referendum was held, only nine of the twenty-one republics supported the new Constitution. The seven republics that rejected it were Adygea, Bashkortostan, Chuvashia, Dagestan, Karachaevo-Cherkassia, Mordovia, and Tuva. In Tatarstan the vote was declared invalid because of the small turn-out and Chechnya refused to take part in the referendum. Despite the poor support for the new Constitution, it was declared legitimate and approved by the citizens. Therefore all the republics were bound by it.

After the plebiscite, there emerged a "war of sovereignties" during which all twenty-one ethno-republics proceeded to proclaim their own constitutions. This turned into a legal war during which the El'tsin administration claimed that the majority of the ethno-republics were violating the federal constitution by declaring themselves subjects of international law, setting borders with other regions and territories, monetary issues and in some stating their rights to grant citizenship. The pro-independence policies of the Chechen Government, for example, prompted the Russian Federal Government to negotiate separately with many of the ethno-republics and consequently set up an unequal federation.[26]

The Russian Diaspora

The dissolution of the Soviet Union raised another question that had to be dealt with immediately: what would happen to the twenty-five million Russians who had been living outside of the territory designated as the new Russian Federation. At first, the Foreign Minister, Andrei Kozyrev, said that only the Russians who lived within the territory designated as the Russian State were to be Russian citizens. Russians living in other states had to abide by the rules of the states in which they lived. This policy lasted only briefly, for ethnic strife and discrimination against Russians became an acute problem that led to a flood of emigration. Russians and all Slavs were labeled as outsiders or aliens as republics declared their independence and sovereignty.[27] The Russian Government offered no guarantees regarding a place to live and work. While the Federal German Parliament offered help to refugees from the East and absorbed Volga Germans and others from Uzbekistan as a standard policy established in 1951, the Russian Government did little to help Russians coming in from the "near

[26] G. Smith, "Sustainable Federalism, Democratization, and Distributive Justice", in W. Kymlicka and W. Norman (eds.), *Citizenship in Diverse Societies*, Oxford 2000, 351-353. The complexity of the process of turning the post-Soviet territories into a federation becomes too mired in detail to be included in this exploratory survey.

[27] Hosking, *op.cit.* note 6, 392-393.

abroad"—the name for the territories of the former Soviet Union. After El'tsin declared the Imperial and Soviet Black Sea Fleets as Russian and then dissolved the Supreme Soviet in September, 1993, the crisis at the White House ensued. Only in 1994 during a New Years' speech did El'tsin come forth with a promise to help the Russian diaspora and to intervene to help Russian *émigrés*.[28]

As Graham Smith points out, the increasing powers of the President after the September 1993 *coup d'État* —the presidential powers that relate to regional and local governments as well as the Federal Assembly—cast some doubts on Russia's ability to set up a democratized federation.[29] Russia's organization is basically territorial and therefore inherently complex and diverse. It has

> "eighty-nine 'federal subjects,' twenty-one higher status ethno-republics, and sixty-eight lower-level subjects, forty-nine regions (*oblasts*), six territories (*krais*), ten autonomous districts (*okrugs*), the Jewish autonomous *oblast* and two federal cities (Moscow and St. Petersburg. Territorial representation is secured on at least two subnational levels, namely local and regional government;" [30]

The new post-Communist federation is formed in places that are populated by peoples who have weak or non-existent traditions of individual freedoms and human rights. These peoples are citizens of the Union and their own regions. Some peoples such as the Chechens did not agree to be part of the new union, but were forced to be part of the federation. In fact they were forced to be citizens of the new order, but they were not treated as such. [31] Consequently, as the Chechen example shows, "[...] demands for group recognition are being played out with often tragic consequences".[32]

Conclusion

For contemporary Russia, spanning from Europe to Asia, with its historic homelands and diverse populations, the citizenship concept is more a territorial concept organized according to the federal lines set up under the Soviet Regime. But Russia's refederated identity is still not clear—it has

28 *Ibid*., 395.

29 Smith, *op.cit.* note 26, 347.

30 *Ibid.*

31 Joan Beecher Eichrodt, a free-lance journalist, conducted over three hundred interviews with Chechen citizens and was repeatedly told of the Chechen resentment over their forced entry into the Russian Federation and the fact that they were not treated as equal citizens. Her archives are to be housed at the Hoover Institute at Stanford University.

32 Smith, *op.cit.* note 26, 346.

several forms which are not always compatible. The Russian nation state is a federal constitutional state that sometimes acts as a type of empire which ecercises its self interest in territories of the former Soviet Union. The example of the use of military force and bombing cities in Chechnya as well as the Russian military presence on the Tadzhik border, in Moldavia, and the Transcaucasus reminds us that the democratic federal image is not the central one.

The citizen is not identified with a nation-state for in the Russian case the country is still a multi-ethnic, multinational entity struggling with its own identity. The process of becoming citizens, after a long period as subjects of the Tsar or citizens of the Soviet State has been slowed or even stunted. For one thing, the centralized Soviet State interfered with the creation of a political community in which citizens could exercise their rights and participate in decision making. In fact the Communist Party substituted itself for a political community[33] and stressed collective interests (and ultimately its own interests) over those of the individual. Furthermore, people not accustomed to using their own initiative in exercising rights have to learn to be citizens by asserting and expressing their interests. The process of transforming subject to citizens is taking place in a context mired in a continuing struggle between the nation state, the territorial state and ideas of universal citizenship.

33 Hosking, *op.cit.* note 6, 405.

Interpretation and Accommodation in the Russian Constitutional Court

Anders Fogelklou

Introduction

Assuming that the new constitutional documents in Central and Eastern Europe have institutionalized democracy, the rule of law and basic human rights, and basically are in line with international and European standards, the main problem is that of their implementation.[1] A condition of democracy, constitutionalism and the rule of law would emerge if constitutional/judicial review through constitutional courts or judicial review would ensure that the constitution is followed.

This would also be the case with the 1993 Russian Constitution. Whatever deficits it may have, a close reading of the original constitutional text makes it what Richard Sakwa once called a triumph of "ethical individualism".[2] Although the Russian Constitution of 1993 is ambiguous[3] in several aspects, especially in the area of federalism, and consequently gave rise to different readings from the very beginning, its main tenor is the emphasis on democracy and the value of the individual person. Articles 1, 2, 6 (2), 17 (1)(2), 18 and 55 of the Russian Constitution are especially important in this respect.[4] In this sense, the 1993 Constitution can be seen as an instrument of change from an undemocratic or unstable system to a democratic and stable system with emphasis on respect for the individual.[5]

Such liberal romanticism, however, belongs to a bygone era in Russia. The text must be put in a concrete context. The problem that will be discussed in this chapter is how the constitutional text will be interpreted and applied by the Russian Constitutional Court in a very different political, legal and social situation.[6]

1 A. Fogelklou, "Introduction: From Transition to Integration", in Anders Fogelklou and Fredrik Sterzel (eds.), *Consolidating Legal Reform in Eastern Europe*, Uppsala 2003, 15, 20-28.

2 R. Sakwa, "The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism", 48 *Studies in East European Thought* 1996 No.2-4, 115-157.

3 For this judgment see, for example, N. Varlamova, "Konstitutsionnaia model' rossiiskogo federalizma", *Konstutsionnoe pravo: vostochnoevropeiskoe obozrenie* 1999 No.4, 113-121; I. A. Umnova, *Konstitutsionnye osnovy sovremennogo rossiiskogo federalizma*, Moscow 1998, 89; T.Ia. Khabrieva, " Doktrinal'noe i kompetentnoe tolkovanie Konstitutsii" in: *Izvestiia vysshikh uchebnykh zavedenii/Pravovedenie* 1998 No.1, 22-34.

4 N.V. Vitruk, *Konstitutsionnoe pravosudie v Rossii*, Moscow 2001, 59.

5 E. Smith (ed.), *The Constitution as an Instrument of Change*, Stockholm 2003.

6 The institutional concept "court" is used here although the Russian Constitutional Court consists in reality of individual judges who may have different opinions; for

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 29-46

The political *regime* has changed under Putin through a number of legislative measures which, taken together, would imply a new constitutional order, although the 1993 Constitution itself has not been changed. This is particularly noticeable in the area of federalism. In the area of federalism, the Court has sustained federal statutes, but it has added that the separation of powers between federal authorities, especially the Presidency and the regions must be balanced,[7] while gradually the federalist structure of the Russian Federation has been eroded.[8]

Although constitutional development without a change of the text of the constitution is possible and often desirable in certain cases, the risk remains that the constitutional document loses its normative force and major discrepancies occur between the constitutional text, constitutional judicial practice, constitutional practice of other institutions, and constitutional reality. The constitutional and legal order could have been the decisive counterbalancing factor to a more authoritarian system,[9] but it seems that the Russian Constitutional Court will not accept the role of being an obstacle to Putin's centralizing legislative measures.

Putin himself, although declaring the dictatorship of law and being constitutionally endowed with the title of Guarantor of the Constitution, is not in every matter concerned with legality[10] or constitutionality.[11] Stability is his main concern. That the legislative organs have extended the tenure of the Constitutional Court Judges from twelve to fifteen years and then to an unlimited tenure up to seventy years of age would probably mean that Putin is concerned with their professionalism and well-being.[12]

the sake of simplicity we will not deal with individual judges except in relation to dissenting opinions.

7 This could be seen for example in the Ruling of the Constitutional Court of the Russian Federation of 4 April 2002 No.8–P. (Cases are taken from the website of the Russian Constitutional Court, at <http://ks.rfnet.ru/>.)

8 See the interview with Constitutional Court Judge Gadis Gadzhiev, "Sud'ia Konstitutsionnogo Suda zaiavil shto federatsiia uzurpiruet prava sub"ektov RF", 27 January 2006, available at <http://www.nr2.ru/moskow/53983.html>.

9 This was said already in El'tsin's time. See *Epokha El'tsina. Ocherki politicheskoi istorii*, Moscow 2001, 384.

10 L. Shevtsova, *Putin's Russia*, Washington, DC 2003, 32.

11 Probably, for fear of not having got fifty percent of the voters to go to the polls, in which case the Prime Minister would become Acting President, he dismissed the then Prime Minister, Mikhail Kasianov, *before* the elections in 2004. Through this measure he partly eroded the significance of the constitutional practice of dismissing the Government *after* the elections, which the President had to do according to the Constitution.

12 *Sobranie Zakonodatel'stva RF* 2001 No.7 item 607; *ibid*. No.51 item 4824; *ibid*. 2005 No.15 item 1273.

Since a constitution is an open legislative act with very general norms and principles, the main methodological problem for a court enforcing a constitution is to secure a minimum of predictability, a main element for a rule of law state. One should rely on constitutional guarantees even if judicial practice modifies and gives concrete content to the abstract text.

Existence Comes First

The aim of this chapter is to analyze the adjunctive strategy of the Russian Constitution in conjunction with its methods of interpretation. The hypothesis is that the Court wants to keep its independence and legal power and is prepared not to invalidate legislation which otherwise it *could* have done. By accommodating with dominant political forces the Court wants to secure not only its existence but also is influence and prestige. In contrast to the El'tsin era where there was confrontation between President and Federal Assembly, the *Duma* and the Federation Council, the Court is now confronted with a much more streamlined political structure.

Such a hypothesis is hardly surprising from a formal point of view. In Latvia, for example, the *presumption* is that new legislation is in conformity with the Constitution,[13] and this presumption probably applies to all constitutional courts. Invalidation of new legislation must be an exception and not the rule. But we will look here if there is a *specific form* of interpretation of the Constitution which is in line with the adjunctive strategy not to oppose the dominant political forces.

Four examples will be mentioned, which all concern legislative attempts by the Russian President and his Administration to implement what has been called "managed democracy". The first one concerns the control of information during electoral campaigns; the second and third concern the restructuring and control of political parties, and the fourth the nomination of governors in the regions.

As a point of departure we will assume that the Court's pragmatic adjunctive strategy is based on the idea that its own existence and what could be called *political-legal capital* must not be put into jeopardy. Some scholarly analysis of the Court has also followed such an approach.[14] The situation could be compared with that of the Constitutional Court of

[13] Interview with the then Latvian Constitutional Court Judge Anita Usacka in December 2002.

[14] L. Epstein, J. Knight and O. Shevtsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government", 35 *Law and Society Review* 2001 No.1, 117-164; A. Trochev, *The Zigzags of Judicial Power. The Constitutional Court in Russian Politics*, Dissertation, University of Toronto 2005; A. Jonsson, *Judicial Review and Individual Legal Activism*, Dissertation, Uppsala Universitet 2005.

Belarus. Through various measures the Constitutional Court in Belarus lost its real influence.[15] The Russian Constitutional Court does not want to share that fate.

After the events in September/October 1993, when the Court's activities were suspended, Boris El'tsin contemplated abolishing the Court, but was advised not to do so.[16] But the Court implemented a policy of restraint in relation to laws and edicts coming from the Presidency, the dominating political force which could retaliate and was more activist in relation to the general protection of human rights, especially in the area of criminal procedure and tax legislation.[17]

The second Chairman of the Court, Vladimir Tumanov, made it indirectly clear a long time ago that under his policies, the Court would not oppose the dominant political forces too strongly.[18] In a sense, it could be called a policy of institutional survival, which acted on the principle of not opposing those forces which could strike back.[19] Tumanov's statement also concerned regional leaders which were unwilling to implement the Court's decisions, although these were not sufficiently strong to have the Court abolished or diminish its prerogatives. Regional actors also saw the Court as an instrument which could promote *their* interests.

Assuming that the Court does not want to appear to be opposed to dominant political trends does not mean of course that the Court has not invalidated legislative measures under Putin. The Russian Constitutional Court has declared in a number of recent rulings that various norms of legislative acts are not in conformity with the Russian Constitution.[20]

Adjudicative Strategy and Interpretative Technique

The second hypothesis is that the Court will use an interpretative technique that will correspond to the strategy outlined above. The specificity of the Russian Constitutional Court, as of other constitutional courts, is that its decisions are published. Its deliberations take place in public and

15 H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago and London 2000, 226.

16 A. M. Yakovlev, *Striving for Law in a Lawless Land: Memoirs of a Russian Reformer*, New York, NY 1995.

17 Epstein, Knight and Shevtsova *op.cit.* note 7.

18 Conversation with the Author in April 1995.

19 *Cf.* K. Wolczuk, "The Constitutional Court of Ukraine: The Politics of Survival", in Wojciech Sadurski (ed.), *Constitutional Justice East and West*, The Hague 2002, 328-348.

20 For example, Rulings of 3 June 2004, No.11-P; 23 April 2004, No.9-P; 17 July 2002, No.13-P.

its decisions are binding for the legal system. One feature of a state based on the rule of law is that court decisions, at least in hard cases, have to be based on complex and intellectually convincing reasons. In this specific sense Russia is still a state based on the rule of law. All cases treated here could be called hard cases in the sense that no immediate legal solution was at hand.

Since Russia is a party to the 1950 European Convention of Human Rights and Basic Liberties, and the Court not infrequently uses norms derived from the Convention, it is bound to convince a fairly large audience. The idea is that the relation between an adjunctive strategy and interpretative technique could be detected through a deconstruction of the legal reasoning and interpretative technique of the Court.

In most cases a (constitutional) court has discretionary powers in the sense that it has the possibility to choose between two or several solutions to the case which all are lawful. [21] That there should be limits to judicial discretion, is based on the reason that the constitutional and legal order otherwise would lack predictability. Discretion without limits means that the normative force of a constitution and, of the legal order for that matter, would collapse.

In order to circumscribe judicial discretion and achieve predictability, legal methods have been developed both empirically and normatively in modern legal systems. The use of discretion in the decision-making of a constitutional court should be circumscribed by certain guidelines and canons which in fact are universal.[22]

It would be fair to argue that four main types of interpretive argument are to be found on the international scene: (i) textual arguments, (ii) systemic arguments, (iii) intentionalist arguments, and (iv) teleological arguments. This list could be made much more detailed. [23]

International research on interpretation and application of statutes has confirmed the *universalist* thesis: *i.e.* that the main types of justificatory practices of higher courts in the worlds are similar in the following aspects: (1) the set of the major types of arguments that figure in the opinions are analogous; (2) the material or sources used in the opinions are similar; (3) the patterns of justification involved in the decision are likewise akin; (4) the methods of weighing various types of arguments against one another show great similarities; (5) precedents play a significant

21 A. Barak, *Judicial Discretion*, New Haven, CT and London 1989, 8.

22 D. Neil MacCormick and Robert S. Summers (eds.), *Interpreting Statutes: A Comparative Study*, Aldershot, UK 1991; D. Neil MacCormick and Robert S. Summers (eds.), *Interpreting Precedents*: *A Comparative Study*, Aldershot, UK 1997.

23 *Ibid.*

part in legal decision-making and the development of law in all countries that were studied;[24] and the role of precedents in) interpreting statutes demonstrates an analogous pattern.[25]

But it must be added that the variety of approaches to legal interpretation increases the possibility of wide differentiation, in spite of the fact that the above mentioned research has found some pattern in the way each method is used by the courts.[26]

Although the Russian Federation was not included in the research project, the third hypothesis is that the justificatory pattern in the rulings and decisions of the Russian Constitutional Court does not deviate from the justificatory practices of other courts in the world. The Russian Constitutional Court may differ in one or several aspects from the *universalist* pattern in the sense that it is part of the Russian legal system with its special traditions and canons of interpretation, but the difference is not very conspicuous.

Russian legal theory is generally rather conservative but enumerates all the methods mentioned in general textbooks.[27]

The normative foundations of the Court's interpretative strategy does not give much guidance.

Article 16 of the Russian Constitution states that the first Chapter consisting of constitutional principles should be guiding for the other chapters of the Constitution. The Court's interpretation of the Constitution must fall within the broad framework of Chapter One of the Constitution. Since this part of the Constitution consists of broad, partly competing principles it gives a wide discretion to the Court.

A very important feature of the activities of the Russian Constitutional Court is the formulation of legal positions (*pravovaia pozitsiia*) through its rulings (which could be compared with precedents in the continental legal family without being completely similar). Without discussing in detail the debate in Russian legal discourse on this issue, the existence of legal positions is an important change in the structure of Russian (constitutional) judicial decision-making by the creation of new norms through *universalization* of previous rulings.[28]

24 D. N. MacCormick and R. Summers, "Further General Reflection and Conclusions", in MacCormick and Summers, *op.cit* note 22, 531-532.

25 R. Summers and M. Taruffo, "Interpretation and Comparative Analysis", in MacCormick and Summers, *op.cit* note 22, 462.

26 MacCormick and Summers, *op.cit.* note 24.

27 A.C. Pigolkin (ed.), *Obshchaia teoriia prava*, Moscow 1995, 2nd ed., 280-293; *Teoriia gosudarstva i prava*, Moscow 2000, 264-287; *Obshchaia teoriia gosudarstva i prava*, Moscow 1998, 323-342.

28 V.A Kriazhkov and O.N. Kriazhkova, "Pravovye pozitsii konstitutsionnogo suda

The Court is not only a negative legislator but also a positive one. The legislator has to consider not only the decisions of the Constitutional Court but also the legal positions of the Court. These are binding for all organs of public power in the Russian Federation. A change of legal position is possible. To change its legal position the Court has to convene a plenary session (Art.73, Federal Constitutional Court Law on the Constitutional Court of the Russian Federation). This has also happened in practice.[29] The grounds for changing a legal position, according to a Russian scholar, must not be based on sudden subjective factors but on objective processes leading to changes of the law and constitutional reality.[30]

The activities of the Russian Constitutional Court have not been unimpressive, and in a number of cases (which will increase in due course) the Court has refused to decide anew case on its own merits, *i.e.*, through a new ruling[31] (*postanovlenie*), but has referred to its previous legal position in the matter (*opredelenie*).

It has been argued that the process of law application is "formalistic" or lacking in argumentative strength in Russia and in other parts of the former Soviet Union.[32] But, in contrast to this formalistic, Russian interpretative tradition the Court uses a much more open legal reasoning. The Russian Constitutional Court uses a variety of interpretative methods proceeding from the usual linguistic and semantic points of departure to teleological and systemic methods and the use of principles, partly not written in the Constitution.[33] The Court often refers to earlier decisions. [34]

Rossiiskoi Federatsii i ego interpretatsiia", *Gosudarstvo i pravo* 2005 No.11, 13-21, in particular 16, with further references.

29 Ruling of 11 March 1998, No.8-P, compared with the ruling of 20 May 1997, No.8-P. *Cf*. Kriazhkov and Kriazhkova, *op.cit.* note 21, 15.

30 B.S. Ebzeev, *Chelovek, narod, gosudarstvo v konstitutsionnom stroe Rossiiskoi Federatsii*, Moscow 2005, 566; L.V. Lazarev, *Pravovye positsii konstitutsionnogo suda Rossii*, Moscow 2003, 113, does not mention *ground*s for changing legal positions.

31 Ger van den Berg (comp.), "Russia's Constitutional Court. A Decade of Reforms. Introduction", 27 *RCEEL* 2001 No.2/3, Special Issue, 175-191.

32 E. Levits, "Interpretation of Legal Norms and the Notion of 'Democracy' in Article 1 of Satversme (The Latvian Constitution)", *Latvian Human Rights Quarterly* 1997 No.1, 55-75, at 57. "Uiazvimaia neprikosnovennost'", interview with the then Russian Constitutional Judge Tamara Morshchakova, *Ekspert* 2001 No.10, 65; also another Russian Constitutional Court Judge, Gadis Gadzhiev, expressed similar thoughts in the official internet publication, at <http://strana.ru/state/law/2000/11/01/973095782.htm>.

33 A. Fogelklou, "The Russian Constitutional Court as a Constitutional Actor", in Kaj Hobér (ed.), *The Uppsala Yearbook of East European Law*, London 2004, 15-32.

34 For example, Ruling of 7 June 2000. More examples could be given.

An interpretation both of constitutional norms and norms of lower legislative acts must take place. A question of legal facts only occurs if the factual implementation sheds light on the existing or possible interpretation of the legislative act. This widens the area of discretion. If the Constitution is very open, as is the case with the Russian Constitution,[35] the area of discretion is even greater.

On the other hand, the Court's decision often concerns the way the contested legislative act *should* be interpreted, *i.e.*, the Court could refuse to invalidate the contested act, but orders that its application should follow a certain pattern.[36]

An important factor is the existence of dissenting opinions which highlight the problem from various perspectives. The norm in the Federal Constitutional Law on the Constitutional Court, obliging the Court to take into consideration only questions of law does not seem to have prevented the Court to discuss possible consequences of a decision.[37]

Discussing constitutional courts, Radoslav Prochazka has argued that one should differentiate between a preservationist and a constructivist interpretation of the constitution in transition countries in Central Europe.[38] Although his reasoning is not completely clear, one might distinguish in this context between preservationist positions which would have their point of departure in the original constitutional document, and/or in *the intentions behind* it. The opposite position could be seen as constructivist, implying that there would be a distance from the original text and the probable intentions behind it, and this also would imply points of departure which could be linguistic, systemic and/or teleological, but hardly based on the intentions of the constitutional law-giver.

If the Court wants to accommodate its interpretative technique, its reasoning and interpretation of the Russian Constitution, with its adjudicative policy of not opposing the main legislator, the Presidency, it will prefer a constructivist interpretation of the Russian Constitution. In fact, arguments of the framers' intentions do not play an important role in the Court's reasoning, if at all. There could be practical reasons for this standpoint, since the discursive material for the 1993 Constitution is to be found in a series of protocols from the Constitutional Assembly

35 B. Strashun, "Constitution as the Main Source of Law", in *Interpretation and Direct Application of the Constitution*, Vilnius 2002, 184-191.

36 For example, Rulings of 23 November 1999 (No.16-P); 11 June 2002 (No.10-P).

37 For example, Ruling of 18 January 1996 (No.P-2), Dissenting opinion (N.V. Vitruk).

38 R. Prochazka, *Mission Accomplished*, Budapest and New York 2002, 8-9.

from 1993,[39] but it is not clear what normative values these protocols may possess.

The conclusion should be that the framers' intentions are not distinct and are difficult to ascertain. Also for this reason the Court's reasoning is primarily based on textual linguistic grounds, although systemic or teleological arguments could also be used. Also other constitutional courts act in similar directions. The question is therefore rather how this constructivist approach is used. In simpler cases a preservationist approach may also be used.

The uniqueness of a large part of the activities of constitutional courts arises from the fact that in relation to a traditional legal syllogism it has a different structure. The major premise is a norm or a group of norms in the relevant constitution; the minor premise is a norm or a group of norms in a lower legislative act; the conclusion postulates their conformity or non-conformity.

The judgment of the Russian Constitutional Court concerning the constitutionality of the Law "On Excise Taxes" of 24 October 1996 is one such case. Here a *linguistic-semantical* method was used. The Court made a simple syllogism where the Constitution was the major premise, the contested legislative act the minor premise and the conclusion was that the statute contradicted the Constitution. The Court used two kinds of expression here. If the Court sustains a legislative norm, it says that the contested norm(s) *do not contradict* the Constitution. If the Court asserts that the norm violates the Constitution, it says that the norm *is not in conformity (does not conform)* with the Constitution. But in most hard cases a constructivist interpretation occurs. The Court's hermeneutics of the Russian Constitution is often holistic, which means that it is often confronted with the hermeneutic circle.[40] The whole decides the interpretation of the parts and the parts decide the interpretation of the whole. It engages also in *consequential*, policy-oriented, reasoning, discussing various arguments for a certain solution and is in this sense not formalistic**.** In the Chechnya ruling of 31 July 1995, which has been extensively discussed in the literature, the most important legal argument was *teleological*. The purpose of the contested Presidential edicts to restore order in Chechnya justified the by-passing of serious formal obstacles. International documents which not had been incorporated in the Russian legal system could

39 S.A. Filatov (ed.), *Konstitutsionnoe soveshchanie: stenogrammy, materialy, dokumenty; 29 aprelia-10 noiabria 1993 g. Spravochnyi tom,* Moscow 1996.

40 Russian legal theory acknowledges that the Court has a wider area of interpretation than a usual court. See T.Ia. Khabrieva and N.S. Volkova, "Osobennost' kazual'nogo tolkovaniia konstitutsii Rossiiskoi Federatsii", in *Teoreticheskie problemy rosiiskogo konstitutionalizma*, Moscow 2000, 38-53, especially 42.

be set aside, in spite of the fact that international treaties are part of the Russian legal system (Art.15 (4)). The constitutional norm that legislative limitations of human rights could only by made through a formal statute (Art.55 (3)) was ignored in view of the extreme importance of the constitutionally protected purpose, to preserve the territorial integrity of the Russian Federation.

But the constructivist approach is often only shared by the majority of judges. A well-known scholar and former Constitutional Court Judge, N.V Vitruk, who had often expressed dissenting opinions, noted that the main principle for the activities of the Russian Constitutional Court should be based on the principle of constitutionality (*konstitutsionnost'*) and legality (*zakonnost'*).[41] These are not precise expressions, but he described them as requiring compliance with *(sledit')* the Constitution. It would be fair to assume that Vitruk is closer to a preservationist position.

The cases to be discussed below concern four examples of constructivism; *i.e.*, they appear to be an accommodation to present political and social reality and this accommodation is reflected in the interpretative strategy.

The method in the first case is to find the contested norm in conformity with the Constitution by saying that the contested norm must be interpreted in a certain way. In this way the meaning of the disputed norms in the legislative act is authoritatively given by the Court. This technique was already used, for example in the Court's Ruling of 23 November 1999 on the constitutionality of the Federal Law of 26 September 1997 "On Liberty of Conscience and on Religious Organizations" in which the contested law was not considered by the Court to be in contradiction to the Russian Constitution.

The other types of reasoning are variants of constructivism based on the idea that the Court does not question the way the legislator wants to achieve its purpose through the contested norms. This passivity could have legal grounds.

In the last case of 21 December 2005, the Court assumes that what the Constitution does not explicitly prohibit, it permits. Obviously, this approach cannot function well without other arguments. Besides, the Court states that the President has an implied power to nominate governors, *i.e.*, the explicit empowering provisions in the Constitution are not exhaustive.

41 V.N. Vitruk, *Konstitutsionnoe pravosudie*, Moscow 2005, 300.

Four Cases

1. The Ruling of the Russian Constitutional Court of 30 October 2003 on the Review of the Constitutionality of Certain Provisions of the Law of 12 June 2002 "On Fundamental Guarantees of Electoral Rights and Rights to Participate in Referendums in the Russian Federation"[42]

There were two dissenting opinions to this plenary judgment, of V.G. Iaroslavtsev and A.L. Kononov, and a separate opinion of G.A. Gadzhiev.

In its ruling the Court held that point f) of part 2 of Article 48 of the contested law did not conform to the Russian Constitution (Art.3, (3); 19 (1)(2); 29 (4)(5); 32, (1)(2); and 55 (3)), since it made it possible to regard all communicative or informative measures not mentioned in the law as (prohibited) agitation.

In respect to the other points in part 2 of Article 48 b) c) d) e), the Court held that these points should be interpreted narrowly. These points were in conformity with the Constitution, but only to the extent that the prohibition extended to the journalist who had a clear intent to propagate the advantages of one candidate before others. Without such clear intent the communicative activity should not be regarded as prohibited information, although it might have similar features, and should remain outside the reach of the prohibitions of the law.

The Court held in general that restrictions for journalists in the various media were allowed during elections. The grounds for such restrictions as covered by Article 55 (3) must be "just, relevant, proportional, moderate [*sorazmernyi*] and necessary for the defense of constitutional values". The *essence* of the constitutional value must not be distorted.

The Russian Court also referred here to the European human rights case *Bowman* v. *United Kingdom* (1998). The European Court of Human Rights held that free elections and freedom of expression were interrelated.[43]

The European Court admitted that these rights may come in conflict and that during elections certain restrictions might be imposed which would normally not be acceptable. Besides, states have a margin of appreciation with the regard to the electoral systems.

However, the cases are similar only to a limited extent. In the European case, it was a question of expenditure for electoral propaganda. In this UK case, it was a question of a woman who was prosecuted for having distributed leaflets promoting an anti-abortion candidate. UK law

42 *Sobranie Zakonodatel'tsva RF* 3 November 2003 No.44 item 4358. This case has also been treated in Fogelklou, *op.cit.* note 33.

43 26 *Essex Human Rights Review* 1998, 2.

did not allow for more than five GBP to be spent for such information. This very low limit on expenditures for non-candidates in the elections violated the European Convention of Human Rights according to the Court in Strasbourg. This limitation was disproportionate.

Thus, in this European case it was not a question of limiting freedom of information among the media but a matter of *electoral expenditure*. The Russian case concerned the limitation of media information to voters and here the European Court would stress the value of the free flow of information. On the other hand, Russian media are in several ways clearly dependent on various financial groups which in their turn are related to various parties and candidates.

The constitutional value to be protected by the law is the voters' right to be objectively informed. The following two cases (2 and 3) on political parties were decided by one chamber of the Court with no dissenting opinions.

2. The Case Decided by the Court on 15 December 2004 Concerning the Prohibitions in Article 9 (3) of the Federal Law of 11 July 2001 "On Political Parties"[44]

By virtue of this provision, parties founded on the basis of a certain profession, on race, or on national or religious affiliation, are not allowed to be registered as parties. Also, the names of the parties must not mention such specific distinguishing features according to the law.

One of the parties in this case, the Orthodox Party of Russia, complained that this rule in the Law "On Political Parties" contradicted Articles 19 and 30 of the Constitution, concerning (material) equality before the Law and the freedom of association, and did not conform to Article 13 (5) which provided specific grounds for prohibiting organizations, different from the ones indicated in the Law "On Political Parties".

But the Court thought otherwise. Since Russia is a party to the European Convention of Human Rights and Basic Liberties and other international instruments, it had to acknowledge that political parties in other parts of Europe (and not only in Western Europe) often include the word Christian in their names (*e.g.*, in Germany); the Court considered these names not to be exclusively confessionally oriented, but to have a wider connotation, expressing European values.

In the Russian context, however, such labels as Orthodox or Muslim would have a more narrow interpretation and would be associated, not with general, but with particular values. Besides, the Court asserted, Russian society, including political parties and religious associations, has in

44 *Sobranie Zakonodatel'stva RF* 2004 No.51 item 5260.

its present phase not achieved "a sustainable experience of democratic existence".

In such conditions, the Court said, a party system based on religious or national identity would "inevitably" lead to the emphasis on the particular rights of corresponding religious and national groups and could also lead to a deterioration of the political and social position of smaller minorities. In the Court's view, the specific Russian situation did not allow for the creation of parties on national and religious grounds.

Finally, the Court asserted, under conditions of increasing religious fundamentalism which also included national elements, the prohibition of political parties on the contested grounds corresponded to "the authentic meaning of Articles 13 and 14 in connection with Articles 19 (1)(2), 28 and 29 and is a proper implementation of the content of these provisions".

The Court solved the dilemma of choosing between a linguistic, linguistic-contextual and also systemic interpretation of the meaning of the Constitution in connection with the disputed law by constructing an empirically-oriented teleological approach. A linguistic, linguistic-contextual, and perhaps also a systemic interpretation would consider the formulation in Article 13 (5) as decisive, but this was not the Court's view. This provision which, among others, prohibits associations which incite to religious and ethnic hatred was used by the Court as its point of departure. The legislator has the right to implement the Constitution in his own way, corresponding to his policies and fears. Of specific significance is that the Court asserted that Russian society had in its present stage not acquired a sustainable experience of democratic life.

The Court consequently did not perceive the Constitution as an instrument of change, as a way of deepening democracy, but rather the other way around. The interpretation and application of the Constitution have to be adjusted to the environment and in fact to be reconstructed, although the Court emphatically denies this. The above-mentioned statement means that the Court is following the arguments usually given by Putin and his Administration for his legislative measures and does not scrutinize them critically. In its sociological and political reasoning the Court makes no reference to political or sociological literature, or to opinion polls or other empirical observations, but the Court may have taken into consideration the official goals of the Law "On Political Parties", as they were presented by the legislator to the Parliament. It may had other motives than the ones officially proclaimed, *e.g.*, to limit the number of political parties and, finally, to secure constitutionally a continuation of the present regime. It is of course an open question how likely it would be that the foundation of parties on the now prohibited grounds would

actually lead to the negative consequences the Court expects to occur. Even if it would be probable that a non-prohibition of religious or nationalist parties could create obstacles to a consolidation of the Russian State, it is not evident that such a state of affairs would not be in conformity with the Russian Constitution. After all, the Court has to weigh the alleged negative consequences against the principles of equality, federalism and freedom of association, and finally also ask whether such a prohibition would lead to more or less democracy.

However, the Court has a legal foundation for its passivity in this issue. The norm in the Federal Constitutional Law on the Constitutional Court stating that the Court only resolves questions of law has been interpreted by the Court in the sense that it does not assess the suitability of the methods used by the legislator to achieve his goals. This would mean entering into political discussions.

3. Ruling of 1 February 2005 on the Constitutionality of Article 3 (2) and of Article 47 (6) of the Federal Law "On Political Parties"[45]

This part of the law demanded that political parties should have branch organizations in half of Russia's provinces, *i.e.*, in at least forty-four regional units. Moreover a political party should have at least ten thousand members and at least one hundred members in each province (or other federation subject).

In this new case, the Court pointed to the purpose of the law as the main ground for its ruling.

Considering these conditions in conformity with the Russian Constitution, the Court again stressed the alleged undeveloped democracy in the Russian Federation and, referring to its previous ruling mentioned above, held that nationalist or religious parties inevitably would distort a process of consolidation of the Russian State. The creation of such parties would prevent the emergence of a more stable system and lead to possible violations of human rights. The Court, however, pointed out that these present conditions in the Russian Federation have a temporary character and when the situation has changed for the better and a more stable party system has emerged, these limits will be abolished.

Quantitative limits within the regulation of political parties do not by themselves contradict the Constitution, according to the Court, stressing that freedom of association and freedom of speech as such have not been abolished. Individuals may, as members of various associations throughout the country, continue to participate in political and social life in provinces

45 *Sobranie Zakonodatel'stva RF* 2005 No.6 item 491.

and municipalities. In meetings and demonstrations and in the media, people may express freely their views and opinions.

Thus the Court again supported the legislator's view of the situation without clear empirical support, referring also to its earlier ruling.

The recent amendment of 11 December 2004 of the Law "On General Principles Governing the Organization of Legislative (Representative) and Executive State Authorities of Constituent Entities of the Russian Federation" (of 6 October 1999)[46] is the latest important legal transformation of the democratic and federal order in the Russian Federation.

According to this law, the President shall nominate governors which should be confirmed by provincial legislative assemblies. There is no requirement that the person to be appointed has to live in the territory of the federal entity. The President has no clear obligation to propose a candidate on the basis of consultations with the assembly of the entity or to choose a candidate from a list drawn up by this assembly. In a Presidential Edict of 27 December 2004, however, the procedure for nominating governors is regulated, which presupposes some kind of consultation.[47] Since the assembly is under threat of dissolution, if it refuses to accept the presidential nominee, its position is weak. The President can also appoint an *interim* head of the executive without any involvement of a body of the subject. He can also—at his discretion—dismiss a governor if the incumbent has lost the confidence of the President.

4. Ruling of 21 December 2005: On the Case of Verification of the Constitutionality of Certain Provisions of the Federal Law of 6 October 1999 No.184 FZ "On General Principles of Organization of Legislative (Representative) and Executive Organs of Public Power in the Subjects of the Russian Federation"[48]

There were two dissenting opinions of this plenary ruling: V.G. Iaroslavtsev and A.L. Kononov (the same as in the case of 30 October 2003 above). The Court held that several parts of the complaints were not admissible on procedural grounds since these complaints concerned the situation in which the provincial legislative assembly had not acted according to the proposal from the President and refused to confirm his candidate for the governorship. According to the contested law, the President might then dissolve the assembly. This also applied to the question of the competence of the President to present candidates to the assembly.

46 *Sobranie Zakonodatel'stva RF* 2004 No.50 item 4950.

47 *Sobranie Zakonodatel'stva RF* 2004 No.52 item 5427, with further changes.

48 *Sobranie Zakonodatel'stva RF* 2006 No.3 item 336.

This form of abstract norm control could not be used by the applicants, according to the Court. Only one provision of the contested law was declared admissible, as it was related to the possibility for the applicants to use their passive and active electoral rights in relation to the election of provincial heads.

The reasoning of the Court started from the principle of federalism in the Russian Constitution, which could be interpreted differently during each phase of the development of the country. Citing previous rulings, the Court stated that the origin of the constitutional federal structure in Russian was based on the sovereignty of the Federation as a whole and thus was not created from below but from above. The constitutional principle of democracy does not demand that all institutions of public power should be based on elective principles. The European Convention on Human Rights and other international documents do not provide clear guidance on the question which public offices should be based on electoral rights. For example, if there is a second chamber, it is not necessary that both chambers should be based on direct elections.

Citing previous rulings, the Court asserted the competence of the federal legislator to regulate the general structure of the main public institutions of the provinces. This applied in particular to the functioning of executive power. The constitutionally proclaimed unity of executive power (Art.77 (2)) means that the heads of provincial units are directly subordinated to the President. The head of a province has not only to deal with federal issues which belong to the joint competence of federal and provincial powers, but also with questions of exclusive federal competence.

A crucial question discussed by the Court concerned the previous Altai ruling of 18 January 1996 (No.2-P) which had declared that the head of a province was to be directly elected by the people. Since previous rulings and their legal positions (*pravovye pozitsii*) are binding on new situations similar to the first case, the problem was how to reconcile the Altai ruling with the present decision of 18 January 1996 (No 2-P).

It had been suggested that the 1996 decision was outdated, but as late as 2002 it was argued that it would be a step back if the President were to appoint the heads of the provincial executives.[49]

The main point in the Altai ruling was that the governmental structure and the principle of separation of power should be basically similar in the federal centre and in the provinces.[50] Thus, the heads of the provinces and the provincial legislative assemblies must be elected directly. The

49 L.V. Lazarev, in *Kommentarij k Konstitutsii Rossiiskoi Federatsii*, Moscow 2002, 216.

50 L.V. Lazarev, *Pravovye pozitsii konstitutsionnogo suda Rossii*, Moscow 2003, 441.

heads should "get their mandates directly from the people".[51] Another aspect was that the mutual relations between legislative and executive institutions should be based on the separation of powers.[52] The legislative assembly should not interfere in the activities of the executive. This part of the ruling was still valid according to the Court, but, it continued, the Constitution was not only to be interpreted through the judgments of the Court, but also through federal laws which could be amended in relation to new conditions. According to the Court, it was not constitutionally mandatory that the head of a provincial unit acquired office only through elections. The Court also stated that there must be procedures leading to co-operation between the federal centre and the provinces concerning the nomination of governors. The Court also mentioned the President's Edict of 27 December 2004 on the procedure to nominate governors which regulates this process.

Concerning the President's power to nominate candidates, the Court said that this competence is not given directly by the Constitution, but that no circumstances prevent the federal legislator to regulate this procedure by giving the President such competence. Such power for the President does not contradict the principles of federalism and separation of powers since the final decision is taken by the legislative assembly of the region. The Court does not mention in this context the President's power to dissolve the regional assembly if it does not consent to his nominee. Thus, in this case the Court prefers not to use a systemic or contextual interpretation, which it otherwise not infrequently uses. As a ground for this approach, the Court may have reasoned that the powers of the President to dissolve the provincial assembly could be the object for a future case before the Court.

Hence, the Court summarizes that the contested changes in the law are not in violation of fundamental human rights and liberties, the principles of separation of powers and federalism and the main constitutional principle of popular participation in the activities of public powers.

The Court has only to decide questions of law, to assess the constitutionality of normative acts, but does not concern itself with circumstances which surround the application of the challenged act.

51 B.S. Ebzeev (ed.), *Kommentarii k postanovleniiam konstitutsionnogo suda Rossiiskoi Federatsii, Tom 1,* Moscow 2001, 295.

52 *Ibid.*

Final Remarks

Also during the Putin administration, the Russian Constitutional Court has in a number of rulings declared various legislative acts not to be in conformity with the Russian Constitution.

Major political decisions, which have to be implemented through legislative acts, will however not be opposed by the Court. This could perhaps be seen as an informal institutional rule and be an expression of the normative ideology of the Court. The kind of constructivism we are looking for could be called *accommodating constructivism* which is quite different from the kind of constructivism close to natural law ideology which reigned under the first Chairman of the Hungarian Constitutional Court[53] or the principled constructivism of the German Constitutional Court.

The interpretative technique of the Russian Constitutional Court could be seen as an *adaptation* to the Russian political and social realities and tradition.[54] The Russian Constitutional Court could, from this point of view, be seen as a successful institution. There are rumors that President Putin will become Chairman of the Court after he has resigned from office.[55] Such rumors confirm that the Court has achieved an impressive position among Russian constitutional institutions.

However, this situation also has drawbacks. The role of the Constitution as an instrument of transformation[56] has to a certain extent been lost and the constitutional text loses some of its guiding force. The danger is that we may be confronted with a large discrepancy between formal constitutionalism and a constitutionalism which really motivates and constrains behavior of political and administrative actors.[57]

53 Prochazka, *op.cit.* note 38, 113-130.

54 Fogelklou, *op.cit.* note 1, 25.

55 S. Shilov, "Mesto v Stroiu", *Moskovskie Novosti* 2006 No.8; see, also, <http://www.mn.ru./issue.php>.

56 *The Constitution as an Instrument of Change*, *op.cit.* note 5.

57 A. Fogelklou, "Constitutionalism and the Presidency in the Russian Federation", 18 *International Sociology* March 2003 No.1, 181-198, especially 197-198.

"Tinkering with Tenure": The Russian Constitutional Court in a Comparative Perspective

Alexei Trochev

While volumes have been written about the law and politics of judicial selection in American courts, very little is known about these aspects of judicial politics outside the US. One recent comparative study analyzes the rules of selection and appointment of justices for the high national courts in twenty-seven countries, and advocates a switch to a mandatory retirement age and a single non-renewable term in office, rather than life tenure, to attract "the best and the brightest" to the bench and to enhance judicial independence.[1] This controversial proposal is supported by the argument that a shorter stay on the bench allows justices to adjudicate honestly without fearing reprisals from the government of the day, whereas life tenure induces justices to behave strategically to avoid attacks from the political branches of government.

Leaving aside the endless debate of how and why judicial selection rules affect actual judicial behavior, this chapter examines the politics of only one aspect of judicial selection systems; namely, the efforts to modify the length of judicial tenure. Although the mechanism of tuning judicial appointments may seem to be a rather technical matter, the process of legislating the length of tenure of justices is not easy. It may provoke heated debates among lawmakers and paralyze the work of the courts. The main argument of this chapter is that the very process of introducing "tenure" amendments may seriously affect the final outcome—the degree of independence of the high court from other political institutions. This process involves political actors from the legislative, executive and judicial branches of government, who focus on the personalities of current justices, rather than on the foundations of an independent judiciary. The legislative process of "tinkering with tenure" of justices may complicate the exact terms of judicial tenure and produce lasting intra-court divisions which may actually shift the court's attention from adjudicating cases to pacifying justices and to lobbying politicians to leave the court alone.

This chapter traces the changes in the Russian Constitutional Court (RCC) Act during 1991-2001 when the politicians and justices set out the rules of judicial tenure four times (see *Table 1*). In 1991, the RCC justices were elected for an unlimited term subject, to a compulsory retirement age of sixty-five. In 1994-1995, RCC justices were appointed for a single

[1] L. Epstein, J. Knight and O. Shvetsova, "Comparing Judicial Selection Systems," 10 *William & Mary Bill of Rights Journal* 2001 No.1, 7-36.

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 47-78

non-renewable term of twelve years, while their mandatory retirement age was raised to seventy. In February 2001, the time that constitutional justices could spend on the bench was increased from twelve to fifteen years, and the mandatory retirement age of seventy was abolished. However, ten months later, this mandatory retirement age of seventy was brought back. Finally, in early 2005, Russia abolished the fifteen-year term while keeping the mandatory retirement age of seventy. Thus, Russia's experience of trying different ways to set the length of judicial tenure in the past decade may identify important questions and challenges for judicial reformers in other parts of the world.

While it is too early to assess whether these "tenure" amendments are likely to create and sustain "an (1) intellectually and legally distinguished and (2) politically independent bench"[2] in Russia, it is useful to attempt to uncover the logic and politics behind the process of legislating terms of judicial tenure. Russian politicians and judges could express their views on judicial selection twice during 2001. Did they care about the principles of judicial independence? Or did they focus on winners and losers in this tenure reform? How did these "tenure" amendments influence judicial behavior in the short run? These questions will be addressed in the first two parts of this chapter.

The Russian experience of "adjusting" the terms of office of constitutional justices offers country-specific insights, a weak base for generalizations and wide-ranging conclusions. Yet Russian experiments with judicial selection of its highest court are not unique in the global "judicialization of politics" era of the past forty years. As will be shown in the third part of the chapter, more than a dozen countries, in addition to Russia, during the period of 1967-2003, attempted to modify the terms of judicial tenure *de jure* or *de facto*. Most of these attempts involved extensive bargaining between politicians and justices and resulted in changes in the actual length of judicial tenure. This shows that political majorities continue to keep the judiciary accountable albeit that the "global diffusion of judicial power" limits the range of choices available to political branches of government in their efforts to influence judicial decision-making. The quest for this shrinking range of choices or the balance between judicial independence and judicial accountability is likely to push the comparative research agenda beyond recounting the judicial selection rules and towards comparing the actual functioning of courts abroad under these rules.

2 *Ibid.*

The Russian Constitutional Court under El'tsin

The Context: Four Groups of Justices

Up until the spring of 2005, the nineteen-member Russian Constitutional Court consisted of four groups of Justices according to their length of tenure. One group of seven Justices was elected in October 1991 with a mandatory retirement age of sixty-five. Between 1994 and 1999, another group of nine Justices was appointed under the 1994 RCC statute for a single non-renewable term of twelve years or until the age of seventy, whichever occurs first. Between 2002 and 2003, three Justices were appointed for one fifteen-year term with no mandatory retirement age under the amended RCC statute of February 2001. To be more precise, the February 2001 changes to the RCC Act equally applied to the terms of tenure of the second group of Justices. To complicate the matter further, the December 2001 amendments to the RCC statute brought back the mandatory retirement age of seventy starting in January 2005. As a result of this change, two Justices, who reached seventy by that time, retired from the bench. They were replaced with the pair of Justices, who were appointed in February 2005 to serve until they were to reach the compulsory retirement age of seventy. To resolve this confusion on the bench, President Putin amended the RCC Act once again in April 2005. This time the amendments provided for the mandatory retirement of seventy for all sitting RCC judges. The following discussion examines what happened during these processes of legislative "tinkering" with the tenure of the Court's Justices and identifies the challenges of selecting the "right" length of judicial tenure.

Table 1: Tinkering with Tenure of the Russian Constitutional Court

Year	Legislative Debates	Term in Office	Justice Must Retire at...	Applies to ...
1991	4 Legislative Sessions	Life Tenure	65	All Judges
1994	4 Legislative Sessions	12 Years	70	Future Judges
1997 (failed)	1 Legislative Session	same	65	All Judges

Winter 2000-01	3 Legislative Sessions	15 Years	None	Judges Elected in 1994- ...
Winter 2001	Unanimous Legislature	same	70 (in force 1/1/2005)	Judges Elected in 1994- ...
Spring 2005	Unanimous Legislature	Life Tenure	70	All Judges

Designing "Life Tenure" Under the 1991 RCC Act

The 1991 RCC Act was a result of four lengthy legislative sessions in spring-fall of 1991. A major issue of contention during the passage of the RCC statute concerned the design of the recruitment rules to the bench of the Court. Designing these rules was linked to the appointment of the justices and ensured that politicians would have to select their nominees quickly and in the process of confirming the statute. Russian legislators already knew the list of nominees for the Court's bench drawn by the parliamentary fractions and tried to adjust the rules of judicial recruitment to their preferred candidates. Not surprisingly, most of lawmakers—who aspired to serve on the Court—were active during the May 6 parliamentary debates on the RCC statute, and presented their views on judicial recruitment.[3] For example, Boris Zolotukhin, one of the drafters of the RCC bill, unsuccessfully tried to persuade the majority of the Russian parliament to raise the upper age limits for judicial nominees from sixty to sixty-five, and for RCC justices—from sixty-five to seventy. According to Jane Henderson, the Supreme Soviet debates over the compulsory retirement age limits proved to be almost "the most controversial issue".[4] This controversy reflects the efforts of politicians to expand the pool of eligible candidates for the RCC seats and to overcome the popular rejection of "gerontocracy" of the late Soviet period when the USSR was ruled by old and incapacitated Communist Party leaders. As a result of parliamentary debates, Russian lawmakers introduced over 180 amendments to the RCC Act, two-fifths of them dealt with judicial status and recruitment. For example, left-wing legislators attacked the life tenure of the RCC justices and demanded to lower the levels of their salaries. However, the Russian parliament rejected these attacks and, in October 1991, elected thirteen

3 According to Jane Henderson's account, the most active were Sergei Shakhrai, Mikhail Mitiukov, Boris Zolotukhin, Oleg Tiunov and Iurii Rudkin. While all of them aspired to serve on the RCC bench, only the latter two became RCC justices. J. Henderson, "The First Russian Constitutional Court: Hopes and Aspirations," in R. Mullerson, M. Fitzmaurice and M. Andenas (eds.), *Constitutional Reform and International Reform in Central and Eastern Europe*, The Hague 1998, 105-121.

4 *Ibid.*, 116.

justices to serve for "an unlimited term" on the Court's bench, subject to the mandatory retirement at the age of sixty-five. Shortly thereafter, newly minted justices elected their Chairman, Valerii Zor'kin, also for an unlimited term.

This "life tenure" of the RCC justices did not prevent the politicization of the Court. By the mid-1993, the divided RCC was entangled in the struggle between the Russian parliament and the President Boris El'tsin. President El'tsin won this struggle by shelling the parliament's building and by suspending the functioning of the already paralyzed Constitutional Court.

Preserving the RCC in 1993-1994: Term Limits

On 7 October 1993, President El'tsin ordered the suspension of the RCC until the ratification of the new Russian Constitution. In his decree, prepared after consulting with the RCC Vice-Chair Nikolai Vitruk,[5] loyal to him, El'tsin accused the RCC and its Chairman, Zor'kin, of extreme politicization and asked the Constitutional Assembly to consider whether Russia needed a separate federal CC at all. The severity of this threat to the Court's survival, pushed justices to act swiftly and defend their two-year old Court. In a matter of two weeks, the RCC justices proposed to cut their life tenure to three, six, or nine-year terms with rotation every three years and to hold an election for the chairmanship of the Court every two or three years.[6] To preserve the Court, some justices were even willing to have the whole Court re-appointed under the rules of the new constitution. Fortunately, justices managed to convince El'tsin's advisors to appoint five to eight new justices to the bench while keeping the existing composition of the RCC. This enlargement of the Court was intended to produce a pro-El'tsin majority on the bench of the RCC.[7]

Once the 1993 Russian Constitution established a nineteen-member federal Constitutional Court as a separate body and preserved the "life tenure" of the original thirteen RCC justices, the Court's justices drafted the law on the RCC and proposed to appoint its justices for a term of fifteen years.[8] Again, the legislative debates took place in parallel with the process of nominating six additional RCC justices. The Communist

5 By that time, the Russian CC was already deeply divided between nine anti-El'tsin and four pro-El'tsin justices with the latter group boycotting the Court's meetings.

6 N. Vitruk, *Konstitutsionnoe pravosudie v Rossii (1991-2001 gg.)*, Moscow 2001, 29.

7 R. Sharlet, "Russia's Second Constitutional Court: Politics, Law, and Stability", in V. E. Bonnell and G. W. Breslauer (eds.), *Russia in the New Century: Stability or Disorder?*, Boulder, CO 2001, 67.

8 Vitruk, *op.cit.* note 6, 37.

law-makers proposed a ten-year term "for a greater accountability" of justices and demanded to keep the existing compulsory retirement age of sixty-five. In the short term, this proposal would preclude the appointment of El'tsin's choice for the RCC chairman—the sixty-eight-year old Professor Vladimir Tumanov. In the long term, the Communists favored shorter judicial tenure, in order to have a say in the future appointments to the Court's bench, given their hopes of winning the next legislative elections. Following the strong argument that one should not fit the law to particular personalities, the State *Duma* almost approved this proposal by a 42% vote. The State *Duma* rejected outright more radical proposals on the judicial tenure of the RCC. For example, Vladimir Zhirinovskii called for the compulsory retirement age of sixty in order to have physically fit justices on the Court's bench. According to him, this figure was in accordance with the average male life expectancy in Russia and the average retirement age. At the other extreme, the Russian Supreme Court proposed to delete the term and age limits to preserve the integrity of judicial independence.[9]

In the course of fervent debates over terms and age limits in several legislative sessions in April-June 1994, the eventual compromise was reached around the figure of a twelve-year single term and a compulsory retirement age of seventy (Art.12, 1994 RCC Act) and the periodic elections by the justices of the chairman and vice-chairman of the Court every three years (Art.23, 1994 RCC Act). Following the passage of the new RCC Act in June 1994, the Federation Council, the upper chamber of the Russian parliament, repeatedly clashed with President El'tsin over six additional seats on the RCC bench and appointed the nineteenth justice, sixty-four-year old Professor Marat Baglai in February 1995.

Although it took the RCC several months to organize its work in a new composition of two groups of justices with unequal tenure and different political views, the Court followed these rules of judicial tenure. The second Chair of the Court, Vladimir Tumanov, retired in early 1997 after reaching seventy. Three years later, he criticized this twelve-year term as violating the constitutional principle of life tenure of all federal judges.[10] Justice Nikolai Vedernikov of the first RCC, retired in February 2000 upon reaching sixty-five.

Naturally, all RCC justices wanted to have the same terms of tenure, and here they were supported by the Russian Supreme Court justices who

9 *Gosudarstvennaia Duma FS RF: Stenogramma zasedanii. **Vesenniaia sessiia***, Moscow 1995, Vol.4 (6-27 April 1994), 831; Vol.6, 8-24 June 1994, 648-650.

10 A. Rozanova, "Nesmeniaemosti nakinuli srok: interv'iu s Vladimirom Tumanovym," *Itogi* (electronic version) 29 September 2000, at <http://www.itogi.ru/paper2000.nsf/Article/Itogi_2000_09_29_210836.html>.

saw the introduction of twelve-year terms as a dangerous attack on the life tenure of all federal judges.[11] Already in the summer of 1997, the Vice-Chair of the Court, Tamara Morshchakova, spoke in favor of amending the 1994 Act to equalize the tenure of all judges. She cautioned, however, that the parliamentary majority would be able to thwart this initiative and introduce amendments aimed at weakening the Court.[12] Indeed, because the Russian President did not have the veto power over federal constitutional laws, the Russian parliament could easily secure the passage of amendments to the 1994 Act.

During El'tsin's presidency, the attempts of legislators to politicize the Constitutional Court were quite frequent.[13] For example, around the same time as Justice Morshchakova spoke in favor of the removal of the compulsory retirement age or at least setting it at seventy for all RCC justices, the State *Duma* debated amendments to lower the compulsory retirement age to sixty-five for all incumbent Court's justices.[14] These amendments would effectively compel the then RCC Chairman Baglai to retire. Fortunately for the RCC, the State *Duma* did not approve these legislative changes. Moreover, the Federation Council, whose "advice and consent" was necessary to appoint President's nominee for the bench, often rejected El'tsin's candidates.[15] This context of executive-legislative confrontation minimized the chances of judges to transform their preferences into the legislation and the chances of President El'tsin to appoint his most preferred nominee to the bench.

The Russian Constitutional Court under Putin (2001-2003)

Putin's Proposals: Equalizing Tenure

In early 2000, when the new Russian President, Vladimir Putin, came to power, the RCC justices re-elected their Chairman Marat Baglai for

[11] V. Zhuikov, "Konstitutsionnyi Sud RF vypolniaet istoricheskuiu rol'", *Rossiiskaia iustitsiia* 2001 No.10, 18.

[12] A. Malysheva, "Interv'iu s sud'ei Konstitutsionnogo Suda RF Tamaroi Morshchakovoi", *Konstitutsionnoe Pravo: Vostochnoevropeiskoe Obozrenie* 1997 No.3/4, 18.

[13] *Ibid*., 14-15.

[14] K. Katanian, M. Balutenko and G. Belonuchkin, *Konstitutsionnyi Sud Rossii. Spravochnik*, Moscow 1998, Chapter 3.2; "Naznachenie sudei Konstitutsionnogo Suda Sovetom Federatsii. 1994 – [...]"; electronic version at <http://www.cityline.ru/politika/ks/if94.html>.

[15] By April 1997, the Federation Council rejected presidential nominations thirteen times. *Ibid*.

a second term. Both Baglai and his deputy Morshchakova were due to retire in March 2001 when Baglai would reach seventy and Morshchakova, sixty-five. Therefore, we could safely assume that most judges expected a new round of elections for both positions shortly after their departure from the bench in the spring of 2001. After Vladimir Putin assumed the presidential powers, he initiated a wide-ranging campaign of strengthening the Russian state. His campaign for "the dictatorship of law" and judicial reform directly affected the authority of the Russian Constitutional Court. Unlike his predecessor, President Putin paid close attention to the Court's work, if only to secure the constitutionality of his proposals to reform Russian governance. Although Putin never brought a case to the Constitutional Court, he often met with justices and showed his commitment to a strong constitutional judiciary.

In fact, the RCC justices had long been calling for this "dictatorship of law" as a necessary element of a strong democratic statehood.[16] Therefore, while Putin's policies to streamline regional laws enjoyed the approval of the Constitutional Court, the justices perceived the seriousness of Putin's policies and his support.[17] Surely, several justices voiced their concerns over losing a hard-working leadership of the Court when Morshchakova and Chairman Marat Baglai would have to retire in the spring of 2001. Their main proposal was to remove the mandatory retirement age for all current RCC justices.[18] To preserve the image of impartiality and to overcome potential intra-Court resistance, members of the Court themselves did not sponsor "tenure" amendments to extend their stay on the bench. Instead, hoping that a highly popular president could secure the fast and smooth passage of their proposals, judges chose to lobby Putin to introduce these amendments in the *Duma*. It is unclear whether RCC Chairman Baglai himself wanted to stay on the bench beyond seventy. According to one source in Putin's administration, Baglai was prepared to retire from the bench at seventy but the presidential administration persuaded him to stay.[19]

16 "Poslednii shans—diktatura zakona: interv'iu s Valeriem Zor'kinym," *VEK* October 1996 No.43; "Diktatura Chubaisa ili zakona? Interv'iu s Gadisom Gadzhievym", *Patriot* December 1996 No.50, 11.

17 R. Sharlet, "Putin and the Politics of Law in Russia", 17 *Post-Soviet Affairs* 2001 No.3, 218-21; A. Trochev, "Implementing Russian Constitutional Court Decisions", 11 *East European Constitutional Review* Winter/Spring 2002 No.1/2, 95-103 (*EECR*).

18 Interview with Vladimir Tumanov, *Radio Echo Moskvy* 24 January 2001, at <http://www.echo.msk.ru>.

19 Interview with an official in the Russian Presidential Administration, Moscow, 25 May 2001.

On the one hand, Putin could score points at home and abroad for strengthening judicial independence by extending the tenure of RCC justices. On the other hand, the pressure to meet the March 2001 retirement deadline dictated the prompt passage of these amendments through the legislature. Although Putin strengthened his position in the legislature through a strong showing of the pro-presidential bloc in the State *Duma* elections in December 1999, he still faced potential resistance in the governor-packed Federation Council. Instead of letting Morshchakova and Baglai retire and nominating his candidates for the bench, Putin chose to extend their tenure. This choice would allow him to prolong his cooperation with the RCC, and to avoid the costs of recruiting new candidates for the bench, the risks of failing to have his nominees appointed by the Federation Council, and the uncertainty from the changes in the leadership of the Court.

President Putin introduced his "tenure" amendments to the RCC Act on 19 August 2000. They included a lengthening of judicial tenure from twelve to fifteen years and the removal of the mandatory retirement at the age of seventy. However, the authors of the bill failed to explain why they picked "fifteen years". Another justification was to unify the status of Constitutional Court justices and, therefore, these amendments would apply to all justices. For the ten justices from the First Constitutional Court this meant that they would either serve fifteen years or until the retirement age of sixty-five, whichever term would be longer. This "fork" was designed to pay partial homage to the constitutional clause on the inviolability of the tenure of judges elected before December 1993. These amendments would have the most immediate effect on the tenure of the RCC Chair Baglai, sixty-nine, and Vice-Chair Morshchakova, sixty-four. Both would reach retirement age in March 2001. Under the proposed changes, the former would serve nine more years, and the latter would sit on the bench until 2006.

The Reactions from the Justices

All Constitutional Court justices were officially on vacation in August and were scheduled to return in mid-September. They were surprised to learn about the haste and secrecy surrounding these amendments. Some of them were offended by the fact that Putin did not wait for their return and failed to consult all the justices before sending the bill to the State *Duma*. This made RCC justices hostages to the presidential initiatives and involved them in the political process against their will. They criticized these amendments as threatening the legitimacy of their Court. Other

justices were appalled by the very attempt to change the law on their Court to suit particular personalities.[20] Justice Nikolai Vitruk diplomatically found these hastily drawn proposals "difficult to explain".[21] Justice Viktor Luchin openly criticized the bill as inconsistent with the Russian Constitution, which did not allow the extension of the judicial tenure through legislation. Moreover, he was convinced that the bill would not reach its alleged purpose of judicial status unification, as it would create three groups of Constitutional Court members according to the terms of their tenure. Aware of true tenure-induced divisions between the RCC members, Justice Luchin ridiculed Putin's equation of the ordinary legislation with the constitution, and argued for the equalization of Constitutional Court tenure through constitutional reform.[22]

Another group of justices carefully avoided the thorny issue of the timing of these amendments and supported the essence of the presidential proposals, arguing that a longer tenure would make Court decision-making more efficient. Thus, several justices agreed that the longer tenure would make the Court's justices more experienced. The RCC ex-Chairman, Vladimir Tumanov, suggested that Putin was not afraid of the change in the composition of the Constitutional Court, because the Federation Council would easily appoint his nominees. Rather, according to Tumanov, the Court itself would suffer from the loss of Baglai and Morshchakova, because they were impossible to replace assets. Therefore, Tumanov applauded the abolition of the mandatory retirement age for all Constitutional Court justices. He recognized that extending judicial tenure to fifteen years did not solve the problem of status equalization among the Constitutional Court members. Tumanov expressed concern that fifteen-year term came from German Gref's plans to replace the life tenure of all federal judges by a fifteen-year term.[23]

The introduction of these "tenure" amendments generated a split among Constitutional Court justices by removing one set of problems and raising another one. However, the justices managed to keep it to themselves, away from the public eye and from the mass media until an open confrontation occurred in January 2002. Yet the secretive process of introducing these amendments quickly raised rumors about a conspiracy

20 Interview with the RCC justices, Moscow, June 2001.

21 Vitruk, *op.cit.* note 5, 42-43.

22 A. Zakatnova, "Konflikt v Konstitutsionnom Sude", *Nezavisimaia gazeta* 30 September 2000, 3; V. Nikolaev, "Konstitutsionnye sud'i mogut poluchit' novyi srok", *Kommersant* 4 October 2000, 2; V. Luchin, "Polnomochiia podporkami ne ukrepish'", *Parlamentskaia gazeta* 11 October 2000, at <http://www.pnp.ru/pg_nomers/22633.htm>.

23 Rozanova, *op.cit.* note 10.

between Putin and Baglai. According to them, Putin offered the extension of judicial tenure in return for Constitutional Court support for his reforms. The fact that the introduction of these amendments coincided with regional resistance to Putin's federalism reforms and threats to launch constitutional litigation about them in the federal Constitutional Court fueled speculations about a possible plot. Undoubtedly, the reputation of Baglai, who gave in to pressure from Putin's advisors, was shaken in the eyes of his colleagues on the bench.[24]

Debating Judicial Independence in the Duma [25]

Preparing these "tenure" amendments for the *Duma* debates, the presidential administration repeatedly lobbied the members of the *Duma*'s Committee on State-Building (DCSB) to recommend the bill for enactment. However, the majority of DCSB members disagreed with the presidential side for a variety of reasons. They expressed concern over the personal direction of the bill which lawmakers quickly nicknamed the "Law on Baglai". Left-wing legislators were against the bill because they disliked the pro-El'tsin stance by the current composition of the RCC. According to their position, extending tenure would reinforce the pro-presidential bias of the Court. Right-wing lawmakers criticized the presidential bill for its piecemeal nature and demanded life tenure for all Constitutional Court justices. Some legislators opposed the idea of changing the tenure of current Constitutional Court justices, as this would threaten judicial independence and set a precedent for tinkering with the tenure of judges in other federal courts. The presidential side failed to provide clear reasons for potential improvements in the Constitutional Court's work resulting from these amendments and avoided the thorny issue of judicial independence. Such a sharp divergence of opinions at the DCSB meetings resulted in the failure of the Committee to provide the legislature with guidance over these "tenure" amendments.

As a DCSB member, Sergei Popov (*IABLOKO*), reported at the *Duma*'s first reading on 8 December 2000, the Committee could not reach a compromise, either to recommend these amendments or to reject them. The Committee voted seven to four to let the whole legislature decide whether it was necessary to amend the RCC statute. Popov himself criticized changing the tenure of current justices as being a tool to reward or punish justices, in violation of constitutional principles of the separation

24 A. Kolesnikov, "Novyi srok dlia sud'i", *Izvestiia* 3 November 2000, 3.

25 For the text of the *Duma* debates, see *Biulleten' zasedaniia Gosudarstvennoi Dumy* No.64 (512), 8 December 2000, 31-37.

of powers and judicial independence. However, he applauded the extension of tenure for future Constitutional Court justices.

The parliamentary debates over the presidential amendments reflected the heated debates at the DCSB meetings. While Presidential Envoy, Alexandr Kotenkov, stressed the efficiency gains in the Court's work, the legislators were more concerned about the independence of the Constitutional Court. The left-wing opposition argued that the amendments would reinforce the pro-presidential bias of the Court. They claimed that life tenure for judges would open opportunities for its abuse, resulting in arbitrary, biased and inefficient court decision-making. Right-wing legislators welcomed the "tenure" amendments and called for the removal of the fifteen-year term restrictions for all Constitutional Court justices during the second reading of the bill. According to Vladimir Zhirinovskii, who opposed the reinstatement of the RCC in 1994, "We want an independent Constitutional Court [...] really independent from [the point of view of] salary, age and tenure. An ideal option is a judge appointed for life, so that he would not care who the Justice Minister was and who sat in Kremlin, so that he would be a judge for the whole nation."[26] Putin's envoy agreed with the life tenure proposals[27] and tried to convince the *Duma* that the Constitutional Court would work better as a result of these amendments. After a 50-minute discussion of the impact of life tenure on judicial independence, the State *Duma* approved the bill by a convincing 78% vote.

The Duma*'s Second Reading: Revenge of the Communists*

Preparing the bill for the second reading in the *Duma*, the DCSB recommended keeping the fifteen-year term without age limitations and to exclude the application of these new rules to the First Constitutional Court justices. This meant keeping mandatory requirement age of sixty-five for the First Constitutional Court justices, as required by the 1993 Russian Constitution. If adopted, this bill would require Constitutional Court Justice Tamara Morshchakova to retire in March 2001. Presidential Envoy Kotenkov initially disagreed with the exclusion of the First Constitutional Court justices. However, he supported the unexpected

26 *Ibid*., 34-35.

27 Alexandr Kotenkov also defended life tenure of the RCC justices at the 1993 Constitutional Assembly:

> "If we will only attempt to infringe upon one of the fundamental principles of hard-fought judicial reform, such as the irremovability of judges, [...] nobody will trust us in the future."

Quoted in M. Mitiukov, *K istorii konstitutsionnogo pravosudiia Rossii*, Moscow 2002, 149.

amendment introduced by Alexandr Salii (*KPRF*—Communist Party of the Russian Federation) which stated that the fifteen-year tenure was applicable to the Constitutional Court justices who were appointed by the Federation Council. This meant that ten First Constitutional Court justices elected by the Congress of People's Deputies in 1991 would serve until reaching the age of sixty-five. Salii did not explain why his amendment was necessary and he did not know which Constitutional Court members except Morshchakova would have to retire. Perhaps, this was an act of revenge of the Communists for Morshchakova's criticism of the Communist Party.

Boris Nadezhdin (*SPS*—Union of Right Forces) criticized Salii's proposal because it did not follow the presidential strategy of equalizing the status of the Constitutional Court justices and would result in the retirement of Justices Morshchakova and Tiunov. Kotenkov and Valerii Grebennikov (*OVR*—Fatherland-All Russia) defended Salii's amendment as following the constitutional requirements of inviolability of judicial tenure. For the legislators, a formal constitutionality of the bill was an important issue because offended Constitutional Court justices could invalidate it or interpret it in such a way so that all Constitutional Court justices would have life tenure. Such a verdict was not impossible since the members of the First Constitutional Court constituted a majority (ten out of nineteen) on the bench of the Russian Constitutional Court. However, besides Nadezhdin's objections, there was no opposition to proposed bill, which was put to a vote ten minutes after the debates began.

Although Salii's proposal garnered 62% of the *Duma*'s vote, the "Constitutional Court tenure" bill did not pass at the first attempt, short of twenty-three votes. Boris Nadezhdin again insisted to discuss Salii's amendment; otherwise, the bill would not be approved. However, his proposal was rejected outright, and the *Duma* voted again, approving the bill by the necessary minimum of 301 votes. At this point, Grebennikov asked to vote for the bill immediately in the third reading, but Kotenkov and the chairperson of the *Duma* meeting, Liubov' Sliska, did not support his haste. They agreed to have the final reading of the bill on the next day, during which the State *Duma* approved the "tenure" amendments by 302 votes.

The right-wing *SPS* fraction called the bill "anti-Morshchakovian", having nothing to do with the constitution and voted against it.[28] However, apart from this opposition, nobody, including the presidential administration, paid notice to the "tenure" amendments. One observer speculated that the presidential side struck a bargain with left-wing *Duma* fractions to

[28] S. Kashin, "Polovine konstitutsionnykh sudei 'nabrosili' tri goda", *Strana.Ru* 25 January 2001.

keep Constitutional Court Chairman Marat Baglai in exchange for Morshchakova's retirement in 2001.[29] Indeed, the thin majority vote showed that cooperation of Communist legislators was crucial for the passage of these amendments. Another daily blamed Putin's administration for inactivity and unwillingness to defend a hard-working judge from the revenge of left-wing legislators.[30] Therefore, the only hope for Morshchakova's supporters rested in a veto of the "tenure" amendments by the Federation Council (FC), the upper chamber of the Russian parliament.

Maneuvering Through the Federation Council

Five days later, on 25 January 2001, the Federation Council Committee on Constitutional Legislation (FCCCL) discussed the "tenure amendments" and unanimously voted to reject them at the next day's FC session. The Committee members used a legal formality to recommend the veto of the bill. They accused the State *Duma* of violating constitutional norms regulating the legislative process. According to Article 108 of the Russian Constitution, the *Duma approves the drafts* of federal constitutional laws. However, in the course of the last seven years, the State *Duma*, routinely *adopted* federal constitutional laws, eleven in total. The Federation Council warned the *Duma* about this unconstitutional wording during the passage of the federal constitutional law on the Russian national anthem in 2000 and threatened to reject such bills in future. Therefore, when the Federation Council members received the "tenure" amendments to the RCC Act "adopted" by the *Duma*, they used this opportunity to punish the lower chamber by vetoing the bill.

Formalities aside, the FCCCL members had much deeper disagreements with the *Duma*'s version of the "tenure" amendments. According to Vladimir Platonov, vice-chair of the Committee, the *Duma*'s amendments deprived the Constitutional Court justices of equal status and distorted Putin's policy of equalizing the status of all Court's members. During heated discussions, the Committee members reasoned that Putin's initial version of the bill could also be made to comply with the constitution by removing the mandatory retirement age of sixty-five for the First Constitutional Court justices. Otherwise, according to Senator Nikolai Fedorov, the bill, as presented, was written in order to extend the tenure of particular RCC justices. Fedorov, of course, had a special interest in opposing the bill, because of his constitutional litigation over Putin's federal

29 S. Mihailova, "Lichnoe delo sud'i Morshchakovoi", *Vremia Novostei* 25 January 2001.

30 V. Eliseenko, "Konstitutsionnyi sud podvergsia diskriminatsii", *Vremia MN* 27 January 2001.

reforms. Once he could push for the "tenure" amendments allowing life tenure for all Court's judges, they could treat his lawsuit against Putin's reforms more seriously.

Feeling strongly that they could convince the *Duma* members to change the passed version of the bill, the FCCCL members voted to recommend the creation of a joint conciliatory commission to work out amendments acceptable to both legislative chambers and the President. The presidential envoy at the Federation Council, Viacheslav Khizhniakov, characterized such a Committee decision as "just".[31] RCC justices formally did not take part in this Committee meeting but some of them were at the Federation Council headquarters trying to convince the legislators to veto the bill or to launch constitutional litigation over it, if passed. Therefore, they supported the Committee's recommendation to veto the *Duma*'s version of the "tenure" amendments.

This recommendation could extend the acceptance of the "tenure" bill indefinitely into the future, since it would probably require several meetings of a trilateral (*Duma*—Federation Council—President) conciliatory commission and its passage through the *Duma* and the Federation Council. This meant that the bill, if adopted at all, would not achieve its purpose of preserving the current composition of the RCC. The bill would become law well after March 2001, the time when RCC Chairman Marat Baglai and his deputy Tamara Morshchakova had to retire from the bench. Extending their tenure then would become a thorny political issue, threatening to damage the reputation of the RCC and its relationship with the presidential administration. This scenario did not fly well with Putin's judicial reform agenda to enhance the reputation of Russia's judiciary and with Putin's efforts to secure the support of the Court.

Therefore, after the FCCCL made public its recommendation to veto the amendments to the RCC statute, the team from the presidential administration vigorously intervened with the leadership of the FCCCL, in order to recommend the bill for approval on the next day's meeting. While the presidential team insisted that the bill was Putin's personal initiative, the *Duma* members agreed to set up a conciliatory commission after the Federal Council's approval of the bill. Vladislav Surkov, the deputy head of the presidential administration, together with the *Duma*'s members, managed to convince the FCCCL chair Viktor Leonov to hold an extraordinary meeting of the Committee and to reverse its recommendation.[32] Loyal to the Kremlin, Leonov agreed and called for a

[31] A. Barakhova and V. Nikolaev, "Sovet federatsii vstupilsia za sudei", *Kommersant* 31 January 2001, 2.

[32] K. Katanian, "Portret Baglaia vyshe Konstitutsii", *Vremia MN* 1 February 2001, 1.

Committee meeting next morning.[33] With the support of the leadership of the Federation Council and the representatives from the *Duma*, Leonov managed to reverse the Committee's recommendation by endorsing the "tenure" amendments.

A few hours later, at the Federation Council, session he presented the Committee's approval of these amendments citing the absence of serious objections to them and the cooperation of the State *Duma* in correcting procedural formalities.[34] The first speakers criticized Leonov's argumentation and called for strict compliance with the constitution. Senator Fedorov argued that the questions of whether to follow the constitution could not be the subject of bargaining in conciliatory commissions. To follow constitutional norms was not a procedural formality, according to Fedorov, and "the portrait of Marat Baglai could not eclipse the Russian Constitution". Senator Aleksandr Surikov warned the legislators that the RCC could invalidate the "tenure" amendments because of the *Duma*'s procedural errors. Leonov defended the bill, insisting that the *Duma* agreed to correct its errors. Egor Stroev, the Chairman of the Federation Council, also supported the bill and invited the legislators to vote for it.

The first attempt to approve the bill garnered only 107 of the 134 votes necessary. After the vote, more supporters of the bill spoke and called for a new vote arguing that the controversy was solely about an editorial error. Surikov spoke again and proposed a new vote on the bill during the next Federation Council meeting on 20 February, after the *Duma* would have correctly "approved" the bill. He again warned that the RCC justices did not rule out the invalidation of the bill on the procedural grounds. Chairman Stroev replied that this court would not invalidate anything, causing laughter among the legislators.[35] After 111 legislators supported his call to come back to a discussion of the bill, Stroev announced a thirty-minute recess. He successfully used the break to persuade the Federation Council members to approve the bill. They all spoke in favor of the bill emphasizing the maintenance of a working relationship with the *Duma* and the President. After hearing the presidential envoy's assurances that the President would sign the bill, 144 Federation Council members approved the "tenure" amendments to the Russian Constitutional Court statute.

33 Leonov became chair of the FCCCL in October 2000, thanks to the lobbying efforts of the presidential administration and behind-the-scenes Committee votes' manipulation. He was appointed to prevent threats from regional governors to use the Federation Council against Putin's federal reforms in constitutional litigation. A. Barakhova, "Gubernatory proigrali Kremliu", *Kommersant* 26 October 2000.

34 For the text of the Federation Council debates, see *Biulleten' 68 zasedaniia Soveta Federatsii* 31 January 2001 No.188, 27-35.

35 A. Barakhova, "Gubernatory prilichno priniali", *Kommersant* 1 February 2001, 1-2.

President and Justices

On the next morning, 1 February, the RCC Chairman, Marat Baglai, met with President Putin who had fourteen days to sign the amendments to the Court's statute (Art.108, RF Constitution). According to Baglai, this was a regular meeting to discuss recent RCC decisions and preparations to mark the ten-year anniversary of the Court in the fall of 2001. But the most important issue was the impact of the "tenure" amendments on the work of the Court. Probably, Baglai was trying to persuade Putin of the importance of keeping Justice Morshchakova on the Court, while Putin was confident that the Court would not lose its efficiency after her retirement.[36] A week later, Putin signed the "tenure" amendments into law.[37] Shortly thereafter Dmitrii Kozak, the deputy head of the presidential administration, hinted at the possibility of reinstating the mandatory retirement age of seventy for constitutional justices as part of a widely advertised judicial reform. Kozak, who also headed a working group on judicial reform, did not seem to worry about the inconsistency of this proposal with the recently passed "tenure" amendments.[38]

The RCC justices, who were traditionally against any changes to the Court's statute, became very alarmed by this legislative activity. On 15 February, Putin invited them to discuss his judicial reform agenda including yet another set of possible changes to the RCC Act. However, the justices wanted Putin to explain his interpretation of the "tenure" amendments. Putin assured them that these amendments did not aim to weaken the Court by any means. He supported their desire to equalize the tenure among the justices. However, he refused to officially ask the Court to determine the constitutionality of these amendments in response to hints from the justices that they would issue a decision extending the tenure to all justices. This meant that Putin did not want to have his "tenure" amendments scrutinized by the Constitutional Court. Perhaps, he did not want to bring such case to the Court due to potential accusations of the conspiracy plot with the Constitutional Court.[39] Instead, Putin suggested that justices would draft themselves a bill to equalize their tenure.

36 V. Nikolaev, "Marat Baglai zastupilsia za zhenshchinu", *Kommersant* 2 February 2001, 2.

37 For the text of the amendments to the RCC Act, see *Rossiiskaia gazeta* 10 February 2001, 3.

38 "Sud'i otvetiat pered zakonom", interview with Dmitrii Kozak, *Kommersant* 12 February 2001, 3.

39 I. Bulavinov and V. Nikolaev, "Prezident blagoslovil konstitutsionnykh sudei", *Kommersant* 16 February 2001, 2.

Knowing the Court's unwillingness to sponsor any draft legislation, Putin probably expected that his suggestion would not materialize.

Why was he prepared to let Morshchakova leave the bench as a result of these tenure amendments? It is possible that the Federal Procuracy and the Russian Supreme Court united with left-wing legislators to lobby against her staying at the Constitutional Court. Morshchakova's active stance on the criminal procedure reform and her personal resentment of the federal Supreme Court leadership may have been a factor here. In addition, she was a vocal opponent of Putin's judicial reform package. In any event, Putin's commitment to a strong Constitutional Court seemed to calm the justices only partially. Some of them still did not accept the logic of changing the law simply to keep particular justices on the bench. Others questioned the constitutionality of these "tenure" amendments. The majority of justices, however, understood that Putin would give a free hand to the Court in interpreting these amendments. Therefore, the justices themselves would have to deal with the confusion and uncertainty brought about by the "tenure" amendments. Ten days later, on 26 February 2001, the RCC justices reelected Morshchakova as the Court's Vice-Chair. This showed that the majority of justices attempted to minimize the impact of these amendments on the work of the Court. Recognizing that these amendments created certain divisions within the Court, constitutional justices maintained normal working conditions and refrained from interpreting "tenure" amendments in public.

As required by the RCC Act, Morshchakova submitted her resignation letter on 31 March 2001, and one daily speculated that she would leave the bench in June 2001 after all her cases would be adjudicated.[40] Indeed, Article 9 of the RCC statute specifies that a retiring justice leaves the bench only after one of two conditions has been met: the appointment of a new justice, or after the Constitutional Court decision in a case in which the retiree was involved. According to Iurii Kudriavtsev, the Head of the Russian Constitutional Court Secretariat, these two conditions aim to prevent the interruption of the work of the Court, as the retirement of a justice poses a threat to the work of the Court or its chamber because of a possible failure to secure a quorum during the court sessions.[41]

The *first* condition depends on the cooperation between the President (who nominates a candidate for the bench) and the Federation Council (that appoints presidential nominees to the RCC). This means that unwillingness or inability of the Russian President to nominate a

[40] "Sud'ia uidet v otstavku v iune", *Izvestiia* 27 February 2001, 4.

[41] N. Vitruk, L. Lazarev and B. Ebzeev (eds.), *Federal'nyi Konstitutsionnyi zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii". Kommentarii*, Moscow 1996, 66.

candidate for the bench effectively extends the judicial tenure of a retiring constitutional justice. The *second* condition reflects the requirement that a case should be heard and adjudicated by the same panel of justices, *i.e.*, a new justice cannot be introduced when proceedings are underway. This condition depends on the willingness of the retiring justice to take part in a new case and on the willingness of the Court's chairman to assign a particular case to the retiring justice. Formally, these two conditions are not related to each other. In practice, however, they both depend on the willingness of the majority of the Constitutional Court justices to recognize the expiration of the tenure of their colleague. Article 18 of the Russian Constitutional Court statute requires a majority vote at the *en banc* session of the Court to discharge a retiring justice from office. Then, the RCC notifies the Russian President of the vacancy, who then has thirty days to nominate his candidate for the bench of the Court. The President sends his nomination to the Federation Council where the legislators have fourteen days to agree or disagree with the President's choice of a constitutional justice (Art.9, RCC Act). The retiring justice leaves the bench only after the appointment of a new Constitutional Court member. Therefore, the formal judicial recruitment procedure begins only after at least ten Constitutional Court justices have voted to approve the retirement of their colleague who has reached mandatory retirement age or whose term in office has expired. Without such a vote, the retiring constitutional justice stays on the bench and continues to participate in hearings. Moreover, Article 18 of the RCC statute penalizes the justices who miss more than two hearings "without valid reasons" by depriving them of generous retirement benefits.

In practice, however, the RCC and the President coordinate their actions in the judicial recruitment process. This is evident from the practical consequences of the "tenure" amendments to the RCC statute. President Putin sent signals that he wanted to strengthen the Court. At the February 2001 meeting with Putin, the Court's justices offered different interpretations of these amendments. They re-elected Morshchakova and showed that they did not want to part with her. They leaked to the press that Morshchakova would work at least through the summer of 2001. This was a signal for potential candidates for the bench to lobby Putin for their nomination. Putin, however, rejected all choices as he realized that diverging views on his "tenure" amendments among constitutional justices could result in constitutional litigation. He was also waiting for the passage of his judicial reform package through the Russian legislature, because this package included another set of "tenure" amendments reinstating mandatory retirement age of seventy for all RCC justices. Finally,

Putin could reinforce his commitment to a strong Constitutional Court by keeping Justice Morshchakova at the Court during the celebration of the ten-year anniversary of the RCC in November 2001. Therefore, the unwillingness of Putin to nominate his candidate for the Court's bench and the uncertainty created by the "tenure" amendments allowed Tamara Morshchakova to remain on the bench well after she reached sixty-five.

Furthermore, while the time seemed to pacify constitutional justices divided over the "tenure" amendments, the uncertainty over Morshchakova's terms of office provided her with an opportunity to voice her views beyond the walls of the Court. Although Article 11 of the RCC Act prohibits the justices from public expression of their views on an issue that can become the subject of the scrutiny of the Court, justice Morshchakova used her uncertain status to evade this ban. She interpreted the "tenure" amendments as an attack on herself by the legislature. Morshchakova argued that the three-year extension of tenure of incumbent justices effectively renewed their non-renewable terms and allowed the political branches of government to reward loyal justices.[42] By the end of March 2001 she made a decision to agree with retirement in order to minimize the damage to the authority of the Court and its members. According to Morshchakova,

> "the power of authority is a very fragile and valuable thing. Difficult to gain, but easy to lose. I feel this with my skin on the bench every day."[43]

Expecting to be replaced in the fall of 2001, Morshchakova actively commented on RCC decisions[44] and engaged in a public discussion of the judicial reform package including the proposals to amend the RCC Act.[45] More precisely, she extensively spoke to mass media immediately after she agreed to resign in March 2001 and renewed her public appearance in July 2001 after she wrote her last Court's decision on the unconstitutionality of

42 T. Morshchakova, "Konstitutsionnyi Sud Rossiiskoi Federatsii", in I. Petrukhin (ed.), *Sudebnaia vlast'*, Moscow 2003, 330.

43 M. Gessen, "Otstavka federal'nogo znacheniia", *Itogi* 6 April 2001, at <http://www.itogi.ru/paper2001.nsf/Article/Itogi_2001_04_06_223617.html>.

44 See Morshchakova's speech at the 22 March 2001 conference on the problems of Constitutional Court decisions' implementation; Morshchakova's interview to the ORT—TV Channel, 5 July 2001; T. Morshchakova, "Gosudarstvo dolzhno prinesti izvineniia", *Vremia MN* 7 July 2001, 2; "Priamaia rech'", *Izvestiia* 12 July 2001; "KS ne budet rassmatrivat' zapros deputatov po Zemel'nomu kodeksu," *NTV.Ru* 17 July 2001.

45 See Morshchakova's interviews in "Uiazvimaia neprikosnovennost'", 10 *Ekspert* 12 March 2001, 63-66; Gessen, *op.cit.* note 43; "Nado zashchishchat' grazhdanina ot gosudarstva", *Nezavisimaia gazeta* 2 June 2001; "Zakazchik—narod, killer—gosudarstvo?", *Obshchaia gazeta* 12 July 2001; "Ot nezavisimogo statusa sud'i nichego ne ostaetsia", *Kommersant* 13 July 2001.

the legislative acts of amnesty. Her public visibility would be much lower if she was not so close to retirement because RCC justices maintain an informal self-imposed ban to comment publicly on their judgments and on any draft legislation.

Most of her colleagues accepted her extra-judicial activism. They also went ahead and assigned Morshchakova to another case scheduled for late fall of 2001. When the Court reconvened after the summer vacation in late September, there was still no presidential nomination to replace Morshchakova. The best legal experts of Putin's administration focused on the bargaining over the judicial reform package in the *Duma*. In addition, the human resources department of Putin's administration was preoccupied with the Federation Council reform searching for and "recommending" suitable candidates for the membership in the upper house of the Russian legislature to the regional authorities. To slow things down further, in early October 2001, President Putin created a commission responsible for the screening of potential candidates for the federal judgeship, including the federal Constitutional Court. This twelve-member commission included mostly officials from the federal executive branch and the presidential administration. Vladimir Tumanov, the RCC ex-Chairman, and Mikhail Mitiukov, the presidential representative at the Court, were appointed to this commission.[46] This meant that the RCC justices could know about the potential nominees for the bench. In the times of Boris El'tsin's presidency, creating a commission like this meant slowing down any official business of judicial recruitment. This may well be the case with Putin's judicial appointments, since he wants to know as much as possible about his nominees by requiring the commission to report all disagreements over nominations. Naturally, this presidential commission could begin to work effectively only after the enactment of the judicial reform package.

In early November 2001, President Putin reiterated his commitment to a powerful Constitutional Court. During his speech at the Court's ten-year anniversary meeting, Putin stressed the authority, professionalism and courage of constitutional justices who preserved the independence of the Court, limited other branches of government, and pacified politicians without interfering in the jurisdiction of other governmental agencies. According to Putin, the RCC guards the federal constitution, protects individual rights and freedoms, and plays an active role in building the legal foundations of the Russian state.[47]

[46] Ukaz Prezidenta RF No.1185 "O Komissii pri Prezidente Rossiiskoi Federatsii po predvaritel'nomu rassmotreniiu kandidatur na dolzhnosti sudei federal'nykh sudov", *Rossiiskaia gazeta* 11 October 2001.

[47] "Vladimir Putin: Konstitutsionnyi sud—organ 'samoogranicheniia vlasti'", *Strana.Ru* 1 November 2001.

Feeling strong presidential support, RCC justices were better prepared to reject possible threats to the power and independence of their court during the second reading of the judicial reform bills in the *Duma*. Indeed, when *Duma* members proposed several amendments limiting the discretion and the power of the Court in mid-November 2001, justices did not wait in hopes that the legislature would vote against them. Having learned from the passage of "tenure" amendments, they rapidly set to work together to prevent these amendments from reaching the floor of the *Duma*. Again, the fiercest critic of the *Duma*'s proposals was Justice Morshchakova who was still at the bench waiting to retire. During one week she gave numerous TV, radio and newspaper interviews defending the RCC's powers and protesting against the proposals to limit them. Her public visibility could rival that of ex-Chairman of the Court, Valerii Zor'kin, during the 1993 Russian constitutional crisis. While other RCC justices obeyed the ban on the public evaluation of proposed legislation, retiring Morshchakova did not fear this ban since she was to leave the bench soon. This opportunity to air the Court's objections through the mass media greatly enhanced the ability of the constitutional justices to preserve the power of their Court. Indeed, it seems that the most controversial proposals to limit the power and discretion of the Court did not reach the second reading in the *Duma* only because of counteraction by the RCC justices.[48]

Back to Mandatory Retirement Age

During the debates on the RCC Act in the State *Duma* on 22 November 2001, several legislators proposed to reinstate the mandatory retirement age of seventy for current RCC members. They argued that setting this limit of judicial tenure was necessary because the rest of federal judges had to retire at sixty-five.[49] The presidential administration agreed with this proposal under the condition that this reinstatement would enter into force from January 2005. As Putin's envoy to the *Duma*, Aleksandr Kotenkov argued, the delay was necessary to prevent having RCC justices with five different terms of office. This disparity in judicial tenure resulted from the difficult formation of the Court when the justices' terms of office had been changed several times non-retroactively. A three-year delay would be good for the institutionalization of the Constitutional Court, according to Kotenkov, because by 2005 there would happen a "natural fall-out of incumbent constitutional justices", resulting in more equal

48 Trochev, *op.cit.* note 17.

49 *Biulleten' zasedanii Gosudarstvennoi Dumy* 22 November 2001 No.131, 23.

terms of office among the remaining justices.[50] The year 2005 appears to have been chosen to allow one of the fiercest critics of presidential power on the bench, Justice Viktor Luchin, to retire in March 2004, when he reaches sixty-five. This explanation masked the President's aspiration for keeping the Chairman Baglai on the bench and the demands of the constitutional justices to minimize legislative tinkering with their tenure. Putin probably realized that this frequent tinkering with judicial tenure could lead to constitutional litigation and divided Constitutional Court, damaging the reputation of the Court and Putin's judicial reform. After Kotenkov's remarks, the *Duma* unanimously voted for the reinstatement of the retirement age of seventy for the Constitutional Court members starting in January 2005.

Intra-Court Conflict

Next day, Morshchakova publicly criticized the re-introduction of the compulsory retirement age and called such behavior of the legislature "illogical."[51] To be sure, Morshchakova's frequent appearance outside of the Russian Constitutional Court triggered resentment from various political and legal circles that could not wait for her to retire. However, by March 2002 she continued to be an active Vice-Chair playing an important role in the Court's decision-making. How much longer could she stay on the bench after she reached sixty-five? Numerous legislative *novellae* confused this matter so much that the answer to this question rested with the RCC justices themselves. They could reach it through official statutory interpretation or through informal agreement among each other. While the outcome of the former would favor the continuation of Morshchakova's tenure for a few more years, the latter would keep Morshchakova until the justices could agree on who would replace her. But, as was indicated earlier, the justices were split on the meaning of "tenure" amendments. This meant that the dissenters would publicize their disagreement, damaging both the relationships between the justices and the public image of the Court.

In fact, one of the dissenters, Justice Viktor Luchin, the one who criticized Putin's "tenure" amendments in October 2000, attempted to raise the question of Morshchakova's retirement when the Court *en banc* convened on 22 January 2002, almost a year since the "tenure" amendments to the Court's statute has been in force. At that meeting the Court was to hear the challenge brought by three regions against a recently adopted

50 *Ibid*., 24.

51 "Nelogichnym schitaet Tamara Morshchakova golosovanie deputatov Gosdumy za ogranichenie vozrasta sudei", *IA Rosbalt* 23 November 2001.

federal law granting President Putin the power to fire regional governors and to dissolve regional legislatures.[52] Marat Baglai, who chaired this Court session, began with the traditional question of whether the parties had objections to the sitting justices. The parties, representatives of the regional legislature and Putin's lawyer, responded with traditional "no". Suddenly, Justice Luchin spoke against having Morshchakova on the panel because her tenure had expired a long time ago under the amended RCC Act. As she had reached sixty-five and had completed all her cases, Morshchakova had to leave the bench and could not take part in the Court's decision-making. Moreover, Luchin asserted that she had to leave the Court for "moral and ethical reasons".[53] Chairman Baglai replied that Morshchakova could not retire because the Russian President had not announced his nominee to replace her. Luchin countered that if the President violated the law delaying the nomination, the Court should not connive at such transgression.[54] While Justice Nikolai Bondar' proposed not to discuss such things in public[55], the ex-Chairman of the Court Valerii Zor'kin attempted to justify Morshchakova's stay and Putin's delay.

According to Zor'kin, the two sets of "tenure" amendments to the RCC statute passed in 2001 contradicted each other. President Putin chose to follow the latest amendments, setting the mandatory retirement age of seventy for all justices and was free not to nominate anyone to replace Morshchakova. Therefore, she could stay on the bench until seventy, and the President complied with the RCC Act.[56] After Zor'kin's remarks, justices adjourned the hearing to deliberate Luchin's objections against Morshchakova. They returned shortly with the vote fifteen to one to keep her on the panel. The only vote against probably belonged to Viktor Luchin. Morshchakova herself probably abstained from voting on this issue.

When the hearing ended, Valerii Zor'kin elaborated his defense of Putin and Morshchakova at the meeting with journalists. In his opinion, "the President had to preserve a quorum at the Constitutional Court." Contradictory "tenure" amendments allowed Putin both options: to

52 Federal'nyi zakon "Ob obshchikh printsipakh organizatsii zakonodatel'nykh (predstavitel'nykh) i ispolnitel'nykh organov gosudarstvennoi vlasti sub"ektov RF", *Sobranie Zakonodatel'stva Rossiiskoi Federatisi* 1999 No.42 item 5005.

53 A. Zakatnova and O. Tropkina, "Skandal v Konstitutsionnom sude", *Nezavisimaia gazeta* 23 January 2002, at <http://ng.ru/politics/2002-01-23/1_scandal.html>.

54 F. Sterkin, "Konstitutsionnyi sud zashchitil prezidenta", *Strana.Ru* 22 January 2002.

55 P. Aptekar', "Sud'i ssoriatsia", *Vremia novostei* 23 January 2002, at <http://www.vremya.ru/2002/11/4/27299.html>.

56 Sterkin, *op.cit.* note 54.

nominate his candidate or to wait until Morshchakova reached seventy, according to Zor'kin. Whichever option Putin would choose, Tamara Morshchakova should go on working at the Court until the Federation Council appointed a new justice. Were she to retire without a replacement, this would create a dangerous precedent for the Court resulting in a paralysis of the Court when, for example, the President would fail to secure the appointment of his nominees to the bench.[57]

In short, Zor'kin favored the middle-ground "pragmatic" approach to judicial tenure, namely that all current RCC justices should serve until seventy. This would unify them and support the legitimacy of the current composition of the Court. This statutory interpretation by Zor'kin was clearly incompatible with the ban on justices to discuss such matters in public. Moreover, his insistence on the constitutionality of the second set of "tenure" amendments was questionable since they would enter into force only in 2005. Finally, in his approach, Chairman Marat Baglai would have to leave the bench contrary to Putin's preferences. Therefore, Zor'kin's position simultaneously defended Putin's behavior and hinted at discrepancies in Putin's judicial reform.

Zor'kin's interpretation of these "tenure" amendments offered the widest latitude to the Russian President in terms of when to nominate his candidate for the RCC bench. Justice Morshchakova finally retired from the Court in April 2002, a year after her tenure expired. A couple of her colleagues, Justices Oleg Tiunov and Nikolai Vitruk turned sixty-five in late fall of 2002, and left the Court in mid-February 2003, three months after their tenure expired. All retirees now hold a position of consultants at the RCC, a practice which has become an unwritten custom.

"Judicial Tenure": Amendments in a Comparative Perspective

Is this story of changing judicial tenure unique to Russia?[58] Comparative data are scarce on this subject. I found several occasions of judges overstaying their terms and legislative "adjustments" of judicial tenure in different countries (see *Table 2*). In Albania, Constitutional Court justices refused to submit to rotation in 1995 and to retire after their first three years on

57 *Ibid*.

58 In June 2002, one of Russia's regions, the Sakha-Iakutiia Republic, which has its own functioning constitutional court, raised the mandatory retirement age of its judges from sixty-five to seventy years of age and set a non-renewable fifteen-year term in office. Art.11(1) of Constitutional Law on the Constitutional Court of the Republic Sakha-Iakutiia and on Constitutional Review Procedure of 15 June 2002, 25 *Iakutskie vedomosti* 3 July 2002.

the bench.[59] In Spain, Constitutional Tribunal magistrates overstayed their terms four to six months when political wrangling delayed the election of new members of the Tribunal in 1983 and 1992.[60] To address this problem, the tenure of Italian Constitutional Court justices was changed in 1967 to make them retire exactly after the expiry of their nine-year term on the bench. Prior to this amendment, the rules of the Court established that the justice should remain in office until the date on which the justice called to replace him/her had been was sworn-in.[61]

In the 1996 South African Constitution, the term of tenure of existing constitutional court judges was extended from seven-year to twelve-year terms subject to the requirement that they retire at age seventy.[62] The new Constitution of Poland, which entered in force in October 1997 extended the tenure of Constitutional Tribunal justices from eight to nine years and abolished the rotation of justices every four years.[63] In the same year, the tenure of Portuguese Constitutional Tribunal members was raised from six-year renewable terms to nine-year non-renewable terms. Portugal Constitutional Court justices hailed this constitutional revision as a move to reduce the dependence of individual justices on political parties that appointed them.[64] In fact, political wrangling of Portuguese political parties prior to the 1997 constitutional amendments and the very process of revising the constitution effectively delayed the re-appointment of the Constitutional Court justices for two and one-half years (October 1995—March 1998)![65]

59 "Albania Update", 4 *EECR* 1995 No.3, 3.

60 H. L. Beirich, "The Role of the Constitutional Tribunal in Spanish Politics (1980-1995)", unpublished Ph.D. dissertation, Purdue University 1998, 184-89.

61 A. Marini, "Regarding the Guarantees of Independence of the Italian Constitutional Court", *Konstitutsionnoe pravosudie* 2001 No.3, 141.

62 H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge 2000, 141.

63 Art.194(1), 1997 Constitution of the Republic of Poland.

64 P. C. Magalhães, "The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies", unpublished Ph.D. dissertation, Ohio State University 2003, 313, 360 (endnote 37).

65 *Ibid*., 220-221.

Table 2: "Tinkering with Tenure"
of High Courts in a Comparative Perspective

Court	When	Term of Office on Paper	Changed Terms of Office
		JUDGES OVERSTAY	
Albania	**1995**	3-year rotation	Judges refuse to retire
Spain	**1983, 1992**	3-year rotation of 1/3 of the Court	overstayed 4-6 months
Portugal	**1995-98**	6-year term	overstayed 2.5 years
Russia	**2001-02**	retire at 65	overstayed 1 year
		TENURE AMENDMENTS	
Italy	**1967**	9 years until replaced	calendar 9-year term
South Africa	**1996**	7-year non-renewable 12-year	retire at 70
Portugal	**1997**	6-year renewable	9-year non-renewable
Poland	**1997**	8-year w/rotation of 1/2 Court every 4 years	9-year, no rotation
Taiwan	**1997**	9-year	8-year w/rotation of 1/2 of the Court every 4 years
Egypt	**2001**	retire at 64	retire at 66
Slovakia	**2001**	7-year	12-year
Kyrgyzstan	**2003**	15-year	10-year
Azerbaijan	**2003**	10-year once-renewable	15-year non-renewable
		FAILED TENURE AMENDMENTS	
Israel	**1965**	retire at 70	retire at 75
Hungary	**1998**	9-year once renewable	12-year non-renewable
Armenia	**2002**	life tenure, retire at 70	12-year, retire at 65
Ukraine (draft)	**2003**	9-year non-renewable, retire at 65	9-year once renewable, retire at 75

In February 2001, the Slovak Constitution was amended to extend the tenure of Constitutional Court justices from seven to twelve years on the bench.[66] The mandatory retirement age of the Egyptian Supreme Constitutional Court justices was extended from sixty-four to sixty-six years of age in 2001. The timing of this extension was made with the appointment of a new chief justice who proved to be loyal to the Egyptian President and who was expected to "tame" the growing power and independence of the Egyptian judicial review.[67]

66 "Constitution Watch: Slovakia", 10 *EECR* 2001 No.1, at <http://www.law.nyu.edu/eecr/vol10num1/constitutionwatch/slovakia.html>.

67 T. Moustafa, "Law Versus the State: The Expansion and Contraction of Constitutional Power in Egypt, 1991-2000", Paper presented at the American Political Science Association Annual Meeting, Boston 30 August 2002, 87 (footnote 158).

A presidential draft of the Ukrainian Constitution which was published in early March 2003, raised the mandatory retirement age of Constitutional Court justices from sixty-five to seventy-five (Art.126), allowed justices to sit for a second nine-year term in a row (Art.148) and deleted the three-year limit of the chief justice term (Art.148). Current Ukrainian Chief Justice Mykola Selivon publicly hinted that he would speed up the review of these amendments by his Court to clear the way for their ratification at a nationwide referendum.[68] However, these proposals met serious opposition from political forces who expected to replace the majority of justices in September 2005 when their non-renewable term would end. Socialist Party leader Oleksandr Moroz accused the Ukrainian President of bribing the justices and argued against extending their terms in office.[69] This time the opposition won, and Kuchma withdrew these changes from the text of constitutional amendments, which was approved by Ukrainian lawmakers a few weeks before the Orange Revolution of December 2004. However, the year-long saga with the delayed replacement of the Constitutional Court Justices in 2005-2006 appears to favor Kuchma's side. This is because current President Yushchenko cannot use the Constitutional Court to fight against his opponents in the Ukrainian legislature.

However, there were also "tenure" amendments that decreased the length of tenure. In 1997, Taiwan's Constitution was amended to achieve what the Polish constitution-makers did away with in their new 1997 constitution. Taiwan's constitutional reform shortened the terms of the Council of Grand Justices from nine to eight years and provided for staggered appointments that coincide with the four-year presidential election cycle. This set of "tenure" amendments would "ensure that each President can appoint roughly half the Council".[70] The February 2003 amendments to the Kyrgyzstan Constitution reduced the tenure of the Constitutional Court justices from fifteen to ten years on the bench (Art.80(5)).[71]

This reduction was a clear sign of dissatisfaction of then President Askar Akaev with the existing constitutional review tribunal. Moreover, the Tulip Revolution of 2005 that ousted Akaev out of office failed to in-

68 "Konstitutsionnyi sud obeshchaet 'v operativnom poriadke' pomoch provesti politicheskuiu reformu", *ForUm* 26 February 2003, at <http://rus.for-ua.com/news/2003/02/26/111318.html>.

69 A. Moroz, "Meniat' sistemu vlasti neobkhodimo segodnia", *Zerkalo fedeli* 12-18 April 2003 No.14 (439), at <http://www.zerkalo-nedeli.com/nn/show/439/38263/>.

70 T. B. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge 2003, 120.

71 New provisions do not apply to the current Constitutional Court justices who continue to serve until the expiration of their fifteen-year terms (Art.V-12). The text of the new Kyrgyzstan Constitution is reproduced at <http://www.gov.kg/cgi-bin/page.pl?id=50>.

duce new political leaders to protect judicial tenure. In late 2005, current President Bakiev sponsored wholesale constitutional reform that seeks to abolish the Constitutional Court altogether. Experts from the Venice Commission blasted Bakiev's plans and insisted on preserving the tribunal. As of January 2006, international advisers together with Constitutional Court judges seemed to convince President Bakiev in preserving a separate Constitutional Court in exchange for reforming this tribunal after the constitutional referendum in 2006.[72]

One of the constitutional reform proposals in Armenia limits the Constitutional Court members' term in office to twelve years and lowers the mandatory retirement age to sixty-five instead of the previous seventy.[73] However, these proposals were not included in the text of the constitutional amendments decided by the constitutional referendum of May 2003, in which the majority of voters rejected any amendments to the 1995 Armenian Constitution.

Among failed attempts to extend the judicial tenure of incumbent chief justices are the Israeli and Hungarian cases. In Israel, in 1965 several members of the Knesset proposed to extend the age of retirement from seventy to seventy-five to keep the soon-to-retire Supreme Court President Izhak Olshan in office. The legal argument for this was similar to the Russian case, namely, to equalize the retirement age for the Supreme Court President with that of the Head of the rabbinical court, seventy-five. The timing of this initiative left a strong impression that supporters of Olshan wanted to prolong his stay at the Court. Similar to the Russian case, this attempt fueled the suspicions of a plot between the legislators and Olshan, who denied any involvement in this proposal.[74]

In contrast, the first Hungarian Constitutional Court President Laszlo Solyom openly proposed in 1998 to amend the constitution to extend the tenure of all incumbent justices from nine-year once renewable terms to twelve-year non-renewable terms. Here, the argument was practical rather than legal, namely, to prevent the total overhaul of the Court's composition and facilitate a smooth transition between incumbent and incoming members of the Constitutional Court. The timing of this initiative was very close to the 1998 parliamentary elections, and, of course, politicians

72 L. Saralaeva, "Kyrgyzstan: Saving the Constitutional Court," Institute for War & Peace Reporting Central Asia, No.424, 29 November 2005, at http://www.iwpr.net/?p=rca&s=f&o=258356&apc_state=henh; B. Malikova, "Chto mne zakony, kol' sud'I znakomy!," *Vechernii Bishkek* 1 December 2005, at <http://vb.kg/2005/12/01/tema/1.html>.

73 The Draft of the Constitution of Republic of Armenia (a copy kindly provided by Kristina Galstyan to the author).

74 S. Shetreet, *Justice in Israel: A Study of the Israeli Judiciary*, The Hague 1994, 409.

had other priorities. Under the existing rules, in 1998-1999 the remaining members of the Court faced the risk of not being re-appointed. Although Justice Solyom was sure that he would be reappointed, the new 1998 government announced that none of incumbent justice would be reappointed. Needless to say, new rulers did not want to lose a chance to appoint their own preferred nominees and used it to their fullest advantage. Meanwhile, public support for the Constitutional Court was failing, due to efforts by Solyom to remain on the bench and due to inactivity of the post-Solyom Court.[75] But Solyom honed his lobbying skills and became Hungary's President in 2005, thus, taking the meaning of "juristocracy" to the whole new level.

A careful observer may note that the majority of these attempts to change the top justices' terms of office occurred in the so-called "late democratization" countries and may be attributed to weak or undeveloped political commitment to judicial independence. However, this assessment depends on the criteria for assessing this commitment. Comparing it with the stability of the life tenure of the US Supreme Court justices is one thing. However, comparing it with the wholesale impeachment of the Argentinean Supreme Court would produce a different result, especially if one remembers that these "tenure" amendments were enacted in the 1990s, during the era of the "global diffusion of judicial power".[76] This means that politicians had to deal with much more powerful constitutional courts and could no longer impeach them.

Conclusion

In the current global "judicialization of politics" era, politicians do not quietly swallow court orders and also demand more accountability from judges.[77] Our analysis has shown one aspect of these pressures on judges: how political actors attempt to shape court decisions by "fine-tuning" the judicial tenure rules because, after all, courts consist of judges who issue those decisions.[78] This chapter has attempted to demonstrate that the process of changing the terms of tenure of the Russian Constitutional

75 K. L. Scheppele, "Democracy By Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)", Paper prepared for the Conference on Constitutional Courts, Washington University, St. Louis 1-3 November 2001, 33-34.

76 C. N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power*, New York, NY 1995.

77 See P. H. Russell and D. M. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, Charlottesville, VA 2001.

78 O. Andreeva, "Proverka na zakonnost'", an interview with Karelia Constitutional Court Chair Valentina Sukhacheva," *Kareliia* 26 January 2002, at <http://www.gov.karelia.ru/Karelia/856/20.html>.

Court justices in 1991-2001 was as difficult as the search for the "proper" length of their tenure. Once the Russian lawmakers agreed on the mandatory retirement age of sixty-five in 1991, they managed to change it three times in the following decade. Once they reached a compromise on a single twelve-year term for the RCC justices in the summer of 1994, it was changed seven years later. In addition to this, there were many failed proposals to "tinker" with judicial tenure. These frequent experiments with judicial terms of office generated conflicts among justices, have involved them in the political process, and have politicized the debates on judicial accountability. The "tenure" amendments to the Russian Constitutional Court statute showed that institutionalization of judicial independence is closely tied to the particular personalities of justices or judicial nominees, and any length of judicial tenure short of life appointment is set arbitrarily to make the Court more accountable. The Russian experience shows that lengthy debates over judicial tenure occurred in both contexts of legislative-executive confrontation under El'tsin (1994) and of legislative-executive cooperation under Putin (2001), and in all four cases of successful "tenure" amendments, the Russian legislature managed to have a final say in the question of the length of tenure of the RCC justices. This may be a sign of maturing Russian democracy but it comes at the expense of the RCC independence.

Politicians realize the link between judicial tenure and degree of judicial independence, but they also want to recruit loyal judges. This preliminary survey of cases of tinkering with tenure of judges of the highest national courts in thirteen countries beyond Russia show that the degree of judicial independence depends not only on the legislative texts, but also on the reputation of the courts and judges and on the commitment of political elites to an independent judiciary. How long judges stay on the bench does not depend on the letter of the law alone. The bargaining among politicians and judges may also determine the actual length of judicial tenure. On the one hand, successful and failed attempts to adjust the terms of office of incumbent justices may reinforce an infectious practice of changing judicial tenure in other countries at variance with standard constitutional guarantees of life tenure for all judges. On the other hand, it shows that politicians realize that the judiciary is slowly gaining power—"that is, jurisdiction over politically sensitive matters, the discretion to handle these matters, and the authority to produce compliance with their decisions."[79] Therefore, we are likely to witness more political struggles not only over judicial nominations, but also over the institutional features of high courts which will determine the balance

79 P. H. Solomon, Jr., "Putin's Judicial Reform: Making Judges Accountable as well as Independent", 11 *EECR* 2002 No.1/2, 118.

between an independent—and an accountable—bench. Future research will have to examine these struggles and see whether "the global diffusion of judicial power" constrains the reign of Joseph Stalin's famous dictum: "Cadres decide everything!"

Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform

Peter H. Solomon, Jr.

For fifteen years, Russia has experienced an extensive judicial reform that put into place the main institutional prerequisites for judicial independence. El'tsin era laws established life time appointments for most judges (until retirement age) and placed the discipline and firing of judges in the hands of the judicial community, all this to ensure security of tenure for judges. President Putin invested large sums of money in the courts to raise salaries of judges, add staff, modernize court operations, and expand the court system—and with this undercut to a degree the dependence of federal courts outside of the capital upon local and regional power. These changes did make a difference to the self-image of judges and to the way they handled ordinary disputes, especially those that pitted citizens against the government. But judges in the Russian Federation were still subject to pressure and influence in the cases that mattered to authorities or powerful persons. This was true in both courts of general jurisdiction and especially the *arbitrazh* courts that heard disputes among firms. Moreover, public trust in the courts, as measured in polls, remained low, even declining in the new millennium.[1]

All this has the flavor of *déjà vu* for Russian observers, not to speak of Western students of Soviet and post-Soviet law. At the same time it poses the question: "why"? Why has extensive institutional change relating to judges and courts, arguably necessary for a less dependent judiciary, proven insufficient to achieve a breakthrough in the conduct of judges, not to speak of how it is perceived? There are many sources of explanation, all of which have some validity and utility.

One source of explanation lies with the institutional reforms themselves. Those reforms may be incomplete or it may be too early for them to have made their mark. Or, the impact of reforms undertaken for courts and judges may be undermined by the absence of reforms in other sectors, such as law enforcement (police and procuracy) or public administration (whose officials may be called upon to implement court judgments).[2]

1 Peter H. Solomon, Jr., "Courts in Russia: Independence, Power and Accountability", in A. Sajo (ed.), *Judicial Integrity*, Leiden 2004, 225-252; *idem*, "Judicial Power in Russia: Through the Prism of Administrative Justice", 38 *Law and Society Review* 2004, 549-582; Mikhail Krasnov, "The Rule of Law," in M. McFaul *et al.* (eds.), *Between Dictatorship and Democracy: Russian Post-Communist Political Reform*, Washington, DC 2004, 195-212.

2 Rachel Kleinfeld Belton, "Competing Definitions of the Rule of Law: Implications for Practitioners", 55 *Carnegie Papers* January 2005, available at <www.CarnegieEndow-

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 79-91

Another kind of explanation focuses upon culture, as a general or specifically Russian problem. Politicians, officials, the public at large, and even judges themselves may not share the attitudes toward law, legality, and courts needed to support institutional developments. In assessing the achievements of the 1864 Judicial Reform, Harold Berman concluded that Russia had borrowed from the West the key institutional features of the administration of justice without the underlying ideas and principles that made them work. Such an assessment may well apply in part to the post-Soviet judicial reforms, sometimes in an obvious and open way. The new 2001 Criminal Procedure Code was designed to promote adversarial procedures and protection of the accused, principles valued by only a minority of legal scholars, let alone most law enforcement officials.[3] On the other hand, there is evidence of a demand for efficient and fair courts among small business people, and survey research indicates that the Russian public does want independent courts. At the same time, negative myths about law, reinforced by negative coverage of courts in the media, ensures the continuation of negative stereotypes of judges and courts.[4]

In the comparative study of legal transition, many associate progress in reducing inappropriate influence on judges, and corruption in public administration generally, with high levels and quality of political competition in a country or region. Thus, it is only when politicians or a hegemonic political *élite* or party experience a real threat of losing power that serious demand for independent and/or powerful courts emerges.[5] This macro-level explanation makes sense for some purposes, but it is of little help in understanding how and why courts operate as they do in Russia and elsewhere (not to speak of how to improve them).

ment.org/pubs>. Alexei Trochev, "Distrusted Courts: The Impact of State (In)capacity on Judicial Power in Post-Communist Countries", prepared for the Annual Meeting of the Canadian Political Science Association, London, Ontario, 2-4 June 2005; Piter G. Solomon, mlad., "Sudebnaia reforma v Rossii", 11 *Otechestvennye zapiski* 2003 No.2, 79-86.

3 Harold Berman, *Justice in the USSR*, Cambridge, MA 1961, 217-220; Peter H. Solomon, Jr., "The Criminal Procedure Code of 2001: Will It Make Russian Justice More Fair?", in W. Pridemore (ed.), *Ruling Russia: Law, Crime and Justice in a Changing Society*, London 2005.

4 Trochev, *op.cit.* note 2; Marina Kurkchiyan, "The Illegitimacy of Law in Post-Soviet Societies", in D. Galligan and M. Kurkchiyan (eds.), *Law and Informal Practices: The Post-Communist Experience*, Oxford 2003, 25-46; *idem*., "Researching Legal Culture in Russia: From Asking the Question to Gathering the Evidence", unpublished 2003.

5 Rebecca Bill Chavez, "The Construction of Rule of Law in Argentina: A Tale of Two Provinces", 35 *Comparative Politics* 4 July 2003, 417-437; Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge 2004; Anna Grzymala-Busse, "Political Competition and the Politicization of the State in East Central Europe", 36 *Comparative Political Studies* 2003, 1123-1147.

A more useful approach to explaining the limited impact of judicial reform in Russia (and other post-communist states) is to examine the actual worlds of judges, court officials, and people with whom they come into contact-to go beyond the formal institutions (and culture) to explore the informal institutions, that is the norms and practices relating to the activity of courts and judges on the ground. By informal institutions, I mean "socially shared rules—usually unwritten—that are created, communicated, and enforced outside of officially sanctioned channels". While informal institutions may complement or accommodate formal ones, many compete with or substitute for them.[6] No doubt informal institutions or practices reflect cultural dispositions as well, but through the medium of the actual incentives that motivate actors rather than an inertial legacy. In short, informal institutions embody the actual practices of relevant actors, and therefore lead to insight about the underlying dynamics.

The concept of informal institutions has been developed and refined in recent years by students of political and legal institutions in transitional regimes. But it is worthwhile recalling two venerable traditions in the study of informal practices and rules. One is Sovietology itself, the best exemplars of which emphasized the gap between formal institutions and the realities of public administration on the ground. From Soviet sources and *émigré* interviews alike, students of the Soviet experience came to appreciate the crucial role played by such informal institutions as the *tolkach* (the pusher or middleman who made the Soviet economy work); *pripiski* (the *de facto* rules of accounting, or how much and what ways one could cook the books); and of course the master concept of *blat* (the rules of interpersonal exchange).[7] While all of these institutions continued in one form or another into the post-Soviet world, a new informal institution also gained pride of place—the practices captured by the word *krysha* (protection services).[8] Another rich tradition of studying informal practices is found in criminology and the sociology of law and

6 Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda", 2 *Perspectives on Politics* December 2004, 725-740; Vladimir Gel'man, "The Unrule of Law in the Making: The Politics of Informal Institution Building in Russia", 56 *Europe-Asia Studies* November 2004, 1021-1041; Anna Grzymala-Busse, "Informal Institutions and the Post-Communist State", unpublished 2004; Daniel M. Brinks, "Informal Institutions and the Rule of Law: The Judicial Response to State Killings in Buenos Aires and Sao Paulo in the 1990", 36 *Comparative Politics* October 2003, 1-20.

7 Joseph Berliner, *Factory and Manager in the USSR*, Cambridge, MA 1958, esp. chapters 11 and 12; Stephen Shenfield, "The Struggle for Control of Statistics", in J.B. Millar (ed.), *Cracks in the Monolith*, Armonk, NY 1992, 89-120; Alena Ledeneva, *Russia's Economy of Favours:* Blat*, Networking and Informal Exchange*, Cambridge, MA 1998.

8 Alena Ledeneva, *Unwritten Rules: How Russia Really Works*, London 2001.

legal institutions. Empirical studies in the United States, United Kingdom, and Canada, often with an ethnographic dimension, revealed how law enforcement personnel developed their own norms of conduct reflecting their interests and mindsets, and in the process apply and even use laws in particular ways; and how these practices vary not only cross nationally but from city to city within particular countries, allowing one to speak of local court cultures.[9]

In this chapter, I examine and raise questions about two informal institutions in the world of judges and courts in the Russian Federation—the role of the chairs of courts; and the relationship between judges and procurators. In both instances, the starting point is formal institutions, but their impact is in turn modified, sometimes in counterproductive ways, by the informal practices. As we shall see, the role of chairs of courts in judicial discipline may undermine the principle of security of tenure embodied in the 1992 Law on the Status of Judges. On the other hand, the close relationship between judges and procurators has produced new informal practices that facilitate implementation of the new Criminal Procedure Code, while preserving the traditional function of trials as confirming guilt and applying punishment.

Chairs of Courts, Judicial Careers, and Outside Influence

The chairmen, or chairs, of courts in the Russian Federation (as in the USSR) are powerful figures who combine major administrative responsibilities with power over rank and file judges on their courts. The problem is that the administrative responsibilities place court chairs into networks of exchange with, if not also dependency on, government authorities in the districts and regions where their courts reside. Thus chairs become the natural point of entry for powerful persons with interests in particular cases. Chairs are also in a position to try to deliver on outside requests, either through assigning cases to mature or cooperative judges or through putting pressure on judges assigned to cases in some other way. (As of 2005, some courts had begun experimenting with case assignment by court administrators, deputy chairs, or even on the random basis by computer, a practice supported by the Chair of the Supreme Court Viacheslav Lebedev. In these courts, the principle of specialization still held sway, and as a rule the Chair retained the right to decide the assignment of especially complicated or important cases.)

9 James Eisenstein and Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts*, Baltimore 1977; Doreen McBarnet, *Crime, Compliance and Control*, Aldershot, UK 2004, part two; Richard Ericson, *Reproducing Order: A Study in Police Patrol Work*, Toronto 1982.

Before the establishment of the post of court administrator in 2000, chairs of courts had full responsibility for ensuring the administrative servicing of their courts, including the provision of utilities and supplies, maintenance and repair of the building, arranging the appearance at trials of accused in custody, as well as arranging apartments and holiday packages for their judges and court staff. Even with help from court administrators and regional judicial departments, the successful operation of many courts seems to require good working relations with the city and sometimes regional governments, not to speak of police and procuracy officials. Typically, the chairs of courts are persons of local original who as a matter of course have or seek places in networks of exchange. Open supplementary funding for courts, including donations from firms, was less common in 2005 than in 1997-98 (at the height of the courts' funding crisis), but there remained many ways that local authorities could facilitate the operations of courts and judges. At the same time, chairs of courts represented especially powerful figures *vis-à-vis* the rank and file judges on their courts, many of whom represented relatively new appointments.[10] To begin, the chairs handled the delivery of perks, especially apartments, even though changes in legislation promised a decline in perks in favor of increases in salary. More important, chairs shaped the careers of their subordinates. Rewards for good performance including promotion came to judges in part through positive evaluations written by the chairs (along with the achievement of acceptable quantitative indicators of performance). This pattern was normal in the judiciaries of civil law countries.[11] At the same time, the chairs played a crucial role in the disciplining of judges, deciding when to give unofficial warnings and when to invoke the formal process of review and possible firing by the judicial qualification collegia (JQC). Formally, most of the complaints came to the collegia from the chairs of regional courts, thereby providing another stage of review in cases against judges on district courts or justices of the peace. But this protection did not apply to judges sitting on the same court (*i.e.*, the regional, republican supreme, or city courts of Moscow and St. Petersburg).[12]

10 Peter H. Solomon, Jr., and Todd S Foglesong, *Courts and Transition in Russia: The Challenge of Judicial Reform*, Boulder, CO 2000; Peter H. Solomon, Jr., and Pamela Ryder-Lahey, *Model District Courts in Action: Achievements and Lessons in a Russian-Canadian Collaboration*, Ottawa 2004.

11 See, for example, Martin Schneider, "Careers in a Judicial Hierarchy", 25 *International Journal of Manpower* 2004, 431-446; David M. O'Brien and Yasuo Ohkoshi, "Stifling Judicial Independence from Within: The Japanese Judiciary", in P. Russell and D. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, Charlottesville, NC/London 2001, 37-61.

12 *Vestnik vysshei kvalifikatsionnoi kollegii sudei Rossiiskoi Federatsii* 2002 No.1, 2003 No.2,

The grounds for initiating disciplinary proceedings against judges included not only serious ones such as a pending criminal charge, breach of judicial ethics, or falsification of court documents, but also such broadly defined *peccadillo*es as producing red-tape, labor discipline infractions, and violations of the norms of material and procedural legislation.[13] It was up to the chairs of courts to decide when to treat such matters as grounds for a disciplinary proceeding. No doubt informal standards emerged, within particular courts, regions, or even nationally according to the dictates of the Supreme Qualification Collegium. At the same time, the chairs of courts retained considerable discretion, which they could use for good or ill, for example to punish judges who showed political immaturity by giving too many acquittals or refusing to cooperate in a case with a powerful intervener.

A group of recent examples of the misuse of discretion by chairs involves judges on courts in the city of Moscow, the city court itself (*Mosgorsud*, which has the administrative status of a provincial court) and the district or intermunicipal courts. Three judges who did not observe the informal rules of conduct in criminal cases lost their jobs as judges on other pretexts. Sergei Pashin joined the Moscow City Court in 1996 after playing a leading role in the preparation and promotion of judicial reform legislation. Among other things, he challenged the *modus operandi* of the court, by giving far more than the normal share of acquittals and providing legal justification that prevented changes by higher courts. Unpopular with the leadership of the court, Pashin committed a minor procedural violation by failing to complete the writing of a verdict before leaving the court for a lecture in St. Petersburg. The court's chair, Zoia Korneeva jumped at the opportunity to start disciplinary proceedings against Pashin, which led in turn to a 1998 decision to remove him from the court by the Moscow JQC, confirmed by the Higher QC, and only later reversed by the Russian Supreme Court itself. (Pashin's eventual departure from the judiciary in 2000 followed another incident in which he had publicly criticized a decision by another judge, an act that constituted a serious violation of judicial ethics.)[14] Another judge on *Mosgorsud*, Olga Kudeshkina violated at least two different norms—the expectation of cooperation with powerful interveners and the prohibition against one judge publicly criticizing another, especially one's chair. Kudeshkina appeared on radio station *Ekho Moskvy* in December 2003 to denounce the Chair of *Mosgorsud*,

especially "Resheniia kvalifikatsionnykh kollegii sudei i Vysshei kvalifikatsionnoi kollegii sudei Rossiiskoi Federatsii po p.1 st.12.1 (distsiplinarnaia otvetstvennost' sudei)" No.2, 23-63.

13 *Ibid.*

14 Solomon and Foglesong, *op.cit.* note 10, 35, 56.

Olga Egorova, for instructing her to work for conviction of an allegedly wayward police investigator, after an intervention from a top official in the Procuracy. The combination of defiance and whistleblowing led to the dismissal of Kudeshkina.[15] Finally, a judge on a district court in Moscow, Alexander Melikov, was removed from the judiciary at the end of 2004 for allegedly "violating the rights of the participants at trial, harming the interests of justice, and weakening the authority of judicial power", in the main because of lenient verdicts (suspended sentences and acquittals). As it happens, most were not protested by the procurator and the rest were confirmed by higher courts, but Melikov was unable to sway the Moscow Judicial Qualification Collegia from fulfilling Egorova's request.[16]

These stories from the courts of Moscow show that at least in this city the norm of deference by the Qualification Collegium to the Chair of the City Court led to misuse of disciplinary proceedings and undermining of the principle of security of tenure enshrined in the Law on the Status of Judges of 1992. The stories also show how other informal norms continued from the late 1940s, namely the avoidance of acquittals, the need to cooperate with law enforcement authorities in fighting crime despite their inability to marshal the proper evidence, and the need to help the chair of one's court deal with the political conjuncture of the day.

The situation in Moscow may represent an extreme, one end of a spectrum; Kudeshkina herself claimed that she never faced pressure from her chair when she worked as a judge in the provinces. But all the elements in the stories exist at least in lesser form throughout the country. Judges are expected to conform to expectations of their chairs and the higher courts regarding their verdicts and decisions, to cooperate with their chairs, and to be team players rather than dissidents or renegades. These are the elementary unwritten rules for a successful judge, whose

15 Iurii Kolesov, "Za otkrovennost': Verkhovnyi Sud otkazalsia vosstanavlivat' na rabote sproptivogo sudiu", *Vremia Novostei* 20 January 2005; Iurii Minklukha, "Verkhovnyi sud: Kritika nachal'stva—povod dlia uvolneniia sudi", *Strana.ru* 19 January 2005. After her firing, Kudeshkina started denouncing Russian justice overall, including in an open letter to President Putin. See Valentina Baranova, "Sudia Olga Kudeshkina: Devianosto protsentov nashikh sudei prodazhny ili upravliaemy", *Komsomol'skaia pravda* 7 Februrary 2005; Olga Kudeshkina, "Est li v Rossii nezavisimyi sud? Otkrytoe pis'mo prezidentu RF V.V. Putinu", available at <www.iamik.ru/20676.html>

16 Iurii Kolesov, "Sudebnaia diuzhina", *Vremia Novostei* 23 November 2004; Radio stantsiia 'Ekho Moskvy' interviu, 9 December 2004, available at <www.echo.msk.ru/interview/33408/iindex.phtml>; O.A. Egorova, "Predstavlenie o nalozhenii distsiplinarnogo vzyskaniia v vide dosrochnogo prekrashcheniia polnomochii sudi Dorogomilovskogo mezhmunitsipal'nogo (raionnogo) suda ZAO g. Moskvy Melikova Aleksandra Alekseevicha", *V Kvalifikatsionnuiu kollegiu sudei goroda Moskvy* 22 September 2004 No.1 (34), 352.

observance is necessary if they are to stay in office, let alone have a chance at promotion. For their part, the chairs of district courts are able to mobilize disciplinary proceedings against judges who do not please them, as long as they have the support of the chair of the regional court, who tends to dominate the Regional JQC even though he/she is no longer a member of it. The question remains: to what degree do these informal practices compromise or undermine the principle of "security of tenure" for judges, which is well established in law and formal institutions. The latter offer little protection to Moscow city judges who violate informal norms, but the principle may still be alive and well in large parts of the Russian Federation.

Just how extensive is the role of chairs of courts as conduits for powerful persons outside the courts to influence decisions cannot be answered without more evidence. Chairs of courts are usually part of local networks of exchange and often expected to cooperate. They themselves are subject to review and reappointment every six years (since 2001), a fact that may make some more responsive to the needs of other branches of government in their regions. But there is reason to believe that there is considerable regional variation in the conduct of chairs of courts, depending upon the local power configuration and the personalities of the chairs themselves.

Judges and Procurators

Apart from inappropriate outside influences on court decisions, the most objectionable feature of Soviet, and arguably Russian, justice was the "accusatory bias" (*obvinitel'nyi uklon*), a feature of both trials and the pretrial stage of criminal proceedings. The accusatory bias at trials was manifested in both official concepts and rules and unofficial practices, such as the discouragement of acquittals, and it was grounded in the relationship between procurators and judges. Identified as a core problem in the 1991 Conception of Judicial Reform, the accusatory bias was supposed to be reduced (if not eliminated) by the new Criminal Procedure Code of 2001 that began operation in 2002. Here we will examine how trials have changed under the new Code and its impact upon informal practices that were part of that bias.

According to official policy of the Communist Party of the Soviet Union, judges and courts were partners with law enforcement personnel in a common "struggle against crime". Moreover, operating within inquisitorial criminal procedure, Soviet judges led the courtroom interrogations, whether or not procurators or defense lawyers were present (procurators appeared in less than half of trials). Both of these aspects of judges' work

were part of the formal institutional design, none of which prevented judges from awarding acquittals to at least ten percent of accused in Soviet courts until 1947. After that, however, acquittals become a mark of bad work, if not failure, first of all for investigators and procurators, and by extension to judges as partners in the fight against crime. The decline of acquittals was rapid and dramatic, reaching by the early 1970s a small faction of a percent of verdicts. As I have explained elsewhere, cases that fell apart in trial because of weak evidence usually ended in a return for supplementary investigation or conviction for a lesser charge (a compromise verdict). Judges who gave more than the occasional acquittal were identified as mavericks and as a rule suffered criticism if not discipline or ultimately loss of their posts. If nothing else, higher courts often threw out acquittals, hurting the judge's quantitative indicator on "stability of sentence". Twenty years ago, I described the pattern of substitutions for acquittals as "informal norms".[17]

The Criminal Procedure Code of 2001 was a compromise document that injected many elements of adversarialism into Russian trials, without sufficient changes in the pretrial phase, where the interest of prosecution remained dominant. Still, the Code did call for significant changes in trials, especially in the role of the judge. The judge was to be converted from the lead questioner into a neutral umpire and leave the presentation of the case and questioning of witnesses to a procurator, whose attendance at trial was now mandatory (this meant that defense counsel also had to be present). Moreover, the most common means for avoiding acquittals when evidence proved insufficient, the return of a case to supplementary investigation at the end of the trial, was omitted from the Code. (The Constitutional Court had already ruled this institution unconstitutional in most situations). To some observers this promised an increase in acquittals in the future, despite the fact that acquittals were still viewed as unacceptable failures by most procuracy offices. Along with the approval of the Code, politicians decided to expand trial by jury as an option for all criminal cases heard in regional courts, notwithstanding the fact that juries had delivered acquittals at the rate of fifteen percent, a matter of concern to procurators.[18]

17 Peter H. Solomon, Jr., "The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice", 39 *Soviet Studies* October 1987 No.4, 531-555; *idem*, *Soviet Criminal Justice under Stalin*, Cambridge 1996, chapter eleven.

18 For analysis of the history, content, and implementation of the Criminal Procedure Code of 2001, see Peter H. Solomon, Jr., "The Criminal Procedure Code of 2001: Will It Make Russian Justice More Fair?", in William Pridemore (ed.), *Ruling Russia: Crime, Law and Justice in a Changing Society*, London 2005. See, also, Pamela Jordan, "Criminal Defense Advocacy in Russia Under the 2001 Criminal Procedure Code",

How have judges, procurators (and investigators) adjusted to these aspects of the new Code? What new patterns of conduct, including rules, have emerged? First of all, there are reports from some courts of a new phenomenon-regular informal meetings between judges and procurators (without the advocates) before trials begin. Such meetings appear wholly improper, as they give the prosecution side an opportunity to influence the judge.[19] But it appears that for the most part a different dynamic is at play. In fact, judges are usually checking whether or not the procurators are prepared for trial and able to conduct a prosecution in an appropriately professional manner! If the judge thinks that the procurator is not ready, the trial may be put off, or the judge may make suggestions to the procurator. The exercise conforms to the court's interest in avoiding wasted time in the courtroom. It might also help to avoid embarrassing situations where the prosecution case is poorly prepared or argued, and the judge might be forced to consider an acquittal for a person who is factually guilty, something few Russian judges tolerate.

Another question is how judges and other actors have responded to the end of returns to supplementary investigation as a substitute for acquittal. The answer is complex. Based on data from the first year and a half of the Code's operation (from mid 2002 to the end of 2003), one can say the following. Yes, there was a small increase in the frequency of acquittals (from 0.4 to 0.8%, 0.6% in cases of state prosecutions), and a small increase in cases stopped for rehabilitative reasons. There was also considerable use of a new institution (3%-4% of the time), return of cases to the procuracy for a short period of time (officially a week, but in practice often longer) to facilitate additional inquiries before the trial began. But the most dramatic change was a drop in the number of criminal cases coming to the courts, a drop that reflected more prosecutorial screening of weak cases, more adjustments by investigators in anticipation of such screening (especially efforts to limit the charges to what the evidence would support), and probably also the dropping of cases by investigators and reluctance of police to open cases in the absence of sufficient evidence. What is striking about these changes in practice, some already constituting norms, is their positive contribution to the underlying purposes of the institutional changes. Most of the new informal practices supported or reinforced the reforms in law, rather than undermining or substituting for them. That is, although a dramatic increase in the rate of acquittal

53 *American Journal of Comparative Law* 2005 No.1, 157-187.

19 K. Moskalenko (ed.), *Basmannoe pravosudie: uroki samooborony Posobie dlia advokatov*, Moscow 2004, 75-78.

did not emerge, it appeared that cases or charges not supported by the evidence were less likely to reach the courtroom.[20]

Trial by jury, however, was another matter, for the consistently high rates of acquittal delivered by Russian juries hurt the reputation, not to speak of the feelings, of law enforcement personnel. Although appeals from acquittals were supposedly to be limited (according to criminal procedure law) to situations of gross violations of rules of procedure or evidence, in practice procurators found grounds acceptable to the Supreme Court of the Russian Federation for gaining review of many of the acquittals rendered by juries, often leading to their quashing. To be sure, the Court could only order a new trial, and the accused could opt for a new jury trial and even achieve an acquittal for a second or third time!

The Conception of Judicial Reform of 1991 portrayed the procuracy as an obstacle to the development of fair criminal justice in Russia and treated procuracy power and judicial power as a zero sum game. In real life, things cannot be that simple. While officially courts are no longer treated as part of the "struggle against crime", in fact many judges who hear criminal cases continue to see this as part of their job and themselves as part of a joint project with law enforcement, albeit with specific roles. After all, the overwhelming majority of judges hearing criminal cases in the district courts came to their judicial posts after working as investigators or procurators. While these judges (especially the younger ones) understand and appreciate the adversarial trial and the role of judges in it, they share the procurator's concern with ensuring the conviction of the factually guilty. In Russia judges remain part of the world of law enforcement and usually cooperate with its representatives. While this tendency contributes to the accusatorial bias, the more serious problems for the accused require reforms of the procedures for pretrial investigation.

Russia is not the only country where procurators and judges handling criminal cases share an affinity. A striking example of that is Japan, where the career paths of the two groups of officials overlap even more than in Russia, and neither judges nor procurators regard acquittals as a normal outcome of a trial. The actual rate of acquittal in Japan is even lower than in Russia. It reflects a system of multiple screening of cases within the procuracy before they reach trial (an informal practice not mandated by law), and an emphasis on securing confessions. Japanese detectives and investigators have an advantage over their Russian counterparts in the special place of confession in Japanese culture. Nonetheless, they still

[20] For the statistical data and its interpretation, see Solomon, *op.cit.* note 18.

resort to unacceptable practices in order to secure confessions from recalcitrant suspects.[21]

Reflections

For more than a decade students of post-communist experience emphasized formal institutions-partly because of their prominence in contemporary social science, and partly because of their promise as a vehicle for directed change. But to understand the scope and limits of the impact of reform it is necessary to shift attention back to informal practices. While this proposition has universal validity, it is especially apt for the post-Soviet world, where divergence of informal practices from formal rules has a strong pedigree and public trust in formal institutions is still at a relatively low level.

The study of informal practices and institutions has its challenges. One is analytical, the difficulty in determining when a pattern of conduct constitutes a rule (has normative significance and is understood by those involved).[22] Another related challenge is empirical, how to gather the evidence about how officials actually behave and their underlying motivations and understandings of their conduct. The fullest studies of informal institutions involve ethnographic work, or at least interviews. But this is true for almost any detailed and nuanced study even of a formal institution.

Each of the studies presented here—of the role of chairs of courts, *vis-à-vis* the disciplining of judges and relations with the outside world; and of judge-procurator relations in the context of the new Criminal Procedure Code—represents a preliminary analysis that deserves fleshing out with more and richer data from different parts of the Russian Federation. To this might be added analysis of the informal practices connected to other parts of the institutional landscape of justice, such as the appointment of judges (especially to higher courts and positions of chair, and soon the reappointment of chairs) and the pretrial phase of criminal justice.[23] Finally, it is important to see courts and judges as part of larger contexts, not only the *vertikal* of judges and courts but also the practice of governance and political configurations in the districts and provinces where they are located.

[21] David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan*, Oxford 2002.

[22] Brinks, *op.cit.* note 6.

[23] See Alexei Trochev, "Judicial Selection in Russia: Towards Accountability and Centralization", in K. Malleson and P. Russell (eds.), *Appointing Judges in the Age of Judicial Power: Critical Perspectives*, Toronto 2005.

A further question is the kind of explanation of the flaws in Russian justice that knowledge of informal institutions provides. Such knowledge leads to understanding of mechanisms and dynamics deeper and more nuanced than an appreciation of formal institutions provides; and it is far more specific than cultural analysis by itself. But informal institutions may also be sufficiently close to the phenomenon being explained as to limit their explanatory power.[24] In fact, it is likely that underlying the position of chairs of courts and the demands placed upon them is a set of power relationships that are manifested in personal networks. What politicians and powerful people expect to obtain through network relations is another part of the story. In short, learning about the informal practices, which characterize the administration of justice, is vital to understand how powerful people have leverage. A full appreciation of the "why" may require consideration of other factors as well and considerable imagination.

24 Herbert Kitschelt, "Accounting for Post-Communist Regime Diversity: What Counts as a Good Cause?", in R. Markowski and Edmund Wnuk-Lipinski (eds.), *Transformative Paths in Central and Eastern Europe*, Warsaw 2001.

Judicial Review of Governmental Actions: A Tool for Russian NGOs?

Anna Jonsson

Introduction

This contribution takes its starting point in the idea of domestication of international standards and human rights, and the legal tools that such a process provides for NGOs and individuals, such as judicial review, rights enforcement, and a rights-based idea of public law. It focuses on the role of NGOs in this process, as potential public interest litigators on the one hand, and providers of free legal aid, assistance and representation on the other. Three questions will be discussed: first, what are the standing rules for NGOs before the Constitutional Court of the Russian Federation, and courts of general jurisdiction within the field of public law? Secondly, what role can NGOs play as providers of legal assistance and legal aid in Russia? And finally, in what political climate do Russian NGOs find themselves today and what are the potential consequences for individuals' rights protection? As we shall see, the prospect for Russian NGOs being able to use judicial review of governmental actions[1] as a tool for claiming accountability and help individuals to obtain redress is very important, taking into account the not-so-generous Russian State legal aid scheme concerning civil and administrative law issues.[2] However, it is becoming increasingly limited due to the Russian State's hardening attitude towards human rights organizations, which obviously constitutes a serious reason for concern.

The Support Structure Explanation and Why Human Rights NGOs are Important

In his book *The Rights Revolution*, Charles R. Epp shows that rights revolutions are primarily a function of pressure from below and that the pressure from below is helped by an effective support structure for legal mobilization. Support structures preceded and supported the rise of rights revolutions in, for example, the United States. The support structure for legal mobilization consists of, *inter alia*, rights-advocacy organizations, rights-advocacy lawyers, and differentiated and pluralistic sources

1 Governmental action is broadly defined for the purpose of this contribution and, hence, includes statutes, sub-statutory legislative acts, decisions, etc.

2 See Anna Jonsson, *Judicial Review and Individual Legal Activism: The Case of Russia in Theoretical Perspective,* Uppsala 2005, 290-294.

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 93-108

of financing, for example governmental financing and private funding.[3] Earlier research shows that political pressure and organized support for protection of individual rights did have an impact on the judicial agenda. However, Epp's study differs from this research in that his emphasis is on material resources, difficulties in obtaining these, and the key role of material resources in civil rights litigation.[4] This is called *the support structure explanation* of rights revolutions.

It could be argued, and rightly so, that the Russian case is not comparable to the countries that Epp discusses. Russia does not have a 200-year history of liberalism, and Russian courts have not been dealing with business disputes for 150 years before turning to civil rights. In addition, Russia has a civil law system and not a common law system. However, that fact does not in itself make an investigation of Russian NGOs and their use of judicial review superfluous, especially since a support structure in itself is vital for a process of changing concepts of rights in countries experiencing a legal transition. Additionally, it is reasonable to apply Epp's reasoning also in studies of states with a civil law tradition, especially if the state in question either has a constitutional court or a chamber of the supreme court practicing judicial review, with the power to declare laws violating the constitution null and void. In this sense, a 'negative law-making process' exists which can be used by citizens to manifest discontent with the outcome of the political process. One important aspect related to the (negative) law-creating activity of courts is that this activity depends on specific actors, for example private parties, NGOs, and labor unions, to initiate the proceedings. Few courts have the right to initiate cases *ex officio.* Therefore, an actor perspective will contribute to an increased understanding of the potential societal effects of judicial review.

Using the legal system to achieve political and legislative ends is not uncommon in both common law and civil law legal systems. Developing a support structure to use the courts for political change has been a political strategy of liberals and egalitarians, especially in the United States. In civil law countries, the phenomenon is relatively new, but on the increase.[5]

3 Charles R. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in a Comparative Perspective*, Chicago, IL 1998, 20-21.

4 *Ibid.*, 3.

5 *Ibid.*, 22. Using courts for political agendas is not uncommon in Europe. However, the support structure strategy does not seem to be as developed. Nevertheless, in the European post-socialist States, public interest law organizations have constituted a vital part of democratization and rule-of-law building projects.

Rules Concerning Standing Relevant for NGOs

Rules Concerning Standing before the Constitutional Court of the Russian Federation

Citizens, associations of citizens, and other agencies and persons specified in federal law have the right to petition the RF Constitutional Court in cases when a law applicable to, or subject to application in, a specific case violates constitutional rights and freedoms of citizens. This recourse can be both individual and collective.[6]

In the Udmurtia case, a group of individuals filed a complaint, claiming that a regional law violated their constitutional rights. The RF Constitutional Court decided to treat it as an individual complaint since the application was founded on an application of the reviewed law in a specific case, involving one of the claimants only. Thus, it is required that all claimants affected by the application of the law to be reviewed should have filed a complaint before a court of general jurisdiction for the RF Constitutional Court to consider it a collective application. In order to enjoy collective standing before the RF Constitutional Court, individuals should prove that the law to be reviewed by the RF Constitutional Court is applicable to their case through being a party in the original court proceedings.[7] The plaintiff has the burden of proof concerning the applicability in a specific case of the law that is said to violate their constitutional rights and freedoms. Thus, for admissibility it is required that the law whose constitutionality is questioned affects constitutional rights and freedoms of the claimant,[8] that the law is subject to application in the specific case and that it is, or has been, under consideration by a court of law or another agency.[9]

A public association will have standing when a law supposedly violates individual or collective constitutional rights of its members or of the association *per se*. In the Union of Advocates Decisions of 29 March 1995,

6 According to Art.125 (4), RF Constitution, and Art.96, Federal Constitutional Law on the Constitutional Court. See, also, V.V. Lazarev (ed.), *Konstitutsiia Rossiiskoi Federatsii*. *Kommentarii*, Moscow 2001, 604.

7 Ruling of the RF Constitutional Court on the Constitutionality of the Law of the Udmurt Republic of 17 April 1996, "On the System of Governmental Bodies in the Udmurt Republic", 24 January 1997.

8 See, for example, the RF Constitutional Court decision of 11 March 1996, "On the Constitutionality of Art.1 (3), Federal Law of 20 May 1993, 'On Social Protection of Citizens [...]'", available at <http://ks.rfnet.ru/postan/p7_96.htm>. In this case, the claimant argued that his constitutional right to a decent environment and social protection had been violated.

9 According to Art.97, Federal Constitutional Law on the Constitutional Court.

the RF Constitutional Court ruled that a public association, in this case the Union of Advocates, did not have standing before the Court unless its complaint was related to a concrete case.[10] In addition, legal persons created for the purpose of realizing constitutional rights have standing before the Constitutional Court. In one case, the question was whether a legal person established for the purpose of safeguarding individual rights and freedoms as protected by the Constitution of the Russian Federation would have standing before the RF Constitutional Court. The Constitutional Court found that legal persons established for the purpose of realizing constitutional rights and freedoms, in this case the right to entrepreneurial activity and the right to private property as both an individual and a collective right, have standing before the RF Constitutional Court.[11] The Court has also ruled that a charitable foundation does not have standing if the contested law cannot be applied to it. The non-commercial organization was denied standing before the RF Constitutional Court on the grounds that the contested law was not directly applicable to the organization *per se*.[12] In addition, public interest litigation has been ruled out by the Court, in the sense that if a plaintiff has initiated abstract judicial review in a court of general jurisdiction before turning to the RF Constitutional Court, then the contested norm cannot be considered to have been applied in a specific case, and hence the RF Constitutional Court will not hear the case.[13] In conclusion, public interest litigation is not recognized by the RF Constitutional Court. In order for NGOs to enjoy standing, its— or its members'—constitutional rights and freedoms must have been affected by the contested statute.

Rules Concerning Standing before Courts of General Jurisdiction: Judicial Review of Normative Acts

In Russia, courts of general jurisdiction consider cases emanating from public legal matters. They exercise judicial review of governmental actions,

10 The decision is unpublished. For a summary, see the text compiled by Ger P. van der Berg, "Russia's Constitutional Court: A Decade of Legal Reform. Part 1, Summaries of Judicial Rulings", 27 *RCEEL* 2001 No.2-3, 222-223.

11 This case concerned, *inter alia*, a joint-stock company: Decision of 24 October 1996 "On the Constitutionality of Art.2 (1) of the Federal Law of 7 March 1996, [...]", available at <http://ks.rfnet.ru/postan/p17_96.htm>.

12 Decision of 1 March 2001 (unpublished). For a summary, see van den Berg, *op.cit.* note 10, 450.

13 An individual had addressed a general court in order to protect a public interest. He did not claim violations of his constitutional rights and freedoms. Decision of 4 December 1997 (unpublished), see van den Berg, *op.cit*. note 10, 294.

which are not statutes.[14] In the following, the focus will be on the Civil Procedure Code (CPC) and the Federal Law "On Appealing to a Court of Law [Concerning] Actions and Decisions Infringing the Rights and Freedoms of Citizens" (hereinafter the "Law on Appeal")[15]—hence, on administrative procedural rules as part of civil procedure. Administrative procedure law is recognized in Russian legal doctrine as a special branch although it has not been codified as yet.[16]

In the 2002 CPC, administrative procedure is dealt with in Chapters 23-26. It is stipulated that courts of general jurisdiction consider administrative cases:[17]

— initiated by citizens, organizations, and procurators contesting the legality of normative acts, or parts thereof, if another court according to federal law is not to consider the complaint;
— concerning complaints of decisions, actions, or inactions of state bodies, bodies of local self-government, civil servants and state and municipal officials;
— concerning the protection of election rights and participation in popular referendums;
— other cases related to public law matters which according to federal law fall under the jurisdiction of courts of general jurisdiction.

According to the 2002 CPC, concerned individuals and organizations, political actors, and in some cases procurators, can initiate judicial review of normative acts before a court of ordinary jurisdiction.[18] In order for

14 See Art.245 CPC, adopted on 14 November 2002 and entered into force on 1 February 2003. See, also, the Resolution of the Plenum of the RF Supreme Court, No.2, 20 January 2003, "On Questions Related to the Adoption and Entering into Force of the New CPC". The CPC is also applicable to cases of judicial review of administrative decisions, acts or omissions, according to Art.6, Law "On Appealing to a Court of Law [Concerning] Actions and Decisions Infringing the Rights and Freedoms of Citizens", entered into force on 27 April 1993. Courts of general jurisdiction also consider cases concerning decisions and acts or omissions of bodies of local self-government. See Art.52 , "Federal Law on General Principles of the Organization of Local Self-Government in the Russian Federation", *SZ* 1995 No.35 item 3506.

15 The Law of the Russian Federation "On Appealing to a Court of Law [Concerning] Actions and Decisions Infringing Citizens' Rights and Freedoms", adopted 27 April 1993 and amended on 14 December 1995, *SZ* 1995 No.51 item 4970.

16 E. A. Vinogradova, "Procedural Law in Russia. Judicial Procedures of Resolving Disputes in the Economic Field", in J. Tolonen and B. Topornin (eds.), *Legal Foundations of Russian Economy*, Helsinki 2000, 206.

17 See Art.245, CPC.

18 The question of what is a normative or a non-normative act is, in itself, an important legal issue with many difficulties. However, it is outside the scope of this chapter to enter into that discussion in detail. Normative acts are those which are acts ap-

individuals to have standing, they have to state in their application what rights and freedoms have been violated by the normative act. The same applies to organizations.[19] Interested persons whose rights, freedoms, and legal interests have been infringed have the right to address a court in order to safeguard their interests. However, when stipulated by the CPC or other federal laws, civil cases can be initiated by a person acting in the interest of others whose rights and freedoms have been infringed—be it private persons, an unspecified group of people, the federal state, federal subjects, or municipal organizations.[20] Furthermore, in cases stipulated by law, state and local-governments bodies, organizations, and individuals have the right to complain to a court of law in order to protect rights, freedoms and legal interests of other persons if so has been requested. In addition, the actors mentioned here may act to protect a legitimate interest of an undecided group of people. Applications can be filed *ex officio* in order to protect legitimate interests of incapacitated persons and minors.[21] Interestingly, also the *Prokuratura* can initiate judicial review of normative acts of state bodies, in the interest of the public, that is in the interest of the federal center, federal subjects, and municipal organizations. It can also initiate judicial review in the interest of individuals, either as a group whose total membership is not known, or as individual persons that due to poor health, age, or incapacity cannot themselves proceed with the case. In this context, it is also interesting to note that procurators may participate by stating views in cases where private persons are usually the weaker party and in which much is at stake for the individual. Examples include eviction cases, labor issues, and claims for damages in cases of wrongful death or bodily injury.[22]

In conclusion, citizens and organizations who consider that their rights and freedoms as stipulated in the Constitution, laws, and other normative acts, have been violated by normative acts adopted by state bodies, bodies of local self-government, or civil servants can complain before a court of law and ask that the normative act be declared, in whole

plicable to an indefinite group of people, subject to application more than once and independently of having once initiated or halted a specific legal relationship. See the Resolution of the Plenum of the RF Supreme Court "On Questions Related [...]", *op.cit.* note 14, Sec.12. Normative acts are to be registered with the Ministry of Justice. Cf. E. P. Danilov, *Grazhdanskii Protsessualnyi Kodeks Rossiiskoi Federatsii*, Moscow 2003, 426.

19 See the Resolution of the Plenum of the RF Supreme Court "On Questions Related [...]", *ibid.*, and Arts. 3, 4, and 251 (5), CPC.

20 Art.4 (2), CPC.

21 Art.46 (1), CPC.

22 Art.45 (1)(3), CPC.

or in part, in violation of the law and hence inapplicable (*nedeistvuiushchii),* not null and void (*nedeistvitel'nyi*). In addition, a procurator does have the right to initiate a case before a court within the limits of his competence, as established in the CPC and the Federal Law on the Procuracy. In conclusion, public interest litigation by public organizations is possible before courts of general jurisdiction concerning normative acts with an administrative character.

Rules Concerning Standing and Judicial Review of Non-Normative Acts

Judicial review of non-normative, administrative acts is governed by the "Law on Appeal" and the 2002 CPC. Collegial and individual actions, decisions, or inactions by a state body, a body of local self-government, establishments, enterprises, and their associations, public associations, state officials or civil servants (including municipal employees) can be challenged—jointly or individually when:[23]

— rights and freedoms of citizens are violated by actions or decisions taken by the bodies mentioned above, or
— citizens are hindered in their exercise of rights and freedoms due to obstacles created by actions or decisions on the part of the bodies mentioned above, or
— an obligation has illegally been imposed on a citizen, or a citizen has illegally been made subject to some kind of responsibility.

Citizens and organizations have the right to file a complaint against decisions, actions, and inactions of state bodies, bodies of local self-government, civil servants, and state and municipal officials that violate their rights and freedoms.

Standing rules according to the CPC and the "Law on Appeal" require that the plaintiff's rights have been infringed by the contested decision, action, or inaction. On the request of the injured party, standing can be transferred to authorized representatives of public organizations and labor collectives. In addition, the ombudsman can invoke a court proceeding in order to protect rights and freedoms that have been violated by a decision, action, or inaction of state bodies and public servants.[24] Still, personal harm or difficulties need to be shown by the claimant. Although standing can be transferred, this will only happen with the direct consent of the party concerned. Victim autonomy is thus of concern to the legislature within this framework. It could be argued that this is in congruence with the nature of the matter since this law deals with, *e.g.*, decisions directed

[23] According to Art.2 (1)(2), "Law on Appeal", and Art.255, CPC.

[24] Art.29 (1), Federal Constitutional Law on the Commissioner for Human Rights, signed by the RF President, 26 February 1997.

to a limited group of people or to individual persons. Thus, they do not have general application, and hence the possibility to engage in public interest litigation is restricted.

Interestingly, citizens and organizations have the right to initiate both judicial and administrative review.[25] Should judicial review be initiated, then the complaint can be filed either in a court of law where the plaintiff lives or in a court of law where the body or person responsible for the decision, action, or inaction is located.[26] This solution has the potential to enhance access to justice and it is quite important for a country of Russia's size and taking into account the poor socio-economic situation of many individuals living in Russia. A court has the right to suspend enforcement of a contested decision until its decision has entered into legal force.[27]

According to the "Law on Appeal", citizens of the Russian Federation have a right to complain to a court of law if they consider that their rights and freedoms have been violated by an act or a decision by a state body, a body of local self government, establishments, enterprises, and their associations, public associations, official or civil servants.[28] Thus, if compared with the CPC, this law includes a wider number of bodies and organizations against whose decisions or actions complaints can be filed before a court of law. The CPC does not include establishments, enterprises, and their associations, and public associations. According to the Resolution of the Plenum of the RF Supreme Court "On Questions Related to the Adoption and Entering Into Force of the New CPC", questions of law that arise in relation to establishments, enterprises, and their associations, and public associations should be resolved as private law legal matters, not as questions of public law.[29]

25 According to Art.254 (1), CPC.

26 Questions of which court has jurisdiction are dealt with in Arts. 24-27, CPC. Complaints over permission denied to leave Russia are filed in the highest Regional Court of General Jurisdiction of the federal subject in which the decision to leave the country has been refused. See Art.254 (2), CPC. This rule is applicable when the person whose request to leave the country has been refused on the basis of that person having divulged information constituting state secrets.

27 According to Art.254 (4), CPC.

28 Art.1, "Law on Appeal".

29 Still, the organizations mentioned here could have power, through delegation, to fulfill state or administrative tasks. And if this should be the case, it is not unlikely that the relationship between the individual and the organization performing the task must be considered as an administrative law relationship. However, the Resolution is not clear on whether the CPC, Chapters 23-25, and the "Law on Appeal" apply to private bodies engaging in activities that, as to their substance, are to be described as state administrative law activities. The RF Constitutional Court has ruled that the state may transfer parts of its public functions to a public association

Conclusion

As shown above, the range of *standing* in the Russian system is broad and includes, *inter alia*, governmental actors, public organizations, as well as individual citizens, alone or in groups. Still, the question of standing rules is not easily determined. In order to reach any conclusions as regards *locus standi* of NGOs, attention will have to be paid to which court the case is being handled by, and what kind of governmental action is being challenged, a statute or a sub-statutory act, a normative or a non-normative act.

NGOs can have standing before the RF Constitutional Court, should a statute violate the organization's or its members' rights and freedoms as stipulated in the Constitution of the Russian Federation. Public interest litigation before the RF Constitutional Court is not possible in abstract cases. Concerning normative acts which are not statutes, courts of ordinary jurisdiction exercise review, and public interest litigation of NGOs is possible. When it comes to non-normative acts, the role of NGOs is limited in comparison and public interest litigation in abstract cases is not recognized.

Legal Assistance and the Role of NGOs in Civil and Administrative Legal Matters

According to the Constitution of the Russian Federation, every person should be guaranteed the right to qualified legal assistance, to be rendered free of charge when provided for by law.[30] In addition, according to the Constitution, every victim of abuse of power should be protected by law. The state is obliged to ensure access to justice and compensation for damage caused by the abuse of power.[31] One major task of the Russian bar associations is to ensure that Russian citizens have access to legal assistance. The "Law on Advocacy" explicitly stipulates that federal monies should be provided for legal aid in criminal cases. However, the law is silent concerning the Federal State's financing of legal aid in civil and administrative law cases and it is unclear what the Russian Federal State is providing in terms of financial support in civil and administrative law cases.[32] It is clear however, that the cost of providing legal assistance in

with obligatory membership, for example notaries and lawyers, without violating the Constitution. Decision of the RF Constitutional Court of 19 May 1998, (15-P); available at <http://ks.rfnet.ru/postan/p15_98.htm>.

30 Art.48 (1).

31 Arts. 52 and 53.

32 In criminal cases, the funding comes from the federal budget: see Art.50 (5), Criminal Procedural Code. See, also, Art.25 (9), Federal Law on Advocacy and the Bar in the Russian Federation (hereafter the "Law on Advocacy"), *SZ* 2002 No.23 item 2102.

civil and administrative law cases should be covered by the federal subjects and regional bar associations. For example, logistical matters, allocation of office premises, housing of advocates, and the financial assistance to bars for maintaining law centers[33] is to be regulated by normative legal acts of federal subjects.[34] In addition, the list of documents that has to be presented by an individual in order to benefit from free legal assistance is stipulated by regional laws or other regional normative acts. Likewise, the procedure for submitting the required documents is to be established by regional law.

The fact that the preconditions, both economic and formal, are to be established by regional law might cause inequality when it comes to *de facto* and *de jure* access to legal aid and assistance in the Russian Federation. Several factors have to be taken into consideration, for example that the economic situation of the federal subjects varies considerably. Several federal subjects are suffering from a weak and non-progressive economy, which might have an effect on the availability of free legal assistance. In addition, since the *regional* minimum wage determines whether someone is entitled to legal assistance in civil and administrative cases, there can be significant differences throughout the country. Additionally, the requirements of what documents have to be submitted, and how, can also vary to a considerable degree between different federal subjects. Complicated administrative procedures are already a problem in Russia; hence, every situation that might cause additional administrative complications is undesirable.

Free legal assistance in civil and administrative cases should, according to the "Law on Advocacy", be provided to citizens of the Russian Federation whose average personal income is below the minimum wage as established by regional law. These individuals have the right to free legal assistance concerning demands for: maintenance payments, compensation

33 As a main rule it is up to each advocate to either establish or join the advocacy body of their choice. In only one case can a bar take action to establish an advocacy body and that is when the total number of advocates in a judicial district amounts to fewer than two per federal judge. Should that be the case, then the relevant regional government agency can instruct the regional bar to establish a law center, in order to guarantee that free legal assistance is available. A law center is a non-profit organization set up in the form of a foundation. See Art.24 (1)(2), "Law on Advocacy". Setting-up, activities, dissolution, etc. of the law center are regulated by the "Federal Law on Non-Profit Organizations" and by the "Law on Advocacy".

34 Art.24 (3), "Law on Advocacy". Regional legislative assemblies will consider and decide how to implement the request to establish a law center, by finding a post for it in the regional budget and follow up on the spending of allocated resources. A.P. Guliaev, K. E. Rivkin, O. B. Saraikina and C. M. Iudushkin, *Kommentarii k Federal'nomu Zakonu ob Advokatskoi Deiatel'nosti i Advokature*, Moscow 2004, 156.

for injury caused by death of the bread-winner, and compensation for maiming or bodily harm in connection with work activities, considered by a court of first instance. Free legal assistance is also provided to veterans of the Great Patriotic War (matters connected to entrepreneurial activities are excluded). In addition, citizens of the Russian Federation can obtain free assistance in order to draft applications for pensions and benefits. Citizens, who have been victims of political repression, are granted free legal assistance in matters of rehabilitation. In addition, free legal assistance should always be provided to minors, kept in children's homes and borstals.[35]

A vibrant support structure, as defined by Epp, is characterized *inter alia* by differentiated and pluralistic sources of funding, including both governmental and private sources. Such a structure is necessary for a "democratization" of access to justice. From that aspect it is unfortunate that one of the weakest components of the Russian support structure is the lack of, both state and private, financial resources for rights litigation. Although, according to Russian law, free legal assistance is to be provided for poor people, this has not so far been an area of state priority. In addition, it has been increasingly difficult lately for human rights organizations engaged in rights litigation to obtain necessary funding from foreign sources.[36]

In conclusion, although legal assistance is guaranteed by the Constitution, the Russian Federal State only provides funding for free legal assistance in criminal cases. Free legal assistance in civil and administrative cases is to be funded by means provided for by federal subjects and regional bar associations. Thus the Federal State, as such, is not the provider of legal assistance in these cases. That is to be provided by advocates, *i.e.,* members of bar associations. Considering the history of Russia as a repressive state, it might be a good thing that citizens do not necessarily have to turn to a state body in order to obtain legal assistance in civil and especially administrative law issues. In addition, it might be reasonable that a private organization like the bar will cover the cost for and take responsibility for providing legal aid, since it is a professional body and since its members are engaging in lucrative business—the providing of free legal assistance can be considered a redistribution of means. Still, the contemporary Russian system is suffering from several weaknesses. The bar is still quite weak due to poor finances and internal struggles. In addition, several lawyers are choosing not to become members of the

35 According to Art.26, "Law on Advocacy".

36 Apparently reforms of the Russian legal aid system are under way. However, it seems that they are state-oriented and do not involve Human Rights organizations.

bar in order to avoid having to provide free legal assistance, since it takes time, cases are not rare, and especially since remuneration is low and uncertain. Thus, it is more attractive to practice law as an in-house lawyer or with a law firm that is not a member of the bar. And the consequences are that the availability of state-provided free legal aid and assistance is quite uncertain, which in its turn means that there will be a larger role for human rights organizations to play in this context. We now move on to consider the political climate in which Russian human rights NGOs find themselves. This approach allows us to make an overall assessment of the availability of free legal aid and assistance in Russia and the consequences of the state's policy towards foreign-funded NGOs.

Civil Society and Human Rights Protection in Russia

Russian human rights organizations play an important role in rights protection in Russia. Not only do they provide free legal aid, assistance and representation, but they also spread knowledge and raise awareness of individuals' rights and freedoms and of the channels available in order to obtain rights protection. Several NGOs have been successful in getting their clients' cases heard by the European Court of Human Rights in Strasbourg.

The Constitution of the Russian Federation stipulates freedom of association for all individuals, including the guarantee of free activity for public associations.[37] Public organizations are to be equal before the law. However, they can be prohibited if they aim to violently change the constitutional system of the Russian Federation, distort the security of the state, create unconstitutional military units, breach the integrity of the Russian Federation, and if they stir up social, racial, national, and religious conflict.[38] The legal framework for Russian civil society encompasses, beyond the Constitution itself, the Federal Law on Public Organizations,[39] the Federal Law on Charitable Activities and Charity Organizations,[40] and the Federal Law on Non-Commercial Organizations,[41] and others.

37 See Art.30 (1)(2). However, freedom of activity can be restricted in accordance with Art.13. In addition, all public and social associations are bound by the Constitution; see Art.15 (2). According to Art.19 (2), the equality of individual rights and freedoms is to be guaranteed irrespective of membership in public organizations.

38 Art.13 (4)(5).

39 Adopted 19 May 1995, No.82-F3.

40 Adopted 11 August 1995, No.135-F3

41 For a more extensive list, including the official name of the laws and their full text (in Russian), secondary legislation, and other information, visit *Legislation on Line*, at <http://www.legislationline.org>.

In its *2003 NGO Sustainability Index*, the United States Agency for International Development (USAID) describes the legal environment of Russian NGOs as "confusing, restrictive, and inhospitable".[42] The legal environment is described as backsliding, while further deterioration is expected in the coming years. Especially, it is difficult for organizations to establish a sufficient financial ground for self-sustainability, due to taxes on grants, a limited possibility to generate revenue tax-free, and constant surveillance by the *FSB*.

Russian NGOs working to strengthen democracy are largely depending on foreign resources. The Russian State does not, however, support and promote foreign funding of the Russian civil society sector, which has become even more apparent during the latter half of 2005. To some extent it is understandable that a state needs to control the inflow of money, for example in order to safeguard the security of the state. However, it is highly questionable whether this goal justifies centralized and increasingly bureaucratized control of all foreign funding of Russian NGOs. In combination with a high tax burden on NGOs receiving foreign support, this development does not contribute to the strengthening of civil society.

In the beginning of 2006, President Putin signed a new law amending laws on NGOs.[43] International and national NGOs, the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE) and a large number of individual states have been highly concerned about the potentially negative effects of this new law. The law further increases control by the Russian authorities of NGOs by enhancing the oversight of registration, funding and activities. The law has also been criticized for leaving too large a margin of discretion for authorities when implementing the law. The law is also considered to violate the internationally recognized right to form, join and participate in activities by NGOs, and to violate "the right to solicit and receive voluntary financial contributions from international sources for the purpose of promoting and protecting human rights". Hence, it does not meet important OSCE commitments.[44] This

42 Russian lawyers active in the NGO sector, members of the Duma, and officials in the Ministry of Justice described the legal environment for NGOs as controversial and ineffective. "Russia", *The 2002 NGO Sustainability Index for Central and Eastern Europe and Eurasia*, USAID, 159, 161, available at <http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2003/russia.pdf>. In addition, on the disregard for the law and the weakness of state institutions supposed to enforce the legislative framework that is supposed to support NGOs, see Marcia A. Weigle, "On the Road to the Civic Forum: State and Civil Society from Yeltsin to Putin", 10 *Demokratizatsiia* Spring 2002 No.2, 117-146.

43 Federal Law No.18-FZ, 10 January 2006.

44 See, for example, "U.S. Says Russian NGO Law Does not Meet Human Rights Commitments", US Department of State Bureau of International Information Programs, 27 January 2006.

development in combination with an increasing "spy-mania" surrounding several Russian NGOs and non-Russian embassy-personnel puts a *de facto* restriction on Russian NGOs ability to communicate and interact with non-Russian NGOs and other actors of importance for a strong civil society.

In addition, human rights organizations critical of the Russian State are, according to several sources, subjected to harassment by the police, the *FSB*, and tax authorities.[45] Denial of mandatory registration of NGOs and arrests of activists are examples of difficulties that human rights and environmental organizations, by definition not considered as state-friendly, are subjected to. The situation for human rights organizations working with Chechnya-related cases is particularly grave.[46] Apparently, 300 NGOs were shut down in 2005, and 400 cases are pending.[47] There are several reports as to the improper and selective use of this possibility to shut down undesired NGOs, *i.e.*, organizations that could prove problematic for the state, especially human rights and environmental organizations.[48] The last organization in order to be subjected to this treatment is the prominent Research Centre for Human Rights in Moscow.[49]

Moreover, the Russian legislative framework is not sufficiently encouraging to charity in order for national donors to fill the gap that might arise if international and foreign donors withdraw from Russia.[50] Thus, weak domestic pluralism as to funding, harassment by the *FSB* and vari-

45 See, for example, "Russia", *The 2002 NGO Sustainability Index*, *op.cit.* note 42.

46 M. McFaul and E. Treyger, "Civil Society", in M. McFaul, N. Petrov and A. Ryabov (eds.), *Between Dictatorship and Democracy. Russian Post-Communist Political Reform*, Washington, DC 2004, 135-173, at 161. See, *e.g.*, Human Rights Watch, "Chechnya: Human Rights Defender Abducted", available at <http://hrw.org/english/docs/2005/01/21/russia10055.htm>.

47 "NGOs to fight closure", 10 *Radio Free Europe/Radio Liberty NEWSLINE* No.17 Part I, 30 January 2006.

48 McFaul and Treyger, "Civil Society", *op.cit.* note 46, 161. According to the US State Department's Report on the Human Rights Situation in Russia, 2000, in its turn citing a report prepared by the Human Rights Information Center and the Center for Development of Democracy and Human Rights, 57.8% of NGOs managed to re-register. Several NGOs continued to work without registration and some registered under a new name. The consequence of not being registered is that the NGO can—at any time—lose its judicial status. <http://www.state.gov/g/drl/rls/hrrpt/2000/eur/877.htm>.

49 See "Russian Authorities Aim to Close Human Rights Research Center", transcription of the broadcast on Mayak Radio at 27 January 2006, available at *Johnson's Russia List*, 2006-#26, 28 January 2006. See, also, A. Ostrovsky, "Moscow seeks to close centre for human rights groups", *Financial Times* 28 January 2006.

50 McFaul and Treyger, *op.cit.* note 46.

ous law enforcement activities, complex tax laws regarding human rights organization and human rights litigation, and the Russian State's negative approach to funding from foreign sources puts the Russian human rights movement in a highly vulnerable position. Hence, Russian civil society in general and human rights organizations in particular are in a more vulnerable position after El'tsin's resignation and Putin becoming President.[51] The war in Chechnya, anti-terrorist operations, the determination to keep oligarchs out of politics, and finally but not least, the fear that the colored revolutions that took place in Ukraine and Georgia might repeat themselves in Russia are plausible explanations for this development.

Conclusions

The rules concerning the standing of NGOs in a court of law within the field of public law has been discussed above, as has the role of NGOs as providers of legal aid and assistance, as well as the political climate Russian NGOs find themselves in today and its potential consequences for individuals' rights protection. However, as to the main question—how and to what degree judicial review of governmental actions can constitute a tool for Russian NGOs in order to achieve accountability and rights protection—the short answer is "yes" in theory and "no" in practice, at least at this moment. Inefficiency and corruption in Russian courts is one important explanation of why judicial review in contemporary Russia is a weak tool for achieving rights protection. However, NGOs do also have an important task as watchdogs and several Russian NGOs have been successful in getting their clients' cases to be declared admissible by the European Court of Human Rights, hence achieving both rights protection and contributing to the agenda setting and the dissemination of information about the grave human rights situation in Russia. Therefore, this author argues that it is of the utmost importance that we highlight the *adequacy* of the legislative framework providing for the rules concerning the standing in court of NGOs on the one hand, and the *inadequacy* of the legislative framework of relevance for legal aid and assistance, and the hostile environment that many human rights NGOs find themselves in, on the other, since, taken together, this provides yet another argument, besides the democracy argument, for why the restriction of the Russian civil society is of such a great concern.

[51] Nations in Transit's rating of civil society in Russia shows a decreasing trend. In 1997 the score was 3.75, while in 2004 it had moved to 4.50. Russia's rating worsened due to the state's increasing hostility towards groups that seek to influence state policies, declining prospects for independent and pluralistic funding, and increasing apathy amongst the population. See Robert W. Orttung, "Russia", in A-Karatnycky, A. Motytl and A. Schnetzer (eds.), *Nations in Transit 2004*, New York, NY 2004.

Lay Judges in Rostov Province

Stefan Machura and *Olga Litvinova*[1]

Introduction

A legal system cannot function effectively without the respect of its citizens. Increasing the citizen's trust in the legal system is, therefore, a major objective of the Russian State. But, for the time being, many Russians remain suspicious. They complain about problems like long and unpredictable trials and corrupt judges.[2] Even the chief representatives of the State, the Russian President[3] and the Procurator-General[4] criticize the legal system, not to mention countless scholars from various disciplines.[5] Media often report scandalous cases.

As part of the reform of the legal system, Russia, like other countries during recent years, has introduced the jury in criminal cases.[6] Its introduction has proved to be a cumbersome process. But today, almost

1 The authors would like to thank the German Science Foundation *DFG* for a research grant. We also would like to thank Professor Klaus F. Röhl, Ruhr-Universität Bochum, Vladimir Solotykh, Vice-President of the *Oblast* court in Rostov-na-Donu and Dr. Sergei Potseluev from the Faculty of Political Science and Sociology, State University of Rostov-na-Donu. Above all, we thank Dmitrii Donskov who processed the questionnaires and discussed the results with us.

2 In a recent public opinion poll, "Courts and Prosecutor's Offices" ranked third (with 32%) among state officials regarded as most corrupt; available at <http://www.cdi.org/russia/johnson/2006-13-4.cfm>.

3 V.V. Putin, *Poslanie Presidenta Rossiiskoi Federatsii V.V. Putina Federal'nomu Sobraniiu Rossiiskoi Federatsii*, Moscow 18 April 2002. An underlying critique can also be sensed in "President Putin's Speech at an Enlarged Board of the Prosecutor-General's Office of Russia" of 21 January 2005, available at <http://www.cdi.org/russia/johnson/9030-13cfm>.

4 V. Ustinov, "Report to the Russian President and the Federal Assembly", *Rossiiskaia gazeta* 30 April 2002, 5, as translated in 54 *Current Digest of the Post-Soviet Press* 2002 No.18, 1-3.

5 *E.g.*, V.S. Nersesiants, *Filosofiia prava*, Moscow 1997; M. Nemytina, *Judicial Reform in Russia: Problems of Strategy and Tactics*. Paper for the Joint Meetings of the Law and Society Association and the Canadian Law and Society Association, Vancouver, Canada 30 May – 1 June 2002.

6 S.C. Thaman, "Europe's New Jury Systems: The Cases of Spain and Russia", in N. Vidmar (ed.), *World Jury Systems*, Oxford 2000, 319-351.

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 109-127

everywhere in Russia, defendants have the right to a jury trial.[7] Still, the jury meets with opposition from Russian public prosecutors. They are used to achieving high conviction rates and doubt the effectiveness of the jury trial which results in more acquittals.[8] In addition, Russian defendants may waive their right to jury trial. This leaves room for manifold pressures and promises. In Russian criminal procedure, which does not recognize the American principle of double jeopardy, the prosecution can ask for a retrial once a jury has acquitted. Cases which have provoked public debate, like the Ulman jury trials,[9] cast doubt on the capability and effectiveness of the Russian jury. However, in a country like Russia, which has switched its political and legal organization rapidly, time is needed before the actors can adapt to their new roles. Arguably, public prosecutors need to change their modes of operation. Police and other government authorities have to learn to respect the independence of jurors. While Russia had a jury system in former times under the Tsarist regime, the new Russian jury is effectively a legal transplant without the benefit of a lively legal tradition. Russian citizens are trying to avoid jury duty so that juries consist predominantly of elderly, uneducated persons.[10] In traditional jury countries, like the US, Britain,[11] or Scandinavia[12] a "jury culture" has developed.

7 The most notable exception is the Province of Chechnya. In neighboring Ingushetia, jury trials have been stopped—allegedly because jurors in this republic have come under extreme pressure. Relatives of the defendants demanded that jurors measure the incriminated acts by the traditional *adat* law. "Rossiiskaia sudebnaia sistema v zerkale faktov: Sudy prisiazhnykh", *FK-Novosti* 6 October 2005, available at <www.fcinfo.ru/themes/basic/materials-advokat-index.asp?folder=3052&foundID=81698>. The Parliament of Kabardino-Balkaria suggested that "terrorist cases" should not be heard by jury courts. "Parlament Kabardino-Balkaria predlagaiet zapretit' prisiazhnym rassmatrivat' dela terroristov", *Regnum informatsionnoe agentstvo* 17 February 2006, available at <www.regnum.ru/news/kab-balk/592304.html>. Besides, there is a jury for Russian military courts without regional exemptions.

8 In 2003, Russian jury courts acquitted the defendants in 15% of all cases. Federal Supreme Court, "Obzor po delam, rassmotrennymi sudami s uchastiem prisiazhnykh zasedatelelei", available at <www.supcourt.ru/vscourt_detale.php?id=165>.

9 A. Sokovnin, "Eduarda Ulmana ne te opravdali", *Kommersant* No.162, 31 August 2005, 4. Ulman, an officer, has been in court twice for the killing of a group of Chechen civilians and was acquitted both times. Twenty-thousand persons filed a protest. A. Lebedeva, "Delo Ulmana prervano", *Novaia gazeta* 6 February 2006, also available at <2006.novayagazeta.ru/nomer/2006/08n/n08n-s04.shtml>.

10 A.D. Popova, "Sovremennyi prisiazhnyi: kto on?", *Sociologicheskie issledovaniia* 2004 No.12, 113-117.

11 V.P. Hans and N. Vidmar, *Judging the Jury*, New York, NY 1986.

12 C. Diesen, *The Unbroken and Unbreakable Tradition of Lay Judges in Sweden*, paper for the conference "Lay Participation in the Criminal Trial in the 21st Century" at the International Institute for Higher Studies in the Criminal Sciences, Siracusa, Italy, 26- 29 May 1999.

As in the case of Japan[13], which finally turned down the idea of introducing a jury system, quite a number of observers doubt the ability of the average Russian to effectively serve on a jury.[14] "Asian", "collectivist", "authoritarian" values would induce them to follow legal authorities such as judges and prosecutors. Before the Russian jury was finally introduced across the country in 2004 after initial experiments in a few regions since 1993,[15] mixed courts were the instruments of lay participation in criminal proceedings. Mixed courts were introduced in 1917 by the Bolsheviks.[16] They were made up of one presiding professional judge and two lay assessors (called "people's assessors"). For a few years, courts of lay assessors and juries co-existed in a small number of Russian provinces, the jury being competent for more serious cases. Today, lay assessors serve only in Russian commercial courts.[17]

Samuel Kucherov wrote about the Russian jury before 1917 and the Soviet court comprising lay assessors:

> "The main difference between the jurors and the assessors is that the jurors decide only about the guilt or innocence of the accused whereas the assessors are members of the bench participating together with the professional judge in the decisions of all questions under the competence of the court arising before and during the court session including the setting of punishment."[18]

13 R.M. Bloom, "Jury Trials in Japan", *Boston College Law School Research Paper* No. 66, Newton, MA 2005.

14 V. Simonov, "Schwere Wiedergeburt des Geschworenengerichts in Russland", *Russland.ru* 13 July 2005, available at <http://russlandonline.ru/mainmore.php?tpl=Politik&iditem=1008>; or the polemic "Jury Joins Defendants in a Restaurant to Celebrate Their Victory at Court", *Pravda* 4 March 2005, also available at <http://english.pravda.ru/print/hotspots/crimes/7837-jury-0>. The joint celebration incident has led to a reversal of the case: Z. Svetova "Prisiazhnye zasedateli pobedili", *Moskovskie Novosti* 17 February 2006, virtually available at <www.mn.ru/issue.php?2006-6-35>.

15 S.A. Pashin, "The Reasons for Reintroducing Trial by Jury in Russia", 72 *International Review of Penal Law* 2001 No.1-2, 253-257.

16 A. Melkich, "Das Gerichtswesen. Theorie und Praxis", in I. Iljin (ed.), *Welt vor dem Abgrund. Politik, Wirtschaft und Kultur im kommunistischen Staate*, Berlin-Steglitz 1931, 534-547.

17 Arbitrazh courts deal with commercial disputes and here the professional judges welcome the special knowledge of "blue ribbon" lay assessors recruited from the local business community. T. Pashchenko, "Unternehmer entscheiden mit – Handelsrichter bei Wirtschaftsgerichten in Russland", 48 *Osteuropa Recht* 2002, 241-245.

18 S. Kucherov, "The Jury of Tsarist Russia and the People's Assessors of the Soviet Union Compared", 12 *Osteuropa Recht* 1966, 170-195.

Table 1: Forms of Lay Participation in Criminal Cases

Court of lay assessors		Jury court	
*Russian**	*German**	*Russian*	*US*
Mixed court, closely working together 1 professional judge, 2 lay assessors		Trial by judge and jury, with separate roles 1 presiding professional judge, 12 jurors, 2 alternates	
In at least all medium criminal cases		Mainly aggravated murder and rape	All criminal cases involving incarceration
mandatory	mandatory	Defendant's right, may waive his right	
Professional (and lay judges) read file	Only professional judge reads file	Only presiding judge reads file	Neither presiding judge nor jurors read file
Presiding judge takes evidence		Prosecution and defense introduce evidence in trial	
Serve for a period of two weeks per year	Serve between 4 and 8 days of sitting per year	Called as jurors for one specific case	

* Lower criminal court: Russian *raion* court or German *Amtsgericht*.

Table 1 highlights the main differences between the Russian court of people's assessors and the Russian jury and compares these with their German and US counterparts.[19] The Russian court of people's assessors is close to its German counterpart. As a major difference, Russian assessors had the right to read the file of the case in advance to prepare for the upcoming trial. In Russian jury trials, the presiding judge prepares a file for the trial.[20] In the US, the presiding judge does not know the file. The provision is meant to prevent prejudice. Quite clear-cut are the differences between mixed courts and jury courts during the hearing itself. Following the "inquisitorial" model, the Continental European judge takes the evidence and questions witnesses first. Then prosecution and defense may present additional evidence or re-examine witnesses. Russian or American jury trials follow the adversarial model. The judge can best likened to a referee in a sports game, while prosecution and defense present their case. Another major difference is the period of service. Russian people's assessors at the lower courts served for fourteen days a

19 S. Machura, *Fairneß und Legitimität*, Baden-Baden 2001; S. Machura, "Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia", 25 *Law and Policy* 2003, 123-150; S. Machura, D. Donskow and O. Litvinova, *Ehrenamtliche Richter in Südrussland*, Münster 2003. In the Russian Federation, the court system is centrally organized, while in the US the individual states are primarily responsible. So there are plenty of variations in the outlooks of American juries. *Table 1* thus refers to a "classical" type of jury. To be precise, German lower criminal courts also know an "enlarged court of lay assessors" with two professional judges and two *Schöffen*. It is used rarely and solely at the public prosecutor's request.

20 Thaman, *op.cit* note 6, 328.

year (except in long running trials) with one judge. German *Schöffen* usually spend four to eight days per year in court[21] and get to know several judges. Thus, Russian and German lay assessors may acquire routines and some knowledge "on the job". They often hear several cases on one day of sitting. British and US jurors are appointed for a specific case. They will rarely build up experience with a particular presiding judge or with certain types of cases.

The Russian and German models required a court with lay assessors for the trial in first instance of all but relatively light criminal cases.[22] In this way, lay participation was the rule rather than the exception, unlike the situation provided by Russian and US jury trials. Jury trials are much more expensive than trials by courts with lay participation. Legal scholars sometimes refer to them as "Rolls Royce" justice demanding "Rolls Royce" prices, not only for the tax-payer but also for defendants who exercise their right to a jury trial. Jury trials in Russia are confined to a very narrow class of criminal offences, most notably aggravated murder and rape. This turns Russian jury trials into rare events.[23] Ironically, the total amount of lay participation has been reduced by introducing jury trials.

Lay assessors did not mirror the Russian population, as eventually turned out for Russian jurors too.[24] They tended to be elderly, or pensioners, and were predominantly female. Their popular nickname used to be "nodders" to indicate their alleged adherence to the judges' opinions. Lay assessors were nominated in factories or housing units. This system came into decline after the end of Communism. In a reform which also paved the way for the jury, the lists of lay assessors were made up randomly

21 Machura 2001, *op.cit.* note 19, 181.

22 In Russia, at the time of the study presented here, criminal offenses carrying a maximum sentence of five years or less were dealt with by a single judge (the people's judge); for the five to fifteen years range, the full people's court (including the two people's assessors) was competent. For more serious cases the provincial court would normally be the competent court, in a composition of a presiding judge and two people's assessors. See Arts.15, 35-3, 1960 RSFSR Code of Criminal Procedure. But note that, in Germany, courts of second instance are also courts with lay assessors in most cases.

23 According to the Russian Supreme Court, 18% of all defendants at higher criminal courts in 2003 asked initially for jury trials. This resulted in 479 cases against 936 defendants, or 9%, since many defendants ultimately waived their right. Federal Supreme Court, "Obzor po delam, rassmotrennym sudami s uchastiem prisiazhnykh zasedatelei", available at <www.supcourt.ru/vscourt_detale.php?id=165>. With this number, jury trials reached a peak. Statistics for the years before 2003 in N. Kovalev, *Handout*, presentation at the Annual Meeting of the Law and Society Association in Las Vegas, NV, 3-5 June 2005.

24 See Popova, *op.cit.* note 10, for a characterization.

from the official population records.[25] The same lists were then used to call juror candidates.[26]

Our study of lay assessors in the South-Russian province of Rostov-na-Donu roughly four years ago is, therefore, not only of historic interest. To our knowledge it was the first empirical study of the people's assessors ever. What makes the results still relevant is that the same people who served then are now eligible as jurors.

The main focus of the lay assessor study was on how citizens had experienced being drafted into the courts for a short period of time. Their vote as lay assessors had the same weight *de iure* as the vote of the professional judge. People's assessors gained first-hand experience in the courts. They saw how citizens were treated and how the judges dealt with themselves as part-time judges. How did people's assessors evaluate the qualities of Russian courts and Russian law? These topics are addressed on the basis of social science theories. It turns out that Russian lay assessors measured their courts and national law by similar criteria as *e.g.,* German lay assessors. The justice of verdicts and the fairness of proceedings turned out to be of great importance for lay assessors.

Legitimacy and Fairness

It is the function of lay judges to contribute to just judgments and fair trials. This, in turn, should enhance the legitimacy of the legal system, its personnel and of specific decisions.[27] Thus, three concepts are pivotal: the justice of judgments, fairness and legitimacy. In theoretical discussions, their uses vary. In the following, the perspective of the social justice research tradition is adopted. This body of literature does not ask what "justice" and "fairness" ideally should be. Nor does it explore the rational validity of legitimacy claims. These are topics for philosophers or legal theorists. Social justice research focuses on what individuals in a specific society regard as "just" or "fair". And it analyses the consequences they draw from this. The view is empirical and not normative.

In his book *Legitimation durch Verfahren*—legitimation by procedure—Niklas Luhmann put forward the idea that, in modern societies, the acceptance of state decisions must be secured in new ways.[28] In former

25 Federal Law "O narodnykh zasedateliakh federal'nykh sudov obshchei iurisdiktsii Rossiiskoi Federatsii" of 23 December 1999.

26 A. Trochev, "Judicial Reform Faces Serious Obstacles in the Regions", 7 *East-West Institute Russian Regional Report* 2002 No.8, 3.

27 S. Machura, "Lay Judges", in D.S. Clark (ed.), *Encyclopedia of Law and Society. American and Global Perspectives*, Thousand Oaks, CA 2006 (in print).

28 N. Luhmann, *Legitimation durch Verfahren*, 2nd ed., Darmstadt 1975; summary of

times, institutions like the Tsarist regime were seen as the expression of God's will. Traditions appeared as sacred and untouchable. Nowadays, the state has to acquire legitimacy not only in a different and more complicated way, but it also cannot use physical force except as a means of last resort, connected with great risks. Russia's sad experience with Chechnya may be a prime example. What then is left to modern state institutions is their approbation in everyday life. Following the American political scientist David Easton, empirical researchers often inquire[29] how much support is enjoyed by institutions. Easton and Dennis described how children growing up in society learn to trust police, courts and government officials.[30] In the years following, positive and negative experiences build up trust or undermine it. Justice within institutions plays a major role in this formation of opinion.[31]

A basic differentiation is between procedural justice and distributive justice.[32] The first refers to the way a decision is reached, *e.g.*, the history of a trial. The latter refers to the result, *e.g.*, the decision of a court. Procedural and distributive justice are linked, as numerous studies have shown.[33] Accordingly, a person who might have reasons to doubt the justice of the outcome, but regards the procedure as fair, may nevertheless be satisfied. This has been called the "fair process effect" by Greenberg and Folger.[34] On the other hand, the decision of a court may appear to be so objectionable that observers assume the procedure has been unfair. Procedures do have a value of their own. In many situations where a decision has to be made, there is a painful lack of independent and precise evaluation criteria for the results. This is certainly true for many court proceedings. In such instances, a fair procedure remains the only method to get to criteria for decisions and to reach a just resolution of the case.[35]

the scholarly debate on Luhmann's approach in S. Machura, "The Individual in the Shadow of Powerful Institutions. Niklas Luhmann's Legitimation by Procedure as Seen by Critics", in K.F. Röhl and S. Machura (ed.), *Procedural Justice*, Aldershot, UK 1997, 181-205.

29 D. Easton, *A Systems Analysis of Political Life*, New York, NY 1965.

30 D. Easton and J. Dennis, *Children in the Political System*, New York, NY 1969.

31 T.R. Tyler, *Why People Obey the Law*, New Haven, CT 1990.

32 *Ibid.*, 5.

33 Overviews, *e.g.*, in E.A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice*, New York, NY 1988; Machura 2001, *op.cit.* note 19.

34 J. Greenberg and R. Folger, "Procedural Justice, Participation and the Fair Process Effect in Groups and Organizations", in P.B. Paulus (ed.), *Basic Group Processes*, New York, NY 1983, 235-256.

35 K.F. Röhl, "Verfahrensgerechtigkeit [Procedural Justice]. Einführung in den Themenbereich und Überblick", 14 *Zeitschrift für Rechtssoziologie* 1993, 1-34, at 21-25.

In legal proceedings, the order of steps taken allows procedural justice to be evaluated independently from the outcome.[36] An observer may form an opinion on the procedure before knowing its result. Judges usually retire after the hearing of the parties. Each of them has his own impressions about the past hearing. Members of the court will have their own feelings about the way the presiding judge has treated the parties and witnesses, or whether they themselves were granted sufficient opportunity to ask questions. Even if the panel of judges comes to a unanimous decision, a lay assessor may have been annoyed by the dominant behavior of the court's president. On the other hand, even if a judge is outvoted by his colleagues, he might still believe that the procedure was applied absolutely correctly. In addition, cognition psychologists discuss the "primacy effect": The first information has more effect than later information. Lind and Tyler assume this to be true also for the relation between procedural and distributive justice.[37]

Social scientists argue that individuals employ a number of criteria in evaluating justice.[38] This also applies to how observers view judgments as just or unjust. A judge, *e.g.*, might use the severity of an injury or individual guilt as a criterion. Or he decides on the sentence, considering the individual defendant's sensitivity for a sanction. Among others, the general prevention of crimes may also motivate a judge. Regardless of the criteria and the relative value assigned to each of them, no observer will evaluate courts without an idea of "justice". Similarly, there are different opinions about whether a particular legal provision is just or unjust. However, hardly anyone would abandon the general idea that laws should be just.

Social justice scholars have identified a number of criteria which people use to determine the fairness of procedures. Fair procedures are characterized by unbiased decision-makers who carefully gather the relevant information. The parties should have the opportunity to present their positions and the proceedings should comply with social morality. The decision-maker has to be considerate in his treatment of the parties and has to respect their rights. In addition, there has to be a mechanism to appeal against a decision.[39] In their "group value-theory", Tyler and

36 J.M. Landis and L. Goodstein, "When is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate", *American Bar Foundation Research Journal* 1986, 675-707, at 682.

37 T.R. Tyler and E.A. Lind, "Procedural Justice", in J. Sanders and V.L. Hamilton (eds.), *Handbook of Justice Research in Law*, New York, NY 2001, 65-92, at 78.

38 G. Mikula, "Einleitung: Thematische Schwerpunkte der psychologischen Gerechtigkeitsforschung", in G. Mikula (ed.), *Gerechtigkeit und soziale Interaktion*, Bern 1980, 13-24, at 17.

39 G.S. Leventhal, "What Should Be Done With Equity Theory?", in K.J. Gergen, M.S.

Lind[40] argue that citizens learn about their status as full-fledged members of society from the fairness of the persons in authority. This also applies to authority relations in social groups. If for instance in Russia, persons of Caucasian origin are treated roughly at police checkpoints, they can easily feel to be second class citizens, not protected by the Russian State. This may then lead to fatal estrangement from the state. Legitimacy has to be nurtured again and again by fair procedures, especially through the fair treatment of citizens by government officials. Post-Soviet Russia is among the many countries which still have a long way to go to establish a better practice and to earn its citizens' trust. Interestingly, it is also generally expected that other citizens are treated respectfully. Fairness is such a high value that observers do not like the authorities to abuse their powers.[41]

The effect of direct experience on the evaluation of Russian law and Russian courts forms the main focus of the following paragraphs. The justice of judgments and the fairness of procedures are differentiated. The approach follows the line of previous studies with German lay assessors in penal courts[42] and in administrative courts.[43]

Method and Sample

Data were collected between May and December 2001. The respondents were people's assessors who decided cases in twelve *raionnyi* courts, that is, county or town district courts. Eight of the courts in the sample were located in Rostov-na-Donu, the unofficial capital of the Russian South. The courts of Azov, Neklinovskii *raion*, Miasnikovskii *raion*, and Taganrog are nearby Rostov. Court clerks distributed envelopes with questionnaires to the people's assessors when they arrived in court. The clerks later collected the envelopes.

The efforts resulted in 147 completed questionnaires. The return rate in Rostov was 66%, a highly acceptable rate. Outside Rostov, problems of organization and manpower in the courts, as well as extreme weather

Greenberg and R. H. Willis (eds.), *Social Exchange: Advances in Theory and Research*, Vol. 9, New York, NY 1980, 27-55; T.R. Tyler and E.A. Lind, "A Relational Model of Authority in Groups", in M. Zanna (ed.), *Advances in Experimental Social Psychology*, Vol. 25, New York, NY 1992.

40 *Ibid.*

41 German *Schöffen* expect that people are treated fairly in court, even defendants. Machura 2001, *op.cit.* note 19.

42 *Ibid.* S. Machura, "Interaction Between Lay Assessors and Professional Judges in German Mixed Courts", 72 *International Review of Penal Law* 2001 No.1-2, 451-479.

43 S. Machura, *Ehrenamtliche Verwaltungsrichter*, Münster 2006.

conditions in December resulted in much lower return rates (Taganrog 18% and at the three county courts 17%). Probably, there also were fewer trials involving people's assessors at these four courts. Statistical checks revealed few differences among the answers from the different courts. All in all, the return was sufficient for the analysis intended.

Of all respondents, 78% were women. Generally, Russian courts are a "female" institution where most of the professional judges are also women. Men tend to engage in areas more closely associated with business. Half of the female respondents were more than forty years of age; half of the men were older than fifty years. These results indicate that working men were using excuses to avoid service at courts more often. Pensioners, 37%, formed the largest occupational group; followed by white-collar workers, 27%; 16% were other types of workers, and 7% were self-employed. The level of formal education was quite high: 50% had the equivalent of a high-school diploma, having at least eleven years in school. Just 6% had less than ten years of education; 8% of the respondents had studied at the university; and 29% attended a technical college or a school of engineering.

Experiences as People's Assessors

Some respondents looked back at an extensive prior experience as lay assessors, five of them even at sixteen, twenty, or twenty-eight years. Nevertheless, 81% said that this was their first term of service. The mean was 2.66 years. On average, the respondents served as a people's assessor for about two weeks during the last twelve months, exactly the figure aimed at by Russian law.

Table 2: Feelings of Pleasure and Pride in Being a People's Assessor (percentages)

	Pleasure	Pride
Very	20,4	17,7
Quite	36,1	29,3
In principle	34,7	41,5
Not much	4,1	4,8
Not at all	0,7	2.0
Don't know	2,7	4,1
No answer	1,4	0,7

(Percentages may not add up to 100 due to rounding.)

It is possible that certain persons come to like serving as a people's assessor and feel honored to have this function. A majority scored "very" or "quite" in describing the pleasure experienced by participating in the court's work, while fewer respondents felt honored by their function (*Table 2*). Answers to both items were highly correlated.[44] This confirms the assumption that both feelings are connected. In consequence, answers can be combined to an index variable on the level of pleasure and pride related to their function.

Table 3: Justice and Fairness Evaluations: Experience as a People's Assessor (percentages)

	Satisfaction with judgments	Fairness to parties	Fairness of presiding judges to parties	Fairness of professional judges to respondents	Accepted as equal by the professional judges
Very	12.9	24.5	36.1	46.9	17.7
Quite	44.9	51.0	48.3	39.5	56.5
Some-what	35.4	20.4	12.2	10.2*	19.0
Less	1.4	-	-	0.7**	0.7***
Not at all	0.7	-	-	-	0.7
Don not know	2.7	1.4	1.4	-	3.4
No answer	2.0	2.7	2.0	2.7	2.0

* wording "in principle", ** wording "few", *** wording "almost not".

(Percentages may not add up to 100 due to rounding.)

Table 3 shows the answers to questions related to the respondents' experience as a lay judge. A majority of the respondents were "very" (13%) or "quite" satisfied (45%) with the trials in which they participated during their time at court. But one-third appeared only "somewhat" satisfied with the judgments. Obviously, there were reservations. Nevertheless, only very few had chosen clearly negative answers. Such negative answers were also circumvented when it came to evaluations of fairness. The court's fairness to the parties was seen positively, just as the fairness of the presiding judges to the parties.[45] Studies in procedural justice have revealed that

44 Tau-b = .711, $p \leq .001$, n = 137. – Tau-b and Spearman Rho are measures for the correlation of two variables. They vary between "0", meaning no connection at all, and "1" which is the perfect correlation.

45 All respondents had been involved in criminal trials. However, they might also have participated in civil cases. At the time of the study, all matters of civil law, family law, and inheritance law had to be heard either by a single professional judge or by a mixed court of one professional judge and two people's assessors (Art.6(I), 1964

the fair or unfair behavior of the person presiding over a procedure forms the main factor for the fairness evaluation of the procedure as a whole.[46] The Russian assessors' evaluation of the fairness to the parties was highly correlated with the evaluation of the fairness of the presiding judge to the parties.[47] The treatment of the parties was not viewed without reservation. The answer "very fair" was only given by one-fourth or one-third of the respondents. But almost one-half of them felt treated "very" fairly themselves. The other half was not fully satisfied with their treatment. A pivotal fairness criteria according to Lind and Tyler is acceptance as a full-fledged group member by the authority.[48] In mixed courts, professional and lay judges are a working group with the presiding judge as the leading figure representing the court system. In the survey, both variables—acceptance and fairness—were significantly correlated.[49] But respondents felt less often "very" accepted as equals, as they felt treated "very" fairly. The median value of the answers is nevertheless at the level of "quite". To summarize, the theory of Lind and Tyler is supported. The fairness of procedures depends largely on the conduct of the representatives of authority: in this case the presiding judges. The justice of trials and the fairness to parties were not seen as ideal, but certainly not negatively.

Evaluation of Russian Courts

The responding lay assessors have gathered information about the courts from within. Their view of Russian courts does not stem solely from sources which are available to all citizens. Most citizens have to rely on media coverage, on films, on stories told by acquaintances, family and colleagues. They may, at best, have direct experience in the role of plaintiffs, respondents, witnesses, defendants, or as spectators of trials. In the following, we ask about how direct experience as a people's assessor influences thinking about Russian courts in general. Before doing so, it should be emphasized that the lay assessors' views cannot be taken for the view of Russians generally. Persons who are very skeptical about courts possibly prefer avoiding serving as a people's assessor. The respondents' answers show the correlations between direct experience and generalized opinion. In a first step, an indicator for trust in Russian courts is formed. Next,

RSFSR Civil Procedure Code). The law did not state when the presence of lay assessors was mandatory. It can be assumed, however, that all rulings regarding child custody related to divorce had to be decided by the mixed tribunal.

46 Tyler and Lind, *op.cit.* note 39; Machura 2001, *op.cit.* note 19.

47 Spearman Rho = .708, $p < .001$, $n = 140$.

48 Tyler and Lind 1992, *op.cit.* note 40.

49 Spearman Rho = .523, $p < .001$, $n = 137$.

this variable will be related to more specific qualities ascribed to Russian courts, judges and Russian law.

Trust in Russian courts was measured by two variables: The respondents were asked: "Generally, how good are the courts working?" and: "How much trust do you have in the judges?" Eighteen percent of respondents said that the courts are working "very good", 53% said "quite good", 19% said "mediocre", 1% said "less good", and 1% indicated "not at all good". Fourteen percent had "very much" trust in judges; "quite a lot" 52%, while 29% trusted judges "in principle", and 5% "less".[50] All in all, the level of trust appeared fairly high, although a certain amount of skepticism was left. Since both variables are significantly correlated, they can be summarized as a measure for trust.[51]

Table 4: Evaluation of Russian Law, Russian Courts and Russian Judges (percentages)

	Justice of judgments	Fairness treating citizens	Fairness of procedural rules	Correctability*	Justice of laws	Justice of penal law	Understandability of laws
Absolutely	15.6	27.9	21.8	3.4	8.8	6.1	6.1
Quite	49.0	46.9	41.5	16.3	31.3	27.9	25.9
In principle	29.3	21.8	30.6	49.0	45.6	43.5	38.1
Hardly	2.7	-	3.4	20.4	8.8	7.5	25.2**
Not at all	-	0.7	-	-	-	-	0.7
Don't know	1.4	2.0	0.7	9.5	4.8	12.2	4.1
No answer	2.0	0.7	2.0	1.4	0.7	2.7	-

* wording: "very good chance", "good chance", "sufficient chance", "small chance" and "no chance".

** wording: "few".

(Percentages may not add up to 100 due to rounding.)

Table 4 indicates opinions about various aspects of Russian courts and Russian law. The judgments of Russian courts were rarely seen as "absolutely" just. Most evaluated them as "quite" just, and three out of ten only as "in principle" just. One-quarter replied that citizens were treated "absolutely fairly" in Russian courts. Most ticked the answer "quite fair". About 20% were more skeptical. The procedural rules followed by Russian courts were evaluated less positively. Even more reluctant were answers to the question: "If a defendant has good arguments against the judgment in his case, how much chance does the court system provide to change it?"

50 No respondent answered "not any". One person ticked "don't know".

51 Spearman Rho = .654, $p < .001$, $n = 136$.

Most answered "sufficient chance". A "very good" and a "good chance" taken together constituted about the same percentage as the alternative a "small chance". About 10% gave no answer. Apparently, the reversibility of judgments constitutes a problem for a significant part of the respondents. Reversibility is one of the criteria for fair procedures, and Russians tend to be skeptical at this point.

The responding assessors were also asked about the qualities of Russian law. When it came to the comprehensibility of laws, only three out of ten answered positively. Only a minority of the respondents rated Russian laws as "absolutely" or "quite" just. Therefore, the prestige of the laws that had to be enforced by the *raion* court with the participation of the respondents was not high. This clearly suggests the problem of Russian society having undergone sweeping changes over the past twenty years. Criminal law especially has usually a great symbolic value for society, as the French sociologist Emile Durkheim has already stressed.[52]

Table 5: Logit Model for Trust in Russian Courts Generally

Factors	*Betas*:
Age	.06
Feelings of pleasure and pride	.22**
Gender	.06
Justice of judgments of Russian courts	.54***
Fairness of procedural rules	.15*
Justice of norms of the penal law	.17*

$p < .05$, ** $p < .01$, *** $p < .001$, $N = 105$, $R^2 = .76$.

Which factors influenced the respondents' trust in Russian courts generally? A multivariate analysis was conducted, and the results are presented in *Table 5*. The explained variance of 76% in the model is very high. Feelings of pleasure and pride associated with the function of a people's assessor contributed significantly. But the justice of the judgments of Russian courts exerts the main effect in the model. Another justice-related factor of significance is the justice ascribed to the penal laws, which form part of the decision program of the courts. Also, there is a procedural aspect in the multivariate model, since respondents' opinions about the fairness of the procedural rules contributed to their trust in Russian courts.

52 E. Durkheim, *Regeln der soziologischen Methode*, (René König, ed.), 4th ed., Neuwied 1976 (French original, 1895).

Table 6: Logit Model for the Justice of Judgments of Russian Courts

Factors	*Betas*:
Age	-.04
Gender	.00
Fairness of the treatment of citizens	.46***
Fairness of procedural rules	.07
Justice of the norms of penal law	.06
Justice of Russian laws	.11
Satisfaction with judgments rendered with participation of the respondent	.30***

*** $p < .001$, $N = 109$, $R^2 = .63$.

Table 6 shows the results of a multivariate analysis using the justice of the judgments of Russian courts as the dependent variable. Since this justice evaluation has been the main influence on trust in the courts, the task is to explain what constitutes it. Two explanatory variables stand out significantly. The perceived fairness of the treatment of citizens correlates with the perceived justice of the judgments. This result replicates the procedural fairness effect known from prior research in Western countries. Fair procedures legitimate outcomes. A second significant factor is the satisfaction with the judgments rendered when the respondents served as a people's assessor. The factor mirrors direct experience.

Table 7: Logit Model for the Fairness of Russian Courts to Citizens

Factors	*Betas:*
Fairness of treatment of parties experienced as lay judge	.34***
Fairness of procedural rules	.46***

*** $p < .001$, $N = 134$, $R^2 = .46$.

If the respondents' opinion on the fairness of Russian courts to citizens is important for an evaluation of the justice of their judgments, what about the background of perceived fairness to citizens? The logit model in *Table 7* indicates two significant factors. The fairness to citizens is related to the perceived fairness of the procedural rules. It is also related in another way to the experience of people's assessors: the more fair they evaluated the treatment of the parties in the proceedings in which they served as people's assessors, the more fair they rated the treatment of citizens in Russian courts generally. They were asked about the fairness for the parties in the trials they took part in. Thus, experience as a people's assessor helped forming their opinion on the fairness of Russian courts generally.

Deliberation Activity

Fairness and justice play a key role in the evaluation of Russian courts. The data also allow an enquiry into the deliberation of the court. The following discussion focuses on the degree of participation. According to their self-report, a majority "often" took part in the discussion of the tribunal (*Table 8*).

Table 8: Participation in the Tribunal's Deliberation and its Factors (percentages)

	Participation in the deliberation*	Opportunity to ask questions**	Court decisions as expected***	Presiding judge tried to understand position***	Enough time for deliberation****
Very	33.3	10.9	24.5	15.6	29.3
Quite	25.2	17.0	42.9	40.8	25.9
Somewhat	19.7	57.1	23.8	23.8	17.7
Hardly	6.1	5.4	1.4	4.8	11.6
Not at all	8.8	6.8	-	0.7	1.4
Don't know	1.4	-	1.4	6.8	4.1
No answer	5.4	2.7	6.1	7.5	10.2

* wording: "very often", "quite often", "sometimes", "hardly", "not at all".
** "very much opportunity", "much opportunity", "sufficient opportunity", "less opportunity " and "no opportunity at all".
*** wording "very", "quite", "somewhat", "hardly" and "not at all".
**** wording "time pressure during deliberation": "not at all", "hardly", "somewhat", "quite", "very".
(Percentages may not add up to 100 because of rounding-off.)

Table 9: Logit Model for the Degree of Participation in the Deliberation

Factors	*Betas*
Opportunity to ask	.37***
Court decisions as expected	-.19*
Time pressure during deliberation	.20**
Presiding judge tried to understand position	.39***
Inspection of records "always and completely"	-.21*
Proletarskii court	.18*
Neklinovskii court	.16*

N = 112. R^2 =.49. * p < .05, ** p < .01, *** p < .001.

To explain the degree of participation, a multivariate analysis was conducted (*Table 9*). Respondents contributed more often to the discussion when they had sufficient opportunity to ask questions and if there

was enough time for the deliberation (see *Table 8* for percentages). They participated more intensely if the presiding judge seemed to try to understand their position concerning the case (answers in *Table 8*). Many presiding judges appeared less than perfect in these respects. To try to understand, to give an opportunity to ask, and to allow enough time for deliberation are measures of the fairness of the presiding judge to his or her lay colleague. In addition, people's assessors were more active when they found the decision of the tribunal at odds with their original expectation. Such a reaction conforms to the institutional role of people's assessors, to introduce their thoughts into the deliberation of the mixed court. Also, when the respondents had "always and completely" read the case files, they contributed more to the discussion;[53] to be informed paid off. In addition to these factors, there also appeared minor differences between the courts.

Conclusion

In this study, aspects of distributive and procedural justice have been correlated with the trust in Russian courts generally. Similar results have been found before in studies with German lay judges in administrative and criminal courts.[54] The justice of judgments, the fairness of procedural rules and the justice of penal law as evaluated by the people's assessors were significant factors explaining their trust in Russian courts. The most powerful factor behind perceived justice of judgments of Russian courts was itself significantly correlated to the fairness ascribed to them. This evaluation, then, was influenced by how fairly the respondents saw the parties treated in the cases they participated in as people's assessors. Similarly, the belief in the justice of the judgments Russian courts render was formed by direct experience: the satisfaction the people's assessors felt with the judgments with which they had been involved. Fairness and distributive justice of the *raion* courts—in which the respondents served—influenced, therefore, their view of Russian courts generally.

Fairness and distributive justice were also important for the role of people's assessors in the deliberations of the mixed courts. Unfair practices of the presiding professional judges effectively limit the degree of participation. A professional judge can hinder lay members of the court simply by setting a very full time-table. Also, he may restrict the opportunity to

53 Asked about the intensity of studying the files, 29% said they read them "always and completely", 22% "often or not always completely", 20% "not always or rarely completely", and 21% "not at all". Another 1% answered "don't know" and 8% did not give an answer to the question.

54 Machura, *op.cit.* note 43; Machura 2001, *op.cit.* note 18.

ask questions. Or he may give the lay person the feeling that his arguments are not heard. Such behavior also differentiated assessor-friendly and assessor-unfriendly behavior by German judges.[55] According to the theory of procedural justice by the American scholars Lind and Tyler, the fairness of group authorities is decisive for the cohesion and effectiveness of a group. Shortcomings as those mentioned harm not only the institution of mixed courts but detract from the general prestige of courts.

How do we explain the contrasting image given by the experiences of the people's assessors, set against the wide-spread harsh criticism in Russia? All in all, people's assessors tended to view courts positively. An important explanation is that the assessors at the *raion* courts took part in every day-practice. These cases lack the corrupt or sensational element of the trials widely reported by the media. There were a number of critical suggestions by the respondents about how the Russian justice system should be reformed.[56] Assessors stressed that court clerks were often not sufficiently qualified. They criticized a lack of financial means and pleaded for better resources. Violations of Russian law and corrupt practices were rarely observed. This sounds logical, since they tend to happen prior to the trial and are kept secret by the actors. In that respect, the results reported should not be misunderstood. Although there are a number of beneficial reforms, Russia definitely has a lot of problems with a court system which is not as reliable as a *Rechtsstaat* demands.

President Putin—who pledged to establish the "dictatorship of the laws"—interestingly joins the number of human rights activists who criticize extremely harsh penalties.[57] The lay people, however, may have internalized the culture of harsh punishment. The rise of violent crime has its share in this. Sometimes, the parties in a court trial are treated roughly by professional judges in Russia. Such behavior was rarely mentioned by the responding lay assessors. Possibly, the presence of the people's assessors in the courtroom stopped such attitudes.

The responding lay assessors observed the fairness of procedures. The similarity of their evaluation criteria and reactions to those in studies about Western countries highlights an important point. If democracy is more than a technical device in the hands of a power elite, it demands not only citizen participation in state affairs. It also needs active citizens who care about the interests of others. This is of the utmost importance

55 See studies *ibid.* and S. Machura, "The Lay Assessor-Friendly Court: Conditions for an Effective Participation", in: The International Committee, The Japanese Association of Sociology of Law (ed.), *The Role of the Judiciary in Changing Societies*, Kyoto 2001, 129-150.

56 Machura *et al.*, *op.cit.* note 19, 69-72.

57 Putin, *op.cit.* note 3.

for discussions concerning the rule of law and the universality of human rights. Even if life in Russia appears characterized by frequent violations of citizens' rights, there exists a feeling for what is fair and unfair. The responding Russian lay assessors cared about how the parties were treated in court. The new democratic institutions of Russia and the values of the Russian Constitution are in accordance with the awareness of many Russian citizens.

With the notable exception of the commercial courts, Russian people's assessors are history now. And the humble start of Russian juries attracts wide-spread criticism. Powerful interests from within the state bureaucracy are opposing the participation of ordinary citizens in the administration of justice. Given that jurors were drawn from the same lists as the people's assessors in this study, they must have similar characteristics. With their psychological make-up, Russian assessors were close to their Western colleagues and close to the people surveyed in numerous studies on procedural justice. Almost certainly, the shortcomings of Russian juries are not the shortcomings of Russian citizens but of the existing regulations and professional practices surrounding them.

The International Effect of Judicial Decisions and Notarial Instruments

Vladimir V. Yarkov

Introduction

The international effect of judicial decisions and notarial instruments is a phenomenon which has grown in importance in recent times. This can be explained, *first of all*, by the development of international trade and entrepreneurship and the growth of foreign investment. Economic globalization has led to the internationalization of law and increased interest in private international law and procedure. The role of these legal institutions consists in the creation of a legal basis for relationships between civil law participants within a legally separate space.

Secondly, as a result of the disintegration of the USSR, numerous persons, connected by kinship ties, found themselves citizens of different states and, consequently, their relationships became a subject regulated by private international law and procedure. *Thirdly*, the development of contacts between individuals, marriages of citizens of different states, as well as the significant emigration from Russia to other countries on the eve of, and after the disintegration of the USSR, have produced questions concerning trans-border inheritance and succession, and the regulation of property relationship within the families concerned. Other factors might be mentioned as well.

The purpose of legal regulation in this sphere is, therefore, to facilitate contacts between citizens of different countries, including family and property relationships, and the realization of successory rights, and to create conditions for the development of international economic relations.

Judicial decisions and notarial instruments occur in various legal procedures. They include the enforcement of court orders concerning the transfer of documents or the taking of evidence, the carrying out of specific procedural acts, the enforcement of foreign court judgments or arbitration awards, notarial and administrative actions, trans-border bankruptcies, civil law and other legal procedures connected with the verification of civil rights or the carrying out of transactions, etc.

The degree and contents of legal cooperation with a particular state are influenced by the most diverse factors. One could mention the participation of Russia and another state in international conventions on legal assistance, the presence of bilateral treaties on legal cooperation, the accessibility for foreign persons of the judicial and, generally, jurisdictional systems for protecting rights, the quality of the legal infrastructure and

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 129-152

the system for registering rights (the Latin *notariat*), the development of the system of compulsory execution, legal culture, the degree of independence of the judges and other significant legal professions, in particular notaries and bailiffs. And then the degree of legal elaboration of economic relations and contacts between people does not always depend on their intensity. Russia, for instance, does not have bilateral treaties concerning legal assistance with such countries as Israel or the Federal Republic of Germany, notwithstanding the sizable emigration to those countries from the former USSR, and the presence of strong ties between citizens on both sides.

The Legal Framework of Cooperation

At the beginning of the twenty-first century, major changes in the sphere of international civil procedure have occurred in Russia. Part VI of the Civil Code of Russia ("Private International Law") was adopted, and several chapters in the new Codes of Civil Procedure (Chaps.43-45) and Arbitration Procedure (Chaps.31-33) were devoted to questions of international civil procedure. In numerous federal laws, much attention has been given to the regulation of legal relationships with an international element. The number of international treaties concerning legal assistance in which Russia participates (such as The Hague Conventions of 1961, 1965 and 1970) has increased. Still, it would be difficult to speak of a complete and successful resolution of all present-day problems of international civil procedure because, on account of various reasons, many questions remain unsolved and new questions have emerged in the course of the development of international civil law contacts.

The number of states, with which Russia has concluded special treaties concerning various aspects of legal assistance (in a wide sense of the term) in civil, family, criminal and other matters, has increased more than twofold and embraces now, according to data from the RF Ministry of Justice, 111 states. More than eighty drafts of such treaties with more than fifty states are in the process of elaboration. About 30,000 requests for legal assistance are being processed every year. Russia participates in forty-seven bilateral and sixteen multilateral treaties concerning legal assistance.[1] Bilateral treaties have mainly been concluded with former allies in Eastern Europe, with the Baltic States, with the CIS states, and, from the countries of Western and Central Europe, with Italy, Spain, Greece, Cyprus and Finland. As indicated before, treaties concerning a number of

[1] Participation of the Ministry of Justice of the Russian Federation in International Cooperation: Present Situation and Perspectives. Information from the website of the Ministry, 26 August 2004.

aspects of international legal cooperation are lacking with such important economic and legal partners of Russia as the Federal Republic of Germany, France, Great Britain and Israel.

Russia and the European Union After 1 May 2004

As from 1 May 2004, many questions of international civil procedure appear in a different light, because in many respects a single legal space—embracing twenty-five states and united by supranational, directly effective legislation—emerged to the west of Russia, after ten new states became members of the EU. This has resulted in the narrowing of the sphere of conflicts of law and the expansion of the role of direct legal regulation in private international law. The question arises whether the treaties concerning legal assistance—concluded between Russia and the new members of the EU—retain their full force, or whether jurisdiction in this matter has been transferred to the level of the Council of the European Union.

In our opinion, the following approaches to solving the question of the legal regulation in the sphere of procedure are possible. The *first* possibility would be the conclusion of new bilateral treaties with individual states of the EU. A *second* option would be accession to the Lugano Convention, and a *third*—the elaboration and conclusion of a general treaty between Russia and the EU concerning legal cooperation in matters of civil, family, and inheritance law. This last approach appears to be the most effective and efficient, inasmuch as it allows the maintenance of a single legal regime for Russian persons, while simultaneously embracing the twenty-five states of the EU. The provisions of the EU Regulations on procedural law might be adopted as the starting-point, inasmuch as they are very much of a technical-legal character and their acceptance and application would in no way diminish Russia's sovereignty and *ordre public*.

Moreover, getting acquainted with the EU Regulations on procedural law would be advantageous with a view towards the gradual harmonization of Russian procedural legislation with the norms and rules of European procedural and notarial law. Such an approach would facilitate legal cooperation on the basis of general principles of legal regulation in the field of international civil procedure and notarial law.

Of the greatest significance, from the point of view of harmonization in Russia, are those procedural-legal institutions on which the interaction of judicial systems and private persons in the judicial sphere is based, especially in the sphere of jurisdiction, the presentation of judicial documents, the taking of evidence, the carrying out of other forms of legal assistance, and the enforcement of judicial and other jurisdictional instruments, including notarial ones.

Principal Questions for Discussion

Among the principal questions for discussion, concerning international civil procedure in Russia, the following could be mentioned. *First*, the dualism of legal regulation, inasmuch as several points of international civil procedure have been regulated differently in the Code of Civil Procedure (CCP) on the one hand and the Arbitration Procedure Code (APC) on the other. *Second*, there is the question of international jurisdiction and the attribution of competence between the arbitration courts and the courts of general jurisdiction in cases involving foreign parties. *Third*, the legal status of foreign persons in civil and arbitration procedure and their rights to enjoy procedural advantages. *Fourth*, the legal regulation of procedural immunity according to the CCP and the APC. In the *fifth* place, the relationship between the procedures of recognition and of enforcment of foreign court decisions. *Sixth*, the basis for recognition and enforcement of foreign court decisions. *Seventh*, the manner and conditions for applying in the Russian Federation the rules on admissibility of enforcement of a foreign court decision on the basis of reciprocity, in the absence of a relevant international treaty. *Eighth*, the enforcement of foreign court decisions and *ordre public* of the Russian Federation. *Ninth*, the trans-border effect of notarial instruments and the executive force of Russian notarial instruments within the framework of international civil contacts.

There are also other important questions, but only a few of these will be discussed.

Jurisdiction in Cases Concerning the Recognition and Execution of Decisions of Foreign Courts or Arbitration According to the New Codes of Arbitration and Civil Procedure

According to Article 3 of the APC and Chapter 31 of the APC, the jurisdiction of the arbitration courts encompasses cases concerning the recognition and enforcement of foreign court judgments and arbitration awards in disputes arising from entrepreneurial and other economic activities. In accordance with Article 22 of the CCP and Chapter 45 of the CCP, the jurisdiction of the courts of general jurisdiction also encompasses the recognition and enforcement of decisions of foreign courts and arbitration panels.

Before the new APC and CCP entered into force, these questions were regulated by the codes of civil procedure of the union republics and also by an edict of the Presidium of the USSR Supreme Soviet of 21 June 1998 (No.9131-XI) "On the Recognition and Enforcement of Deci-

sions of Foreign Courts and Arbitration" (hereafter: "1998 Edict"), which designated the relevant provincial court of general jurisdiction as the competent court. The Law of the Russian Federation "On International Commercial Arbitration" (Arts.6, 35, 36) did not indicate a competent court for dealing with the question of the recognition and enforcement of an arbitral award.

The question which court would be competent to decide matters concerning the recognition and enforcement of international arbitral awards was, therefore, much debated by specialist authors, before the adoption of the new APC. There were two basic positions. The first one held that courts of general jurisdiction would be competent.[2] According to the second one, these matters were to be submitted to the arbitration courts.[3] Other authors were of the opinion that in such cases both courts could have jurisdiction.[4] In our view, the important differentiation of the topics of civil jurisdiction among the various court systems should not be ignored. Retaining alternative jurisdiction in this sphere would hardly be justified, as it would lead to confusion in court practice and in the results of the application of the law.

After the 2002 reform of procedural legislation, disputes concerning "non-entrepreneurial" civil contacts—especially labor, inheritance, family, consumer, and many other matters, including also the resolution of questions concerning the recognition and enforcement of foreign court judgments and arbitration awards—remained within the competence of the courts of general jurisdiction. Article 32 and Chapter 31 of the new APC referred questions concerning the recognition and enforcement of foreign commercial arbitration awards, taken abroad, and also of foreign court decisions (connected with entrepreneurial and other economic activities), to the competence of arbitration courts, which appears justified in order to avoid contradictions in court practice.

In order to be recognized and enforced, a foreign arbitration award must be legally validated through a recognition and enforcement proce-

2 See V.V. Iarkov (ed.), *Arbitrazhnyi protsess*, Moscow 1998, 431 (chapter author: E.V. Vinogradova); M.M. Boguslavskii, "Mezhdunarodnoe grazhdanskoe protsessual'noe pravo v stranakh SNG", *Reforma grazhdanskogo protsessual'nogo i arbitrazhnogo protsessual'nogo prava v stranakh SNG. Materialy konferentsii*, Kiel 2000, 121; B.P. Karabel'nikov, *Priznanie i privedenie v ispolnenie inostrannykh arbitrazhnykh reshenii. Nauchno-prakticheskii kommentarii k N'iu-Iorkskoi konventsii 1958 goda*, Moscow 2001, 118-123.

3 See T.N. Neshataeva, *Mezhdunarodnyi grazhdanskii protsess*, Moscow 2001, 147.

4 Iu. Timokhov, "Rassmotrenie v rossiiskikh sudakh khodataistv o priznanii, ispolnenii i otmene reshenii mezhdunarodnogo kommercheskogo arbitrazha", *Khoziaistvo i pravo* 2001 No.6, 107-112.

dure, called "exequatur".[5] The recognition and enforcement procedure concerning foreign arbitration awards (Chap.31, APC) has an adversarial character and allows both sides, plaintiff and defendant, to defend their interests in the arbitration process.

Various Approaches Towards Jurisdiction in the CCP and the APC

Chapter 44 of the CCP, devoted to jurisdiction, establishes the place of the defendant (Art.402 (2), CCP) as the basic criterion for determining jurisdiction of the Russian court in cases in which a foreign person takes part. Article 247 (1) of the APC mentions the place of the defendant as one of ten determining factors. Moreover, the criteria for jurisdiction of a Russian arbitration court are broader than those of a court of general jurisdiction. In particular, the arbitration court (according to Art.247 (1)(10), APC) considers the case where the legal relationship which is being disputed has a close connection with the territory of the Russian Federation also as one of the cases in which a foreign person participates. This approach permits the arbitration courts to take on cases on the basis of the rather flexible criterion of a "close connection".

The Relationship Between the Recognition and Execution Procedures Concerning Foreign Court Decisions

Literature and legislation distinguish between two basic types of court decisions: recognition and adjudication (according to the classification of the claims).[6] An adjudication decision requires specific activities with regard to its enforcement (realization of a financial claim, transfer of assets, carrying out of certain acts, etc.), while recognition decisions are realized by abstaining from specific actions or by the registration of certain rights through a judicial instrument, issued, as a rule, outside enforcement proceedings.

The 1998 Edict distinguished between two methods of validation of foreign court decisions, depending on the type of decision—adjudication or recognition, according to the established classification. Article 10 of

5 Different procedures for recognizing and executing foreign arbitration awards exist, but in this case only the "*exequatur*" procedure comes into purview. See Neshataeva, *op.cit.* note 3, 141; , M.M. Boguslavskii, *Mezhdunarodnoe chastnoe pravo*, 4th ed., Moscow 2001, 425-426; Kh. Shakh [H. Schack], *Mezhdunarodnoe grazhdanskoe protsessual'noe pravo* (transl. from the German), Moscow 2001, 453.

6 See, *e.g.*, V.V. Iarkov, *op.cit.* note 2, 179-180; M.K. Treushnikov and V.V. Sherstiuk (eds.), *Arbitrazhnyi protsess*, 4th ed., Moscow 2000, 150-152.

the 1998 Edict established a special method of validation of recognition decisions, according to which decisions of foreign courts not subject to compulsory enforcement were recognized without any further proceedings, if no interested persons raised any objections. The same provision established a special procedure through which an interested person could raise objections against recognition of the foreign court decision.

In accordance with Articles 2 and 10 of the 1988 Edict, the question concerning recognition and enforcement of foreign court decisions—whether or not subject to compulsory enforcement—was referred to the jurisdiction of courts of general jurisdiction. In accordance with Article 32 and Chapter 31 of the APC, cases concerning recognition and enforcement of foreign court decisions—rendered in disputes or other matters arising from entrepreneurial or other commercial activities—were referred to the competence of the arbitration courts. It is to be noted that Article 241 of the APC only concerns foreign court decisions which require recognition and enforcement; in other words, according to the terminology of the APC—adjudication decisions.

However, the APC does not directly answer the question in which way a foreign court decision will be enforced; whether, for instance, it would require registration in the shareholders' register or another register within the territory of the Russian Federation. Would it be necessary—in such a case—to follow a particular recognition and enforcement procedure as a general rule, or could such a decision be executed without a special procedure, in the manner indicated in Article 10 of the 1988 Edict?[7] The APC also does not provide directly for a procedure for filing, and dealing with, complaints of interested persons against recognition of a foreign court decision. One should conclude, therefore, that any kind of decision—whether on recognition or on adjudication—is to be executed in accordance with the provisions of Chapter 31 of the APC through the request of an interested person and the decision on it by the court.

While the APC knows only one way of recognizing and enforcing foreign court decisions, the CCP offers three possibilities: (i) the "*exequatur*" procedure (with regard to adjudication decisions, see Arts.410-412, CCP); (ii) with regard to recognition procedures, where interested persons may raise objections (Art.413, CCP); (iii) with regard to various kinds of recognition procedures (Art.415, CCP), where no special procedure for raising, and dealing with, complaints has been provided.

In particular, according to Article 413 of the APC, foreign court decisions—which are not subject to compulsory enforcement—are recognized

7 According to Art.3 of the Federal Law "On the Entering into Force of the Arbitration Procedure Code of the Russian Federation", the 1988 Edict applies insofar as it does not contradict the APC.

without any further proceedings, if no objections are raised by interested persons. In this way, in contrast with adjudication decisions, recognition decisions concerning foreign court decisions are subject only to posterior court control.

Objections against the recognition of a foreign court decision may be raised by an interested person—within one month after the rendering of such a decision has become known to him—at the intermediate court (the Supreme Court of the Republic, the territorial or provincial court, the Moscow or St.Petersburg City Court, the court of the autonomous province or district) of his place of residence or sojourn.

Objections of an interested person against the recognition of a foreign court decision are heard in open court sessions, and the interested person is to be informed of the time and place of the hearing. The non-appearance of the interested person—if the court knew that such information had reached the latter—does not prevent the hearing of the case. If the interested person requests the court to postpone the hearing and the court considers such a request well-founded, the court will postpone the hearing and inform the interested person accordingly.

After consideration of the objections against the recognition of the foreign court decision, the court will either decide not to recognize the foreign court decision or to reject the objections of the interested person. A refusal to recognize a foreign court decision—not subject to compulsory enforcement—is only allowed on the basis of the grounds provided by Article 412 (1)(1-5) of the CCP. Whether the presence of an international treaty is a necessary precondition to recognize a decision in this case, remains an open question, taking into consideration the general rules of Article 409 of the CCP.

In the Russian Federation, according to Article 415 of the CCP, the following foreign court decisions do not require further proceedings, on the basis of their contents:

— with regard to the citizenship status of a person, whose national court rendered the decision;
— on the divorce between a Russian citizen and a foreign citizen, or the establishment that their marriage was null and void, if at least one of the spouses was living abroad at the time of the hearing;
— on the divorce between two Russian citizens, or the establishment that their marriage was null and void, if both spouses were living abroad at the time of the hearing;
— in other cases provided by federal statute.

Although Article 415 of the CCP does not provide for the filing of complaints, the possibility that decisions taken on the basis of it would

violate the rights of Russian citizens cannot be excluded. In such a case, the questions remains unanswered whether interested persons may file a complaint with a Russian court or whether they should use the means of redress provided by the legislation of the state in which the decision *a quo* was taken.

The enumeration of Article 415 of the CCP takes into account Articles 158 and 160 of the Family Code and cannot be considered exhaustive, as it can be extended by federal statute. In this respect, one could also raise the question concerning the necessity of applying such a condition as the existence of an international treaty (Art.409 (1), CCP) to the decisions indicated in Article 415 of the CCP. A treaty between the Russian Federation and a foreign state would hardly be required for the recognition in the Russian Federation of a foreign court decision that would, for instance, restrict the capacity of a citizen of that state. In such a case, when the relevant documents are presented, the transactions with such a person within the framework of civil relationships in Russia would not be without risks, notwithstanding the absence of treaty on mutual recognition and enforcement of court decisions with the state in question (and Russia does not have many of such treaties).

It was noted, for instance, in the decision of the Civil Division of the RF Supreme Court of 15 August 2002 (No.78-G02-42) that no court proceedings are required in order to recognize a divorce pronounced by a Finnish court, as such a decision by its very nature is not subject to compulsory enforcement. At the same time reference was made to Article 23 of the Treaty on Legal Assistance in Civil, Family and Criminal Matters with Finland, in force since 9 August 1980.

The rule concerning the requirement of an international treaty does not, therefore, extend—in our view—to cases where a federal statute provides for the recognition of a foreign court decision without further proceedings, as *e.g.*, in Article 160 (1) of the Family Code or Article 415 of the CCP. In this connection, the correctness of the approach in the decision of the Civil Division of the RF Supreme Court of 18 March 2002 (No.78-G02-9) is doubtful. R.R. Iagafarova had applied for recognition on the territory of the Russian Federation of a divorce pronounced by the District Court of Alkmaar (Kingdom of The Netherlands) between herself and S.B. Serebrier; the marriage had been registered in the City of Leningrad on 18 May 1991. Her request was refused on the grounds that the decision had been taken by a court of the Kingdom of The Netherlands, between which and the Russian Federation no treaty on legal assistance in family matters existed.

Although this decision was taken before the new CCP had entered into force, the rule of Article 160 (3) of the Family Code was in force nevertheless, according to which divorces between Russian citizens or between Russian citizens and foreign citizens or stateless persons, pronounced abroad in accordance with the legislation of the relevant foreign state concerning the competence of organs deciding about divorces and with the legislation applicable to divorces, are considered effective in the Russian Federation. That is why the decision of the Russian court raises doubts.

As already observed, the APC—unlike the CCP—does not provide different enforcement procedures for recognition decisions as opposed to adjudication decisions. This raises the question concerning the manner of hearing objections against a foreign court decision, serving as the basis for the registration of rights, without going through the "*exequatur*" procedure. In the practice of the courts of one of the Russian regions, after the new APC had entered into force, the question occurred in which manner interested persons could file their complaints against a foreign court decision. A right of ownership had been registered in the port of Sovetskaia Gavan' in favor of the new owner of a ship, sold on the basis of a decision of the local court of the city of Pusan (Republic of Korea). The regional court of the Pomor'e Region, which—before the new APC had come into force, had accepted a request for a hearing on the basis of Article 10 of the 1988 Edict—closed the proceedings after 7 August 2002 and handed the case over for hearing by an arbitration court. The arbitration court—considering that the APC did not provide for the hearing of complaints against the recognition of foreign court judgments, and that such matters were referred by Article 10 of the 1988 Edict to the competence of the courts of general jurisdiction—closed the proceedings on account of the lack of jurisdiction.

The Civil Division of the RF Supreme Court (decision of 29 November 2002, No.56-G02-32) upheld the decision of the Primor'e Regional Court, and noted that the provision of Article 10 of the 1988 Edict, allowing the filing of complaints and the hearing of them in such matters (not being subject to compulsory enforcement) was part of the proceedings covered by Chapter 31 and Articles 241-246 of the APC. In the APC, this procedure—the filing of complaints—fell under the general norm of Article 41 of the APC.

In our view, the situation could be solved as follows. According to Article 3 of the Federal Law "On the Entering into Force of the Arbitration Procedure Code of the Russian Federation", the 1988 Edict is applicable insofar as it does not contradict the APC. As the procedure for hearing

complaints against the recognition of foreign court decisions, which are not subject to compulsory enforcement, is defined in Article 10 of the 1988 Edict, this part of the Edict is therefore applicable. The jurisdiction of arbitration courts in such matters (connected with "other economic activities") is based on Article 27 of the APC. It would not be logical to apportion jurisdiction in the sphere of international enforcement over two court systems; this would run counter to the logic of the law reform itself in the sphere of jurisdiction.

Enforcement of Foreign Court Decisions in Russia. Reciprocity in the Absence of a Treaty

Various systems exist for admitting foreign judicial decisions into the national legal space: exclusively in cases provided by an international treaty, on the basis of reciprocity, or on condition of conformity with the demands of a fair judicial enquiry, and others.[8] Russian legislation and court practice had, for a long time, regarded the existence of an international treaty as an indispensable condition for the recognition and enforcement of a foreign court decision (1988 Edict; Art.437, CCP). If no treaty was available, the foreign court decision was not subject to enforcement.[9]

In accordance with Article 241 of the APC, foreign court decisions are recognized and enforced by arbitration courts in the Russian Federation if such recognition and enforcement are provided by an international treaty of the Russian Federation and by federal statute. A similar provision is contained in Article 409 of the CCP. The basic principle for allowing the recognition and enforcement of foreign court decisions in the Russian legal system remained unchanged therefore. A reference to the possibility of admitting reciprocity as a condition for recognizing and enforcing foreign court decisions was taken out of the APC and CCP drafts. At the same time, the reciprocity principle as a condition for recognizing and enforcing foreign court decisions in bankruptcy cases had been included in Article 1 (6) of the Federal Law "On Bankruptcy",[10] and also—as a condition for applying rules of substantive foreign law—in Article 1189 of the RF Civil Code. Article 1 of the RF Law "On Bankruptcy", in particular, leads to the conclusion that claims of foreign creditors may be based on foreign court decisions, against Russian organizations which are, for instance, subject to bankruptcy proceedings, provided that the general rules for recognizing and enforcing foreign decisions, indicated by Chapter 31 of

8 See, especially, M.M. Boguslavskii, *op.cit.* note 5, 425-433.

9 See, *e.g.*, *Biulleten' Verkhovnogo Suda RF* 1999 No.7, 5.

10 This law has been translated, with a commentary by Professor Popondopulo *et al.*, in 31 *RCEEL* 2005 Nos.2-4.

the APC have been observed, including the rules concerning international jurisdiction of courts.

The admission of reciprocity appears to be justified from the point of view of comity in international legal relations (*comitas gentium*), because it allows the enforcement of a foreign decision in the absence of a treaty, provided certain requirements of domestic law have been met and the proper procedures have been followed. It is to be noted that the drafts of the CCP and the APC had allowed the enforcement of foreign court decisions on the basis of reciprocity, but these provisions were excluded from the definitive text of these Codes.

The principle of reciprocity has found expression in the domestic law of a whole range of countries, *e.g.*, §328 of the German *Zivilprozessordnung*, Article 269 of the 1991 Law on Civil Procedure of China, Article 425 (1) of the CCP of Kazakhstan, and many others. A number of scholars have criticized the reciprocity principle, arguing that it aggravates the position of the plaintiff. Professor Haimo Schack, for instance, writes that the refusal to admit a court decision on a complaint of a foreigner in Germany on the mere ground that the state where the decision was taken does not recognize decisions of German courts, would be unjust. In this connection, he points to the more appropriate regulation of the matter in Switzerland, where the reciprocity requirement has been dropped.[11] Dr. Litvinskii is also critical towards reciprocity, on the basis of an analysis of French doctrine.[12] One could agree to the extent that the best solution would be to admit all foreign court decisions in the Russian legal space on the basis of an "*exequatur*" procedure, without recourse to the presence of an international treaty or the principle of reciprocity. But at the present state of Russian legislation, the application of reciprocity rules would already constitute an important step ahead.

There are at present two grounds for allowing reciprocity in Russian legislation. The *first* one is to be found in Article 1 of the RF Law "On Bankruptcy". The *second* is expressed in the statement of the USSR attached to the ratification of the 1958 New York Convention. This statement includes in particular the words that "with regard to arbitral decisions, taken on the territory of states which are not members of the present Convention, the USSR will apply the provisions of the Convention only under conditions

[11] See Shakh, *op.cit.* note 5, 425-428.

[12] See Litvinskii's insightful studies on reciprocity: D.V. Litvinskii, "Vzaimnost' v oblasti priznaniia i ispolneniia reshenii sudov inostrannykh gosudarstv", *Zhurnal mezhdunarodnogo chastnogo prava* 2002 Nos.2-3, 20-34, and *idem*, *Voprosy priznaniia i ispolneniia reshenii sudov inostrannykh gosudarstv (na osnove analiza prava Frantsii i Rossii). Dissertatsiia na soiskanie uchenoi stepeni kandidata iuridicheskikh nauk*, St.Petersburg 2003, 186-200.

of reciprocity".[13] In our view, therefore, Dr. Karabel'nikov has drawn the correct conclusion, *i.e.*, that arbitration awards rendered in Russia may be recognized and enforced in countries which do not participate in the 1958 Convention. A relevant precedent occurred in 1966, when a decision of the Foreign Trade Arbitration Commission at the Chamber of Trade and Industry was recognized and enforced on the territory of Ghana, which at the time was not a party to the Convention.[14] Article 35 of the Law on International Commercial Arbitration provides that an arbitral award—irrespective of the country where it was rendered—is binding. It is therefore safe to say that nowadays any arbitral decision, irrespective of the place where it was taken, may be subject to recognition and execution.

In respect of reciprocity, the courts went even further. The notable decision of the Civil Division of the RF Supreme Court of 7 June 2002 (No.5-G02-64) established that a request for the recognition and enforcement of a foreign court decision may be granted even in the absence of an international treaty, if decisions of Russian courts are recognized by the courts of the foreign country on the basis of reciprocity. Subsequently, when the request of the plaintiff concerning the enforcement of a decision of the High Court of Justice (UK) was considered in the Arbitration Court of the City of Moscow (decisions of 10 October 2002 and 21 March 2003) and the Federal Arbitration Court of the Moscow District (decision of 2 December 2002),[15] the right of the plaintiff to request the recognition and enforcement of a foreign court decision in the absence of a special treaty between Russia and the United Kingdom was not doubted by the courts.

A decision of the Federal Arbitration Court of the Far East District of 25 February 2003 (No.F03-A73/03-1/140) also noted that the absence of an international treaty did not by itself constitute an obstacle to the recognition and enforcement of a decision of a state court of the Republic of Korea on the territory of the Russian Federation. In this case, recognition and enforcement of such decisions take place on the basis of the principles of reciprocity and international comity.

The application of the reciprocity principle may be regarded as a positive thing, in a general sense, at least under certain conditions.[16]

13 See S.N. Lebedev, *Mezhdunarodnyi torgovyi arbitrazh*, Moscow 1965, 191-192.

14 See B.P. Karabel'nikov, *Priznanie i privedenie v ispolnenie inostrannykh arbitrazhnykh reshenii. Nauchno-prakticheskii kommentarii k N'iu-Iorkskoi konventsii 1958 goda*, Moscow 2001, 22-23.

15 For the respective decisions, see A.I. Muranov, *Mezhdunarodnyi dogovor i vzaimnost' kak osnovaniia privedeniia v ispolnenie v Rossii inostrannykh sudebnykh reshenii*, Moscow 2003, 90-104.

16 See Muranov, *op.cit.* note 15.

As the *first* condition one could mention that a request for recognition and enforcement of a foreign court decision can be considered by the competent arbitration court, even if no relevant bi- or multilateral treaty exists, on condition that it satisfies the requirements defined by the APC, and the procedure for acquiring permission to enforce ("*exequatur*"), as defined in Chapter 31 of the APC has been observed. As Dr. Muranov has noted correctly, the courts, as organs of state power, are entitled to answer the question of the presence of reciprocity and other questions arising in that connection.[17] The construction— according to which reciprocity will be established by the courts without obligatory reference to the possibility of applying it in a federal law—is therefore to be preferred.

Secondly, reciprocity does not require the foreign state or the plaintiff to offer an absolute guaranty that any decision of a foreign court which would need compulsory enforcement on the territory of Russia will be recognized; neither does it require similar conduct by the foreign state in the resolution of such questions. Reciprocity only presupposes that the foreign position with regard to Russian court decisions will be of the same nature as the position which Russia occupies with regard to foreign court decisions.

The question arises, in the *third* place, how reciprocity is to be determined if, for instance, the recognition and enforcement of a Russian court decision has been denied in the United Kingdom, while a British plaintiff requests enforcement in Russia. Is full reciprocity required in the enforcement of judicial decisions on both sides, or is a relative reciprocity sufficient?

It obviously makes sense to distinguish between full and partial reciprocity, when one can speak of the enforcement of not all, but a large and significant group of court decisions of a foreign state.[18] Moreover, one should distinguish—depending on the grounds—between the procedural and substantive preconditions of reciprocity. Russian courts, in judging the norms concerning reciprocity in the sphere of recognition and enforcement of foreign court decisions, should therefore base their decisions with regard to this principle not on incidental and individual foreign court decisions concerning the refusal of "*exequatur*" in respect of decisions of Russian courts, but comprehensively evaluate the practice that has emerged, on the basis of the materials presented by the parties' representatives and with the aid of experts' conclusions and other admissible evidence.

Fourthly, there is the important matter of the burden of proof of reciprocity. In the past, we expressed the view that procedural reciprocity

17 *Ibid.*, 56ff.

18 See for more detailed argument: Shakh, *op.cit.* note 5, 426-427.

ought to be treated as a presumption, where the burden of proof of refutation must lie with the defendant, by analogy with material reciprocity (as in Art.1189 (2), Civil Code).[19] A careful examination of this question shows that the burden of proof of reciprocity should lie with the plaintiff, because it is he who in the absence of an international treaty puts forward the question of recognition and enforcement of a foreign court decision. This is the way the matter has been resolved by Article 328 (5)(§1) of the German *Zivilprozessordnung*, according to which recognition of a foreign court decision is excluded if reciprocity is not guaranteed.[20]

In its ruling of 13 September 2002 (No.5-g02-119), the Civil Division of the RF Supreme Court upheld a judgment of the Moscow City Court. In this judgment, a request of Nörr-Stiefenhofer-Lutz GmbH was rejected, which had asked for the recognition of a judgment of the court of first instance in Cologne of 30 May 2001, opening bankruptcy proceedings against Nosta Metallhandels-GmbH, in view of the fact that assets belonging to the latter were located in Moscow. The Civil Division pointed out that no evidence had been presented during the hearing which would prove that decisions of Russian courts would be recognized on the territory of the Federal Republic of Germany. The references of the claimant to Article 102 of the *Einführungsgesetz* of the German bankruptcy regulation, as well as to rulings of the Civil Senate of the Supreme Court of the Federal Republic of Germany of 14 November 1996 and 21 November 1996, which recognized a decision of a Swedish court in a bankruptcy case, to demonstrate the operation of the reciprocity principle between the Federal Republic of Germany and Russia, were rejected. A reference to Article 1189 of the Russian Civil Code was also rejected, because the latter provision regulates questions regarding the application of foreign law in resolving disputes concerning questions of substance. In the present case, the question concerned the recognition and enforcement of a decision taken by a foreign court in a dispute which had already been dealt with in substance.

As a *fifth* point, there is the relationship between reciprocity and *ordre public*. In our view, individual refusals to recognize Russian or foreign court decisions on account of *ordre public* considerations should not affect our understanding of the basic principles of reciprocity. Such a refusal is based on reciprocity, but recognition and enforcement of a foreign court decision is denied because the consequences of its enforcement would be incompatible with the domestic legal order. A refusal based on consider-

19 V.V. Iarkov (ed.), *Kommentarii k Arbitrazhnomu Protsessual'nomu Kodeksu Rossiiskoi Federatsii*, Moscow 2003, 231 (chapter author: V.V. Iarkov).

20 Almost all commentaries to Art.328 of the German *Zivilprozessordnung* contain a list of states with which reciprocity exists, with reference to court practice.

ations of *ordre public* is, in this sense, a special case of the application of the reciprocity principle.

The following case is of interest in this respect (ruling of the Presidium of the RF High Arbitration Court of 10 July 2001, No.5758/00).[21] The MS "Svetlovodnyi" had been attached in Korea at the request of the South-Korean firm "Komako Ko Ltd.". This firm had not been registered in the State Shipping Register of the Russian Federation as the owner of the vessel. Subsequently the vessel was sold by "Komako Ko Ltd." to a Russian legal entity, ZAO "Kuril'skii Universal'nyi Kompleks", as the result of an auction directed by the commercial district court of the city of Pusan. The ownership change of the vessel had not been entered in the Russian State Shipping Register.

In accordance with a disposition of the deputy chief of the Fisheries Department of the Ministry of Agriculture and Provision of the Russian Federation, the ship's entry in the State Shipping register of the Magadan fishing port was struck off and was registered in the sea-fishing port of Nevel'sk on behalf of the ZAO "Kuril'skii Universal'nyi Kompleks" without any statement from the OAO "Magadanrybprom", registered as owner, and without presentation of the ship's documents, which had been branded as invalid in the local press.

In accordance with Article 33 of the 1999 RF Maritime Shipping Code—which was in force at the moment the refrigeration vessel "Svetlovodnyi" was struck off the state shipping register of the port—the registration of a ship in the RF State Shipping Register or in the ship's log, of the ownership and other rights *in rem* in the vessel, or of restrictions or encumbrances, is the only proof of the existence of the registered right, which can be disputed only through court proceedings.

The harbor master of the sea-fishing port of Magadan, as the representative of the competent authorities in the port, could only strike the vessel off the register on the basis of a statement by the owner in accordance with Article 33 of the Maritime Shipping Code or of a court judgment. In the present case, both the owner's statement and a court document concerning the transfer of the ownership of the refrigeration vessel "Svetlovodnyi" were absent. There is only a document concerning the enforcement of procedural measures—attachment of the vessel and the sale at auction in the port of the city of Pusan.

The OAO "Magadanrybprom" protested against the vessel being struck off the State Shipping Register of the Magadan sea-fishing port as a result of its being sold at auction and following a radio message from

[21] *Vestnik Vysshego Arbitrazhnogo Suda* 2001 No.11, 19-21.

the Ministry of Agriculture and Provision, such measures being unable to serve as the basis for amending the Register.

Moreover, the plaintiff pointed out that the foreign measures had been effected in disregard of the bankruptcy proceedings taking place in the Russian Federation; the bankruptcy of the OAO "Magadanrybprom" had been declared by the Russian arbitration court on 20 April 1998 and the attachment of the vessel—being part of the assets of the bankrupt joint-stock company—had been ordered in the city of Pusan on 28 April 1998 at the request of the firm "Komako Ko Ltd.", a creditor of the fifth rank in the bankruptcy case.

The plaintiff's arguments, supporting his claims and the defendant's objections against the claims, including the documents presented to support the latter, were not examined by the (Korean) court and remained essentially unevaluated. This led to a referral of the case for a renewed examination with the aim to elucidate the question whether there were grounds for amending the State Shipping register of the Russian Federation: did the Korean judicial authorities have jurisdiction to issue documents concerning the MS "Svetlovodnyi"; on the basis of which actions (court decisions, including those of a commercial or arbitration court, or other empowering acts), issued in the city of Pusan, was the ownership in the vessel transferred from the OAO "Magadanrybprom" to the firm "Komako Ko Ltd."; were such actions recognizable in the Russian Federation; was such a transfer of rights registered in the State Shipping Register of the Russian Federation or in the ships' register of any other country as a registration of the transfer of the ownership in the vessel from the OAO "Magadanrybprom" to the firm "Komako Ko Ltd."; did the ZAO "Kuril'skii Universal'nyi Kompleks" acquire the vessel in good faith; what is the relationship between satisfaction of the claims on the vessel (payment for repairs) and satisfaction of the bankruptcy creditors (including the firm "Komako Ko Ltd.") of the OAO "Magadanrybprom"?

A document concerning the conducting of a public auction by the court of the Republic of Korea had been offered, but this could not be considered as a ground for amending the State Shipping Register of the Russian Federation for a number of reasons, spelled out in the ruling of the Presidium of the RF High Arbitration Court, as the Korean creditors were attempting to achieve satisfaction of their claims against a Russian company by evading the proper order of priority in bankruptcy proceedings.

The question remained how the Korean creditors could defend their rights within the framework of the present legislation. One possibility would be that their claims against the Russian company would be satisfied

by the Korean court (on condition of the court observing the rules for international jurisdiction), and then considered established in the course of bankruptcy proceedings, by virtue of Article 1 (6) of the Federal Law "On Bankruptcy", on the basis of reciprocity. Otherwise, even if there would be a decision of the court of the Republic of Korea allowing attachment of the vessel and a treaty on reciprocal enforcement of court decisions between the two states concerned, such a decision would hardly be acceptable in Russia, inasmuch as it would result in the satisfaction of a claim of one creditor, disregarding the proper order of priority of creditors.

As Justice Neshataeva has correctly observed, the basic principles of bankruptcy legislation can fully be considered to belong to the criteria for applying the *ordre public* reservation.[22] The foreign court decision in the case reviewed, recognizable in principle on the basis of reciprocity, would violate certain principles of bankruptcy proceedings as laid down in the earlier statute, as well as in the present Federal Law "On Bankruptcy", such as the principle of the exclusivity of bankruptcy proceedings (the collection of all claims against the debtor within a single procedure), of the unity of the debtor's total assets (irrespective of the place where they are located), and of the order of priority of satisfying the claims of the creditors, because such a decision would evade the bankruptcy procedure taking place in Russia.

A *sixth* point is the contents of the procedure to establish reciprocity. The court must be guided by certain criteria in order to reliably establish reciprocity. In Germany, for instance, equivalence (*Gleichwertigkeit*) is regarded as the basic criterion in the recognition and enforcement of foreign court decisions; equivalence is considered to embrace a general concurrence (*wesentliche Übereinstimmung*) of the court decisions, as well as their internal or substantive reciprocity (*innere Gegenseitigkeit*).[23] The foreign court decision, subject to recognition and enforcement, should be equivalent to the decisions of German courts, subject to recognition and enforcement in that particular country, to which the person requesting an "*exequatur*" in a German court must refer as an existing reciprocity.

General concurrence concerns, first of all, the character of the court decision itself, which must agree in general terms with the decision subject to recognition in a court of the Federal Republic of Germany, both in respect of the subject matter of the decision, as in respect of the conditions required for its recognition or compulsory enforcement. This requirement to set the law concerning recognition against German law

22 See T.N. Neshataeva, *Mezhdunarodnyi grazhdanskii protsess*, Moscow 2001, 166.

23 D. Martiny, *Handbuch des internationalen Zivilverfahrensrecht*, Tübingen 1984, 526.

encompasses all norms, substantive as well as procedural, although, as a rule, full equivalence is only theoretically feasible.[24]

Therefore, in a procedure to establish reciprocity, the plaintiff must prove, and the Russian court must establish, the following circumstances:

1. The plaintiff must prove that recognition and enforcement of decisions of Russian courts and courts of the foreign country in question have occurred;
2. The incidence of recognition and enforcement is relatively regular, *i.e.*, partial reciprocity exists between the Russian Federation and the other state;
3. The decisions of Russian courts, recognized in the other state were comparatively equivalent (as to contents) with the case in hand;
4. The "*exequatur*" procedure of the foreign court decision on the basis of reciprocity must in any case agree with the conditions for recognizing and enforcing judicial decisions, as provided by Chapter 31 of the APC and Chapter 45 of the CCP; and
5. Even if reciprocity has been proved, there should not be any other legal obstacles to satisfy the request (Art.244, APC; Art.412, CCP), including Russian *ordre public* considerations that would prevent enforcement of the court decision in question.

The Executive Force of Notarial Instruments in Russian and International Civil Contacts

As a general rule, notarial instruments are carried out voluntarily, when the parties, who have certified an agreement or contract through the intervention of a notary, proceed to act in accordance with the line of conduct as laid down in the notarial instrument. In international civil contacts, notarial instruments are also carried out in this way as long as there is no dispute. Affidavits concerning the right of inheritance, for instance, issued by Russian notaries, in favor of Russian citizens, in order for them to receive an inheritance abroad, such as accounts in foreign banks, have been enforced in foreign countries on condition of their going through some kind of certification procedure, in order to establish their legal validity.

When a dispute arises, compulsory enforcement will be realized, as a rule, through the courts. But in a number of countries, unlike Russia, notarial instruments may have executive force. In Russia, as is known, only notarially certified agreements concerning the payment of alimony enjoy executive force; additionally, one could assume that so-called "executive

24 R. Geimer, *Internationales Zivilprozessrecht*, Köln 2001, 15.

notes" (*ispolnitel'naia nadpis'*) on certain documents could be regarded as enforcement documents, inasmuch as the enumeration of Article 7 of the Federal Law "On Enforcement Proceedings" is not to be considered exhaustive.

At this point the international law preconditions of notarial instruments concerning money obligations may be mentioned. Article 50 of the Brussels Convention and Article 50 of the Lugano Convention establish the trans-border effect of such notarial instruments, as a subspecies of authentic instruments. Apart from this, the new EU Regulation No.44/2001 of 22 December 2000 is of importance; Article 57 of this Regulation mentions authentic instruments; they encompass not only notarial instruments, but also documents issued by court bailiffs and certain other persons.

With regard to international treaties in which Russia takes part, some of them establish the executive force of the notarial instrument in international civil procedure, *e.g.*, Article 51 of the Minsk Convention, concluded among CIS states. This provision states unequivocally that notarial instruments concerning money obligations have the same force as court decisions and are subject to enforcement among the participating states. This means that an enforcement note of, say, a Russian notary, may be subject to compulsory enforcement in a number of other countries, parties to the Minsk Convention.

Similar provisions have been included in the legal assistance treaties between Russia and Italy (Art. 26) and Poland (Art. 52). That is why this question is important to Russia. If Russia would restrict the domestic possibility for notaries to make executive notices, the Russian domestic legal space would still be open—by virtue of international treaties—for compulsory enforcement of notarial instruments of those states.

In the declaration of the 6th All-Russian Congress of Judges of 2 December 2004 "On the State of the Administration of Justice in the Russian Federation and the Possibilities for its Improvement",[25] the question of joining the Convention of Lugano was raised. If this matter would be resolved in positive manner, Russia would find itself in a single legal space for the circulation of judicial decisions and notarial instruments on the territory of Central, Western, Southern and Northern Europe. One has to remember that notarial instruments enjoy a trans-border effect according to the Convention of Lugano. This may result in notarial instruments issued, for instance, in France, having executive force in Russia, once Russia would have joined the Convention of Lugano. But if Russian civil parties would not have the possibility to receive notarial instruments with executive force in Russia, they would have a lower level of legal protection. It is

25 *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 2005 No.2, 5-17.

necessary therefore, not only to maintain, but to extend the possibilities of Russian civil parties to receive such instruments of legal protection as the executive notice of the notary, and also to expand the sphere of notarially certified contracts which may be directly enforced, without the intervention of the court, in the case that one of the conditions of the contract has not been observed.

Of special importance is the extension of the sphere of notarially certified instruments with executive force through the work on the draft Code of Executive Proceedings of the Russian Federation.[26] Article 59 of this Draft mentions contracts, including notarial instruments, which have the force of an enforcement instrument.

Another question concerns the competent court for the question concerning the recognition and enforcement of a notarial instrument issued, for instance, in Italy or Poland, and regarding civil law relationships between entrepreneurs. The CCP and the APC, unfortunately, are silent on this issue. On the basis of Article 27 (1) of the APC, the competent court, in our view, is the arbitration court, if the notarial instrument is covered by the criteria of this provision, which states that all cases connected with entrepreneurial or other economic activities are within the jurisdiction of the arbitration court. The provision does not only cover disputes, but also other cases connected with the carrying out of entrepreneurial or other economic activities. If the notarial instrument concerns financial relations between citizens and is not connected with entrepreneurial activities, the competent court for its enforcement, on the basis of Article 22 of the CCP, is the court of general jurisdiction.

Notaries and Mediation

The study and improvement of legislation concerning mediation constitute promising topics in connection with the question of instruments with executive force. Negotiation and mediation have attracted considerable attention of late. The importance of an amicable settlement of disputes has been stressed in statements by the leaders of the highest courts in Russia. The Declaration of the 6th All-Russian Congress of Judges of 2 December 2004, "On the State of the Administration of Justice in the Russian Federation and the Possibilities for its Improvement", mentioned the desirability of legislation which would strengthen alternative means of dispute resolution (through negotiation, mediation, consultation, etc.).[27] The advantages of alternative dispute resolution are obvious.

26 *Ispolnitel'nyi kodeks Rossiiskoi Federatsii. Proekt*, (Foreword by V.M. Sherstiuk and V.V. Iarkov), Krasnodar' 2004.

27 *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii* 2005 No.2, 9.

First of all, mediation, as well as other alternative means of settling disputes, are of great importance to regulate disagreements between civil parties, by facilitating the reaching of an agreement without involving institutions which have been given the authority to settle disputes on the basis of the law or through a contract between the parties. Dispute settlement by the court, in many cases, does not lead to a genuine solution of the conflict, because it requires afterwards the compulsory enforcement of the court decision, *i.e.*, it involves various state organs in the conflict between the parties. The resolution of a dispute through the participation of a mediator, on the other hand, a neutral person who is not dependent on either party and who does not possess the power to decide the dispute, is often more effective, because it allows the parties to reach a resolution of the conflict through a compromise, without compulsion or unnecessary loss of the time and money involved in a formal trial. In mediation, attention is not only directed towards the legal side of the dispute, but also towards the search for the most practical and fair solution.

Secondly, mediation has become a popular topic in recent years. Russian courts have had to deal with an ever growing number of disputes, which has led to an increase in their workload and, thus, to the need to increase expenditure for the judicial system. Mediation is, therefore, considered to be one of the possibilities for freeing the courts from those cases that could more successfully be resolved in the pre-trial stage or outside the court system. There are not yet many serious studies on this topic available,[28] and for this reason the Center for Notarial Studies has produced translations of two books to inform notaries of this interesting new development.[29]

Thirdly, all the typical features of mediation and mediators, such as strict impartiality and disinterestedness, independence of all other persons, increased liability for one's own actions, and many others, are also characteristic of notarial work. The resolutions of the XXII Congress of the International Union of the Latin Notariat (Athens, 2001) stated correctly that the notary, who by virtue of his professional duty is often called upon to bring divergent interests under a common denominator, is predestined—more than the representatives of other professions—to serve as a mediator.[30]

28 See, *e.g.*, the interesting studies of E.I. Nosyreva, *Aktual'noe razreshenie grazhdansko-pravovykh sporov v SShA*, Voronezh 1999; E.V. Bruntseva, *Mezhdunarodnyi kommercheskii arbitrazh*, St. Petersburg 2001.

29 See *Mediatsiia v notarial'noi praktike. Prakticheskoe posobie*, (Transl. from the German by S.S. Trushnikova), Moscow 2005, and *Tekhnika vedeniia peregovorov dlia notariusov*, (Transl. from the German by S.S. Trushnikova (forthcoming)).

30 I.G. Medvedev, "Analiticheskii obzor po materialam raboty poslednikh Kongressov

If we analyze the basic activities of the notaries, we shall indeed see all the essential features of mediation in the work of the notary of the Latin type, including the Russian notary. There is first of all the disinterestedness of the notary, who is bound by law to take the interests of all parties to a transaction into account. In contrast to the members of other legal professions, the notary is not allowed to "work" for one side only—that is the essence of his profession—he must safeguard the interests of all persons involved in the realization of a concrete notarial transaction. Moreover, the notary is bound to warn about the consequences of the transactions to be performed, which allows the parties to make the right decision, and this also applies to the mediation process. One also has to take the obligation into account—essential for the notarial profession—to honor professional secrecy, *i.e.*, the confidentiality of mediation is a core element of the profession of the notary, who has a legal duty to maintain secrecy. In many European countries, contracts, concluded with the aid of a notary, enjoy another valuable quality: on account of the notarial form, the contract enjoys executive force and then the results of mediation can be subject to compulsory enforcement without the intervention of the court. In Russia, only a single contract concluded with the aid of a notary has such executive force, the contract concerning the payment of alimony.

For the participants in the mediation process, it is also important that the performance of mediation by a notary implies as a general rule at the same time the provision of expert legal advice to the parties in a conflict. Whereas for many categories of lawyers and other persons mediation represents a secondary type of employment, it is a professional duty for the notary, imposed by virtue of the law. For all these reasons, mediation is both for society and for the parties a more rational, economical and less stressful way of resolving and settling disputes.

To what improvements and perspectives could this lead for the notarial profession? A draft federal law on conciliation procedures (mediation) for the resolution of commercial disputes has now been prepared. The work has been carried out in the RF Chamber of Commerce and Industry on the basis of the 2002 UNCITRAL Model Law "On International Commercial Conciliation Procedure".[31] Article 23 of the final draft mentions the notarial certification of contracts for the settlement of disputes and other disagreements. It adds that a notarially certified dispute settlement contract has the force of an executive instrument and can be enforced

Mezhdunarodnogo soiuza Latinskogo notariata", *Tsentr notarial'nykh issledovanii: materialy i stat'i, Vypusk pervyi*, Ekaterinburg 2003, 107.

[31] Reproduced at <www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf>.

compulsorily without addressing the court, in the manner provided by the law on enforcement proceedings.

Conclusion

It has been shown that furthering the use of judicial decisions and notarial instruments in international civil contacts depends on the gradual resolution of a whole range of questions, concerning both content and organization. Much will also depend on the political will to carry out a number of reforms in the sphere of law, especially with regard to expanding the possibilities for recognizing foreign court decisions on the basis of reciprocity. Ultimately, the best option in our view would be that foreign court decisions could be recognized and enforced in Russia, on condition of their being in conformity with the rules of fair court proceedings and not being in violation of the *ordre public* of the Russian Federation, *i.e.*, as stipulated by Chapter 31 APC and Chapter 45 of the CCP.

The same would apply to notarial instruments; otherwise, the subjects of notarial and judicial proceedings in Russia would be placed in an unequal position. In such a way, judging from practical experience, notarial instruments, including those with a financial aspect (as, *e.g.*, in inheritance cases), could be enforced without difficulties in other countries, if no disputes have arisen. If a dispute between the heirs arises, recognition and enforcement of a judicial decision concerning rights of succession would depend on the presence of a treaty between Russian and the other state.

Another important aspect is the organization of study and training programs for judges and notaries in the application of foreign law, and the knowledge of international treaties and the law of the European Union. All this should facilitate the increasing involvement of Russia in the international traffic of judicial decisions and notarial instruments, ultimately directed at the protection of the interests of Russian citizens and organizations.

EU Rules on Judicial Cooperation with Russia and Ukraine in Civil and Commercial Matters

Alexander Trunk

The economic recovery of Eastern Europe and continuing flows of migration from territories of the former USSR to Western Europe (as well as to the United States, to Israel and other countries) have caused in the last few years a considerable growth of court proceedings in civil and commercial matters with an "East European" dimension. Very often, this requires cooperation between courts in the European Union and courts or other public authorities in neighboring countries in Eastern Europe. Such situations arise particularly often in the relationship between the EU and Russia and Ukraine, the two largest (by the number of their population) successor states of the former USSR.

For example, when a marriage is concluded and one of the spouses is the citizen of a country of Eastern Europe, the foreign spouse normally has to bring a document from his home country showing that there is no legal impediment to his marriage. Delivery and evaluation of such a document from a foreign court or notary public is a matter of judicial cooperation, and whether one receives such a document quickly, slowly or not at all can have a great impact on personal lives. Similar issues arise in many other aspects of family life. Taking another example, it has become rather popular in some Western countries to adopt a child born in a country of Eastern Europe. This requires the approval of such an adoption by the competent authorities of the home country of the child. Other typical examples are the recognition of foreign divorces or child custody orders. In view of the high numbers of immigrants from East European countries to the West, such cases are the everyday business of our courts.

Of course, judicial cooperation is not limited to family matters or matters of inheritance; it is also an element of business. When a Dutch enterprise has an unpaid claim against a Russian or Ukrainian debtor, the creditor may choose to go to court—either in The Netherlands or another EU country, or in Russia or Ukraine. In both cases, the proceeding will require cooperation with judicial authorities abroad, *e.g.*, by sending the writ of action to the other country, by calling in witnesses from abroad or, finally, by trying to enforce the judgment abroad. If restrictive rules or informal structures in foreign countries block such cooperation, this is a serious impediment to international trade and investment. On the other hand, a very liberal approach to judicial cooperation may also have its risks. This is linked to the general quality of the judicial system of a country. If

Ferdinand Feldbrugge, ed.
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the judiciary of a country cannot be trusted, other jurisdictions will not be inclined to recognize judgments rendered in that country.

At present, the degree of judicial cooperation between the EU and its East European neighbors is less than satisfactory. Judgments from many CIS countries are not recognized in most EU countries and *vice versa*. This is true, in particular, for the relationship between the EU and Russia due to the non-existence of an international treaty on mutual recognition and enforcement of judgments; but even in cases where national rules would allow for mutual recognition of judgments on the basis of factual reciprocity, there seem to be hesitations in using this possibility. In other fields of judicial cooperation, legal bases for cooperation may exist, but their implementation is weak—cross-border service of documents taking months or even remaining without success, and cross-border evidence taking is not used due to overly bureaucratic requirements.

The present chapter—as well as the entirety of the presentations of the panel members as a whole—seeks to analyze the legal deficiency of the *status quo* and purports to find ways of improving judicial cooperation between the EU and CIS countries in the future. Though the topic of this panel has been limited to the relations between the EU and Russia and Ukraine, its findings may also be of some use for the relationship among the EU and other CIS countries.

This chapter approaches the topic from the perspective of the European Union. Another chapter in the present volume[1] offers the reader a corresponding analysis from the perspective of Russia. After a brief overview of EU legislation on cross-border judicial cooperation, the relevance of this EU legislation for third countries such as Russia and Ukraine will be discussed. Thereafter, the steps the EU has proposed or might propose to Russia and Ukraine with a view to improving judicial cooperation will be outlined. Finally, we shall deal with some issues which might get in the way of closer judicial cooperation between the EU and Russia or Ukraine.

EU Legislation on Judicial Cooperation in Civil and Commercial Matters

Within the EU—and this includes the relations between the old EU members and the new "Eastern" Member States—judicial cooperation has been, to a significant degree, unified by EU rules.

The best known and most important legal instrument in this field is the Brussels I Regulation on Jurisdiction and the Enforcement of

[1] See the work by Professor Yarkov.

Judgments of 22 December 2000.[2] This Regulation apportions territorial (international) jurisdiction in civil and commercial matters among the EU Member States and provides for mutual recognition and enforcement of judgments among the EU members under very liberal conditions. This regulation has replaced an older convention—the 1968 Brussels Convention—and by and large duplicates the so-called Lugano Convention of 16 September 1988, which extends the rules of the Brussels Convention to Member States of the European Free Trade Area.[3] Jurisdiction and recognition of judgments in *family matters* is the subject of a *second* regulation, the Brussels II Regulation of 2000/2003.[4] *Thirdly*, judicial cooperation in *insolvency proceedings* (bankruptcy) is dealt with in a special Regulation of 29 May 2000,[5] which covers jurisdiction, recognition of proceedings and conflict of laws in bankruptcy. The economic importance of cross-border insolvencies is shown by the Yukos case.[6]

The above-mentioned regulations deal with two central aspects of cross-border litigation: jurisdiction and mutual recognition of judgments. There are, however, a number of other practically important issues of judicial disputes with an international dimension. The first is the cross-border service of judicial documents; the second is the cross-border taking of evidence, *e.g.*, calling in an expert on Armenian law, who happens to live not in the EU, but in Armenia. These two matters are dealt with in two recent EU Regulations of 29 May 2000 (service)[7] and 28 May 2001

2 Council Regulation (EC) No.44/2001 of 22 December 2000 "On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters", *Official Journal* L 012, 16 January 2001, 1-23.

3 A description of the Brussels and Lugano Conventions is given by P. North and J.J. Fawcett, *Cheshire and North's Private International Law*, London 1999, 13th ed., 182 *et seq.* and 480 *et seq.*

4 Council Regulation (EC) No.1347/2000 of 29 May 2000 "On Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses", *Official Journal* L 160, 30 June 2000, 19-36, as amended by the Council Regulation (EC) No.2201/2003 of 27 November 2003 "Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility Repealing Regulation (EC) No.1347/2000", *Official Journal* L 338, 23 December 2003, 1-29.

5 Council Regulation (EC) No.1346/2000 of 29 May 2000 "On Insolvency Proceedings", *Official Journal* L 160, 30 June 2000, 1-18.

6 Yukos has been declared bankrupt in its home country, Russia on 1 August 2006. Before, the Yukos management tried to initiate bankruptcy proceedings in the US in an effort to prevent the sale of Yukos assets in Russia and other countries.

7 Council Regulation (EC) No.1348/2000 of 29 May 2000 "On the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial

(evidence).[8] A particular feature of these Regulations is that they more or less duplicate two conventions in the same fields, which were created in 1965 (service) and 1970 (evidence) by The Hague Conference on Private International Law, an international organization established in The Netherlands.[9] All EU Member States have also ratified these two Hague Conventions, but the corresponding EU regulations improve the rules of Hague Conventions and try to make cross-border service and evidence taking in the EU easier than under The Hague Conventions.[10]

The most recent approach of the EU is to unify basic structures and procedural guarantees in specific kinds of proceedings and then provide for an even more liberal regime of mutual recognition of judgments, which renounces, most notably, public policy control. This has been done in an EU Regulation of 21 April 2004, creating a specific European enforcement order for uncontested claims.[11] A similar regulation establishing a European simplified proceeding for money claims (*Mahnverfahren*) is soon to be expected.[12]

Meaning of EU Cross-Border Litigation Legislation for Russia and Ukraine

The above-mentioned EU regulations do not cover judicial cooperation with third countries. This means, for example, that they do not cover recognition of Russian or Ukrainian judgments in the EU or *vice versa*. Also, they do not cover service of documents or evidence taking between the EU and Russia.

However, in some aspects the EU regulations on cross-border civil procedure do have relevance for Russia or, more exactly, for Russian citizens or enterprises. The regulations are not limited to EU citizens. Therefore, a Russian or Ukrainian claimant—who wishes to bring suit against a de-

Matters", *Official Journal* L 160, 30 June 2000, 37-52.

8 Council Regulation (EC) No.1206/2001 of 28 May 2001 "On Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters", *Official Journal* L 174, 27 June 2001, 1-24.

9 For the text of these conventions and additional information, see the website of The Hague Conference at <http://www.hcch.net>.

10 For further details, see A. Trunk, "Sources and Principles of Judicial Cooperation in the Baltic Sea Area", in A. Trunk, A.-M. Nuutila and V. Nekrošius (eds.), *Judicial and Administrative Assistance in the Baltic Sea Area*, Berlin 2005, 12 *et seq.*

11 Regulation (EC) No.805/2004 of the European Parliament and of the Council of 21 April 2004 "Creating a European Enforcement Order for Uncontested Claims", *Official Journal* L 143, 30 April 2004, 15-39.

12 *Cf.* the revised proposal of the Commission of 25 May 2004, accessible at <http://www.ipr.uni-koeln.de>.

fendant in the EU—profits from the uniform jurisdiction rules contained in the Brussels I or Brussels II Regulations. The regulations apply to all defendants domiciled in the EU. On the other hand, they do not normally apply to defendants domiciled in a non-EU country.[13] When a German enterprise wants to sue a Russian defendant in Germany, jurisdiction has to be determined by German civil procedure rules, which partly deviate from the EU rules. Thus, between the EU and Russia or Ukraine there is no common approach in jurisdiction. This may in some cases create hardships. For example, a Russian defendant may be sued in Germany, when some—even very little—property of the defendant is found in Germany (Art.23, German Code of Civil Procedure/*ZPO*).[14] A similar rule exists, by the way, in Russia[15] and Ukraine.[16] Such points of jurisdiction are normally not appreciated by defendants and they are usually excluded in international treaties.

Judicial Cooperation EU–Russia and Ukraine: Specific Instruments?

Such a treaty, however, does not exist between the EU and Russia or Ukraine.[17] Could—or should—a treaty on judicial cooperation between the EU and Russia or Ukraine be concluded, or are there any other legal instruments to improve judicial cooperation between the EU and Russia or Ukraine?

Declarations of the Parties

The so-called Roadmap for a Common Space of Freedom, Security and Justice between the European Union and Russia, which has been agreed on by the EU and Russia on 10 May 2005 contains a rather humble, small subparagraph on judicial cooperation in civil matters (III. Justice Sec.3.3.).[18]

13 Except in the case of exclusive jurisdiction and, under certain conditions, prorogation clauses.

14 True, this provision has been mitigated by German jurisprudence, requiring some additional link of the dispute with Germany, *cf.* C. Heinrich, in H.-J. Musielak (ed.), *Zivilprozessordnung. Kommentar*, Munich 2005, 4th ed., Sec.23 note 2.

15 Art.402 (3)(2), RF Code of Civil Procedure of 14 November 2002; Art.247 (1)(1), RF Code of Arbitration Procedure of 24 July 2002.

16 Art.76 (1)(2), Ukrainian Law on Private International Law of 23 June 2005.

17 The EU–Russia and EU–Ukraine Partnership and Cooperation Treaties (PCA) of 1994 do not specifically deal with judicial cooperation.

18 Accessible at the website of the Delegation of the European Commission to the Russian Federation at <http://www.delrus.cec.eu.int> (Press Release of the Summit

It provides that:

"it will be necessary to develop EU/Russia cooperation in the following priority areas:
3.3. To develop cooperation on civil matters

- [...]
- [...]
- *explore the possibility of an EC-Russia agreement on judicial cooperation in civil matters.*" (italics added)

Between the EU and Ukraine, as far as is known, such a commitment has not yet been made.[19] In any case this seems to be only a matter of time, as the needs for judicial cooperation of the EU with Russia and Ukraine are comparable.

Before exploring the feasibility of a Judicial Cooperation Treaty with Russia or Ukraine, one must consider possible alternatives to such a treaty.

Alternatives

Lugano Convention

In the political discussions, the proposition is occasionally made that Russia or Ukraine should join the 1988 Lugano Convention on Jurisdiction and Enforcement of Judgments. The Lugano Convention is a treaty among the Member States of the EU and the Member States of the European Free Trade Area closely resembling the Brussels I Regulation. In principle, other European States can accede to the Lugano Convention. Past experience shows, however, that the present parties of the Lugano Convention grant access to new parties only after lengthy negotiations. Moreover, the accession treaty must be ratified by all present members of the Convention, which slows down the process even more. Negotiations with Poland, which finally acceded to the Lugano Convention in the year 2000, took nearly ten years. Negotiations with Hungary and Czech Republic—for some reason—became deadlocked so that these countries, even today, have not yet managed to joint the Lugano Convention. It would seem, therefore, that joining the Lugano Convention is not a realistic alternative for Russia and Ukraine.

of 10 May 2005); see, also, <http://ec.europa.eu/comm/external_relations/russia/russia_docs/road_map_ces.pdf>.

19 *Cf. e.g.*, the EU–Ukraine PCA Assessment Report (March 2003), accessible at <http://europa.eu.int/comm/external_relations/ukraine/intro/pcarep2.pdf> and the EU-Ukraine Action Plan (2004/2005), at <http://delukr.cec.eu.int/files/Action%20Plan%20Text-final-website.pdf>, which refers to a specific Action Plan for Justice and Home Affairs and further actions on ministerial level.

The Hague Conventions

Another possible alternative would be to join some of The Hague Conventions on Judicial Cooperation. Both Russia and Ukraine are already members of the 1965 Hague Service Convention and the 1970 Hague Evidence Convention. There are some additional Hague Conventions, which might indeed be a reasonable option for Russia and Ukraine, *e.g.*, The Hague Convention on Recognition of Alimony Decisions of 2 October 1973. However, there is at present no modern, broad Hague Convention on Jurisdiction and Recognition of Foreign Judgments. In addition, practice under the two Conventions of 1965 and 1970—with regard to Russia and Ukraine—is still very sparse, and these Conventions are themselves today in a process of revision. Since Russia has not yet determined the "Central Authority" under Hague Evidence Convention of 18 March 1970, the Convention is not even formally working. In practice, judicial cooperation with Russia in this field still uses the outdated—and in many aspects clumsy—Hague Civil Procedure Convention of 1 March 1954.[20]

Bilateral Conventions with EC Member States: The Future?

Yet another option would be the conclusion of separate judicial cooperation treaties with individual EU Member States. Both Russia and Ukraine have inherited from the Soviet Union numerous bilateral judicial cooperation treaties, mostly with countries of the former Socialist bloc. Some of these treaties were concluded with Western countries, such as Finland, Greece, Italy or Spain (Russian treaties),[21] but not with important trade partners such as Germany, France, Sweden or the United Kingdom. The judicial cooperation treaties of Russia or Ukraine with "new" EU members have not been touched by the EU accession of the Central and East European countries (CEEC) countries, even though there may in the future be political pressure from the European Commission upon the new member countries to denounce these treaties since they contain conflicts rules contradicting the 1980 Convention on the Law Applicable to Contractual Obligations (the Rome Convention) or its future successor regulation.[22] The conclusion of additional bilateral treaties certainly remains an option if negotiations about a treaty with the EU were to drag on. A treaty

[20] *Cf.* I. Utkina, "Current Problems of Judicial Assistance in the Field of Judicial Service Abroad and Evidence: The Russian Perspective", in Trunk, Nuutila and Nekrošius (eds.), *op.cit.* note 10, 32 *et seq.*

[21] The text of these treaties can be found at V.P. Krasheninnikov and P.V. Kruzhkov, *Sbornik Mezhdunarodnykh Dogovorov Rossiiskoi Federatsii po Okazaniiu Pravovoi Pomoshchi*, Moscow 1996.

[22] *Cf.* A. Trunk, "Das russische Internationale Privatrecht aus Europäischer Perspektive", *Kieler Ostrechts-Notizen (Kiel Journal of East European Law)* 2005 No.1/2, 23 *et seq.*

with the EU as a whole would, however, be more efficient, as it would create a basis for judicial cooperation with all EU member countries at the same time.

Reform of Autonomous Law

Finally, Russia and Ukraine could reform their domestic procedural codes with a view to enhancing judicial cooperation with foreign countries.[23] For example, Russia could move to the principle of factual reciprocity in matters of recognition of foreign judgments.[24] However, this would not necessarily guarantee reciprocity with the EU as a whole.

Competence of the EU to Conclude such a Convention?

One reason why the EU and Russia formulated the idea of an EU–Russian judicial cooperation treaty so cautiously[25] may lie in the fact that the competence of the EU to conclude such a treaty is not yet clearly established. It might be argued that Article 65 of the EC Treaty—which grants the Community the power to legislate on cross-border civil procedure—is limited to judicial cooperation *within* the EU (reference in Art.65, EC Treaty to the "internal market"). However, according to the jurisprudence of the European Court of Justice, the Community has an implied power to conclude treaties with third States in matters, for which the Community possesses an internal legislative competence.[26] It seems, therefore, that the Community may well conclude a treaty on judicial cooperation with Russia, Ukraine or other countries. This is in line with the position of the European Commission in the context of further projects of The Hague Conference, where the Commission organizes "joint positions" of the Member States and—at the same time—declares that the EC as such intends to join The Hague Conventions.[27] It is another question whether

23 Ukraine has already done this to a large degree in its Law on Recognition of Foreign Judgments of 2002 (on the basis of factual reciprocity), *Vedomosti Verchovnoj Rady* 2002 No.10 item 76.

24 At present, factual reciprocity is sufficient only under the Russian Bankruptcy Law of 2002; see A. Trunk and V. Yarkov, "Country Report 'Russia'", in A. Bülow, K.H. Böckstiegel, R. Geimer and R.A. Schütze (eds.), *Internationaler Rechtsverkehr in Zivil- und Handelssachen (Loseblattsammlung)*, Munich 2003.

25 *Cf. supra* note 18 (Roadmap).

26 European Court of Justice, Case C-22/70 Commission of the European Communities *v.* Council of the European Communities (AETR), *European Court Reports* 1971, 263.

27 *Cf.* the Statement of the Commission with regard to the proposition of 20 November 2001 as to a decision of the Council to empower the EC Member States to sign Hague conventions in the field of child protection, COM (2001) 680 endg. at <http://www.

the EU competence in this field is exclusive or concurrent. As the EU has not yet concluded judicial cooperation treaties with third countries, it would seem that—at least presently—it has not yet "fully exercised" its competence.[28]

Particular Issues in a Judicial Cooperation Treaty with Russia and Ukraine

The most sensitive issues of a future EU–Russian or EU–Ukrainian judicial cooperation treaty relate of course to the contents of such a treaty.

The basic question is, from an EU perspective, whether—and to what degree—the EU is ready to trust the Russian or Ukrainian judiciary authorities. One the one hand, it seems that there have so far not been any serious complaints with regard to judicial cooperation with Russia or Ukraine. On the other hand, the Russian, Ukrainian and Western mass media abound with reports on the perceived weakness of the judiciary in CIS countries, ranging from the low qualification of judges to political pressure or charges of corruption. In any case, the experience gathered under the existing judicial cooperation treaties with Russia or Ukraine will have to be more closely scrutinized.

Under the present circumstances a cautious approach would seem necessary. This should, however, not exclude judicial cooperation generally, but it might include a differentiated, step-by-step approach.

— For example, one might *initially* approximate the rules on direct territorial (international) competence.
— *Additionally*, one might open up the rules on cross-border service of actions and cross-border service of documents along the lines of the EU Service Regulation and the EU Evidence Regulation. This would include direct cooperation between the courts (or, at least, some courts which could develop specific know-how in international matters).
— As a *third* element, one should provide for mutual recognition of judgments, possibly in a step-by-step manner. For example, recognition of family law decisions or decisions in consumer disputes could be admitted rather quickly, while decisions in larger commercial disputes probably need specific scrutiny. Perhaps it would be possible to include even such decisions into mutual recognition, if the fairness of the process is observed and confirmed by an independent party. In this respect, parallels might be drawn with the recent EU regulation of 21 April 2004 on the European execution order for uncontested claims

europarl.eu.int/meetdocs/committees/libe/20020522/680000de.pdf>.

28 As to this formula of the ECJ, see R. Geiger, *EUV/EGV. Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft*, Munich 2004, 4th ed., Art.10 EGV notes 8 *et seq.*, Art.300 EGV notes 3 and 4.

and the planned regulation on a European accelerated proceeding for money claims.

Perspectives

Even though judicial cooperation in civil matters plays a rather low-key role in the Roadmap on Cooperation in Justice and Home Affairs, negotiations in this field might lead to concrete results in a relatively short time, perhaps because this sphere of cooperation is less "politicized" than cooperation in criminal matters. In any case, the present state of factual non-cooperation is not in accordance with the level of economic and social contacts between the EU and Russia and Ukraine; neither does it reflect the farther-reaching political will of all three sides to create joint areas of cooperation in many fields.

In order to underline the public interest in an improvement of the legal framework for judicial cooperation between the EU and Russia and Ukraine, the participants of the 2005 Berlin panel have agreed a joint resolution, calling upon the responsible politicians and diplomats to take concrete steps which might—in a longer perspective—lead to a judicial cooperation treaty between the EU and Russia and/or Ukraine.

Appendix

Resolution of the Panel "Judicial Cooperation between the EU and Russia and Ukraine", ICCEES World Congress 2005, Berlin

Resolution

The participants of the Panel "Judicial Cooperation with Eastern Europe" at the VII World Congress of the International Council for Central and East European Studies (Berlin, 29 July 2005)

— welcome the declaration in the EC-Russia Roadmap for a Common Space of Freedom, Security and Justice that the possibility of an EC-Russia agreement on judicial cooperation in civil matters should be explored,
— underline the need for such an agreement,
— ask the representatives of the European Union and of the Russian Federation to start negotiations for the agreement as timely as possible,
— suggest that similar negotiations should be undertaken between the European Union and Ukraine.

On behalf of the participants of the Panel:

Ferdinand Feldbrugge (chair)
Wolodymyr Kossak
Alexander Trunk
Vladimir Yarkov

Eugene Schuyler and the Bulgarian Constitution of 1876

Patricia Herlihy

"I am fearfully busy. Just now I am getting up a Constitution for Bulgaria."

(Eugene Schuyler to Evelyn Schuyler Schaeffer, November 1876.)[1]

Schuyler and His Mission to Bulgaria

Nation building has become a subject of international interest and domestic debate in the United States.[2] Unintentionally, the United States was involved in the mapping and constructing of Bulgaria in the 1870s through the activities of a minor American diplomat, Eugene Schuyler. The American Government did not initiate Schuyler's participation in the making of the Bulgarian Constitution and in the end disciplined him for his unauthorized actions.[3] Nonetheless, Schuyler can be credited in large measure for the emergence of an autonomous Bulgaria and for the shape it ultimately assumed.

There are two parts in the drama leading to the liberation of Bulgaria in which Schuyler played a role. The first is the change in British foreign policy from supporting the Ottoman Turks to closer relations with Russia, which his reports in the spring of 1876 on the massacres of Bulgarian Christians helped to effect. In 1876, Schuyler and the Russian diplomat, N.A. Ignatiev, devised a Constitution for Bulgaria. When the *Porte* refused to adopt it and other reforms proposed by the European Powers, Russia

1 Eugene Schuyler, *Eugene Schuyler: Selected Essays: With a Memoir by Evelyn Schuyler Schaeffer*, New York, NY 1901, 88. In her memoir of her brother, Evelyn Schuyler Schaeffer includes excerpts from Eugene's letters. The late Frank G. Siscoe, who did not live to complete his biography of Eugene Schuyler, collected many of Schuyler's letters. I am indebted to his widow Anne, his son John and his wife Carolyn, for allowing me to consult these letters, hereinafter cited as "Schuyler Papers".

2 See, for example, James Dobbins *et al.*, *America's Role in Nation-building: From Germany to Iraq*, Santa Monica, CA 2003.

3 *Osvobozhdenie Bolgarii ot Turetskogo iga: Dokumenty v trekh tomakh*, Moscow 1961, Vol. 1, 341 n. 1:

> "Schuyler and MacGahan and even Schneider in their reports and correspondence gave a correct picture of the bloody massacres by the Turks and the desolation of Bulgaria, for which Schuyler later received censure from the War Minister of the USA."

The author probably meant the State Department instead of the War Department. See Michael B. Petrovich, "Eugene Schuyler and Bulgaria, 1876-1878", 7 *Bulgarian Historical Review* 1979 No.1, 65.

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Russia, Europe, and the Rule of Law, 165-184

declared war in 1877 against the Turks.[4] Victory for the Russians led to the acknowledgment by Europe of an autonomous Bulgaria.[5]

Eugene Schuyler was born in Ithaca, New York, in 1840, of a prominent old Dutch-American family. He held a doctoral degree from Yale College and a law degree from Columbia College. After practicing law for a couple of years in New York City, he entered the American Foreign Service. He served in Russia from 1867 to 1876, first as Consul in Moscow, then in Reval (Tallinn) and, finally, in St. Petersburg.[6] His second post was in Constantinople, beginning in 1876 as Consul General and Secretary to the United States Legation. He had only been in Constantinople a few days, when he asked the American Minister Horace Maynard to help him enter Bulgaria to investigate reports by American missionaries of mass murders of Christians.[7] As Maynard wrote the American Secretary of State, Hamilton Fish, on 21 November 1876:

> "Mr. Schuyler, the newly-appointed secretary of legation and consul-general, arrived the 6 of July, from England, in the midst of the discussion [of the massacres]. Having learned the state of it, and moved by a desire to ascertain the truth, he decided to visit Bulgaria in person and make inquiries on the ground. In a note to his excellency Safvet Pasha, I informed him of Mr. Schuyler's intended trip and procured for him a traveling firman."[8]

He went to Bulgaria with a Bulgarian interpreter, Peter Dimitrov, and two assistants. En route he met up with Januarius MacGahan, an American war correspondent for the London *Daily News*, and Carl Schneider, a reporter for the *Kölnische Zeitung*.[9] Schuyler informed the State Depart-

4 Schuyler's sister, Evelyn Schuyler Schaeffer, wrote in her memoirs, "Sunrise to Sunset", 91: "There may have been some foundation to the belief that he [Eugene Schuyler] was largely instrumental in bringing on the Russo-Turkish War." The typescript is located at the Cornell University Division of Rare Books and Manuscripts.

5 See Ronald J. Jensen, "Eugene Schuyler and the Balkan Crisis", *Diplomatic History*, Vol.V, Winter 1981 No.1 , 23-37. Also Dale L. Walker, *Januarius MacGahan: The Life and Campaigns of an American War Correspondent*, Athens, OH 1988, 166-191.

6 For biographical information, see Schaeffer's memoir of her brother in *Selected Essays, op.cit.* note 1, 3-204 and "From Sunrise to Sunset", 85-95.

7 Eugene Schuyler, "United Bulgaria", *North American Review* November 1885 No.141, 464.

8 David Harris, *Britain and the Bulgarian Horrors of 1876*, Chicago, IL 1939, 403. Although Maynard clearly states it was Schuyler's idea to go to Bulgaria, Schuyler implies otherwise:

> "Under these circumstances the American Minister, Mr. Maynard, deputed me, although I had arrived in Constantinople only a few days before, to proceed to the interior of Bulgaria, and to ascertain, if possible, the exact truth of the case."

Schuyler, *op.cit.* note 7, 464.

9 See Howard J. Kerner, "Turco-American Diplomatic Relations 1860-1880", unpub-

ment that at least 15,000 Christians had been brutally tortured and killed at the hands of irregular and regular Turkish troops.[10]

Schuyler's official report, which appeared in the British press, inspired William Gladstone to write his well-known pamphlet.[11] Gladstone's publications and rhetoric so stirred the public against the Ottoman Empire that England began to favor Russia against the *Porte*. Up until then British foreign policy had supported a strong Ottoman Empire to balance Russian and French ambitions in the Near East.[12] As late as May 1876, a British fleet went to Besika Bay, menacing Russia.[13] The widespread publicity by Gladstone and others of the Turkish massacres of Bulgarian Christians inflamed the public in Europe, especially in the Balkans, Russia, and England. As one Englishman wrote Schuyler in September 1876: "the English people are roused as they never were roused before within my memory".[14] Even American newspaper editorials and articles expressed widespread

lished PhD dissertation, Georgetown University 1948, 318-393. Michael B. Petrovich gives the most detailed published account of Schuyler's visits to Bulgaria, see *op.cit.* note 3, 51-68.

10 J. A. MacGahan, *The Turkish Atrocities in Bulgaria, Letters of the Special Commissioner of the* Daily News *with an Introduction and Mr. Schuyler's Preliminary Report*, London 1876. The careers of Schuyler and MacGahan had some remarkable similarities. As Petar Sopov writes:

> "Time can never erase the names of Schuyler and MacGahan from the grateful memory of the Bulgarian people. There is still a great deal to be researched in their lives and work."

See G. Sopov, "Eugene Schuyler—Distinguished Politician, Statesman, Diplomat and Scientist", 11 *Bulgarian Historical Review* 1983 No.1, 73.

11 W. E. Gladstone, *The Bulgarian Horrors and the Question of the East,* London 1876. See Jensen, *op.cit.* note 5, 30 for the impact of Schuyler's report on Gladstone.

12 Actually, the day before Gladstone's pamphlet was published, British Foreign Secretary Lord Derby had already warned the Ottoman authorities that—in the case of Russia declaring war against the *Porte*—Britain would not support the Turks. This was in response to Turkish victories over the Serbs, but in general, British foreign policy until then had been anti-Russian. See Geoffrey Miller, *Straits: British Policy Towards the Ottoman Empire and the Origins of the Dardanelles Campaign*, Hull 1997, 4. By 6 January 1877, Salisbury (one of the two British representatives at the Conference of Constantinople) wrote to Derby that he told the Sultan of the "deep abhorrence which had been excited in England by the crimes committed in Bulgaria last summer", *Correspondence Respecting the Conference at Constantinople and the Affairs of Turkey: 1877-1877*, Turkey, 1877 No.2, London 1877, 21 and 174.

13 Harris, *op.cit.* note 8, 67.

14 Edward A. Freeman to Eugene Schuyler, 27 September 1876, Schuyler, *op.cit*. note 1, 78.

sympathy for the Bulgarians and were familiar with the Schuyler and MacGahan reports.[15]

The American Minister in Constantinople, Henry Maynard, also communicated to the Secretary of State, on 21 November 1876, that Schuyler's reports "have wrought powerfully to arouse the conscience of mankind".[16] Schuyler's reports also aroused powerfully the ire of the Ottoman Government. Its views were expressed by an anonymous author in a semi-official newspaper, *La Turquie*, printed in Constantinople on 26 November 1876, which accused Schuyler of producing accounts "more imaginary than truthful concerning massacres in Bulgaria" and of being a journalist, not a diplomat. The article ended by suggesting that Schuyler should be withdrawn:

> "We do not know how the American Government will interpret the conduct of its employee, but it is certain that it is far from conforming to the Monroe doctrine, which regulates the relations between the United States and the countries of other continents."[17]

In a forceful note to Secretary of State Hamilton Fish, Schuyler wrote angrily:

> "Savfet Pasha makes by implication two statements, both of which are untrue, (1) that I was not officially sent to Bulgaria, and, (2) that while there I acted as Correspondent of various newspapers."[18]

The *Porte*, however, continued to attack Schuyler for his report. The Turkish Council of Ministers wrote on 12 December 1876, the eve of the Peace Conference at Constantinople, that Schuyler's report had been "written at first glance and was based on believing the statements of ill-intentioned individuals, and that he omitted any mention of how the Muslims had been ill-treated at the start of the insurrection".[19]

The memorandum continued to excoriate Schuyler for claiming that Muslims had burned Bulgarians alive. While Muslims can stoop to murder, the author allowed, they would never perpetrate such a crime. Schuyler would have known that, had he "spent some time in a Muslim country and had studied the customs, principles and character of the people".[20] The memorandum also vehemently denied that the regular

15 Philip Shasko, "From the Other Shore: the American Perspective of the Eastern Question and the Bulgarian Crisis of 1876", 18 *Bulgarian Historical Review* 1990 No.4, 3-21.

16 Harris, *op.cit*. note 8, 404.

17 *Ibid*., 405. Schuyler assumed that the author was the Turkish official himself.

18 *Ibid*., 407.

19 *Ibid*., 407.

20 He was obviously unaware that Schuyler's book *Turkistan: Notes of a Journey in Russian*

Turkish army commanded by Hafiz Pasha had committed atrocities. The author asserted "anyone who knows the rigorous discipline exerted over the Imperial Army would recognize Schuyler's calumny as contrary to reason and common sense".[21]

Schuyler's reports on the massacres of Bulgarians made it possible for him to raise relief funds. As Maynard characterized him: "Mr. Schuyler himself has been made the almoner of thousands." His reports and solicitations resulted in "speedy and ample provision for the thousands of naked and houseless Bulgarians many of whom would perish under the rigors of winter in the Balkans".[22] He also helped to transfer twenty Bulgarian orphans to Russia for adoption.[23]

The Constitutional Draft

Because these events surrounding the massacres have been well documented, I want to examine more carefully Schuyler's second contribution: his role in composing the First Constitution of Bulgaria in 1876. Michael Petrovich dismissed the importance of Schuyler's Constitution:

> "Ignatiev got Prince Tseretelev and Eugene Schuyler to write a draft constitution for an autonomous Bulgaria. There is no need to examine the draft here. First, its main provisions were never Schuyler's nor Tseretelev's, but Count Ignatiev's, which the two elaborated on the basis of their intimate knowledge of Bulgarian local conditions. Second, neither their first draft, nor their second draft, nor still a third draft concerning Bulgaria, which Ignatiev had ready, had any success."[24]

Ignatiev told Schuyler that the Conference would accomplish nothing unless they had a concrete plan for consideration by the European

Turkistan, Khokand, Bukhara, and Kuldja, New York, NY 1876, an account of his nine months in Central Asia most sympathetic to the Muslim population he encountered, had just appeared in print.

21 *Ibid*., 409. On 23 February Maynard wrote Fish:
> "Mr. Schuyler made his investigations carefully, and nobody now pretends that he did not ascertain the truth. It is not too much to say that his testimony is, of all others who have borne witness, the most authoritative."
Ibid., 417.

22 US Archives, Constantinople Consular Despatches, 23 February 1877, Maynard to Fish in Harris, *op.cit.*note 8, 417. Schuyler's wife made a generous donation to the wounded Bulgarians. See letter from unknown author, dated 10 January 1876, from Sofia to Schuyler in Schuyler Papers, Bulgarian File.

23 Schuyler wrote to his sister:
> "One of the commissions I have in Bulgaria is to bring back with me twenty little she-orphans, aged from seven to twelve, for adoption in Russia. Imagine my doing it!"
See Schuyler, *op.cit.* note 1, 86.

24 Petrovich, *op.cit*. note 3, 62.

Powers to present to the *Porte*.[25] Far from only adding details, Schuyler and Tseretelev did draft a Constitution. In a letter from Tseretelev to Ignatiev on 1 November 1876, Tseretelev writes that he is including a draft for a Constitution that he and Schuyler had been working on and that he wishes to explain the bases for the provisions that they had made.[26] He goes on to list the reasons for their proposing a single province, the kind of administration they recommend, and other facets such as reducing the number of Turkish administrators.

He would scarcely need to explain the reasoning behind the plan to Ignatiev had Ignatiev been the designer. He never refers to a plan sent them by Ignatiev and gives every indication that they are submitting their own work for review. At the end of the letter, Tseretelev writes that in Schuyler's view the needs of the Bulgarian people would be best served if a foreign prince became the titular ruler of Bulgaria. He is clearly indicating which are the items they have agreed on and which they differ on. This would not be the case had they been merely adding a few touches to a previously drawn up document. In sending a copy of the draft constitution to his superior A. M. Gorchakov, Minister of Foreign Affairs, Ignatiev says that he is including one project drawn up by Tseretelev and Schuyler at his directions ("*sur mes indications*") and a second project "drawn up in haste as a response to your telegram" in case the first one was not accepted by the conference.[27] These are the plans later referred to as the maximum and minimum plans. While Ignatiev claims authorship of the minimum, he attributes the maximum plan to Schuyler and Tseretelev. Ignatiev was much too busy dealing with the Eastern Crisis, consulting with the Russian Foreign Minister and Russian Ambassador Shuvalov in London and the European Powers about convening a conference to draw up a detailed constitution for a future Bulgaria.[28] Naturally, the Schuyler-Tseretelev proposal would be in general harmony with Russian interests. They were, after all, working for Ignatiev. As Salisbury wrote to Foreign Secretary Derby on 15 December 1876, he was enclosing two documents "propounding a scheme of administrative autonomy for the province of Bulgaria", the Schuyler one "differs from the latter [that of Ignatiev] in

25 Schuyler, *op.cit.* note 7, 468.

26 *Osvobozhdenie*, *op.cit* note 3, 488-489.

27 *Ibid.*, 487.

28 In addition to the correspondence between Ignatiev and others in *Osvobozhdenie*, *op.cit.* note 3, see the Ignatiev correspondence for 1876 reproduced by H. Seton-Watson: "Unprinted Documents. Russo-British Relations During the Eastern Crisis", IV *Slavonic Review* 1925-1926 Nos.3, 4, 5. For a discussion of Ignatiev's delegating the writing of the constitution, see Marin V. Pundeff, *Bulgaria in American Perspective: Political and Cultural Issues*, Boulder, CO 1994, 222.

some respects, especially in the omission of any reference to the support to be given by the armed force of one of the military Powers to the execution of the reforms".[29]

Schuyler modestly acknowledged that:

> "as a person tolerably well acquainted with the present situation of the Bulgarian people, I should co-operate with Prince Tseretelef and another of his secretaries in preparing some scheme of government which could be submitted to the Conference for the approbation of the Powers."[30]

Schuyler went on to explain

> "The work was divided petty equally between us [Schuyler and Tseretelef], although we consulted together on every article. Others who had special knowledge were called in to assist us, including two attachés of the Russian consulate-general at Constantinople, who had lived for some time in various parts of Bulgaria and Macedonia, and Mr. MacGahan, who had won the confidence of all who knew him. Mr. Baring, the English secretary, was also invited to assist, but Sir Henry Elliot [British Ambassador to Constantinople] refused to allow him to give any aid and kept him at Philippolis. It was of course impossible for foreigners, even had they known the country much better than we did, to have drawn up a constitution thoroughly suited to the needs of the inhabitants; but we were enabled in the end to draft a scheme which we thought would be acceptable to the Powers and at the same time be capable of working fairly well."[31]

It was amazingly brazen for an American Consul, who was not even commissioned to engage in diplomacy, to assist a foreign country, Russia, without official authorization to write a constitution for a part of the Ottoman Empire, which would result in detaching a large territory from that same state to which he was accredited. It is not clear just when his superior Maynard knew of Schuyler's work on the constitution. But historian Kerner asserts that the US Minister to Constantinople Horace Maynard "must share in his [Schuyler's] guilt because he could have stopped it by refusing to give his approval for such a dangerous act".[32]

Ignatiev involved Schuyler in the writing of the Constitution of Bulgaria not only because of his knowledge of law and his sympathy for Bulgarians, but also because he was credible. As he wrote to Minister of Foreign Affairs A. M. Gorchakov on 16 November (n.s.) 1876, in a secret

29 *Correspondence*, *op.cit.* note 12, 42. Schuyler's proposal is printed in French and English, 42–50.

30 *Ibid.*, 469.

31 *Ibid.*, 467.

32 Kerner, *op.cit.* note 9, 376. Maynard might share the guilt, but he was rewarded by President Rutherford Hayes with an appointment as Postmaster General as soon as he left his post in Constantinople in 1880. In addition to the correspondence between Ignatiev and others in *Osvobozhdenie*, *op.cit.* note 3, see the Ignatiev correspondence for 1876 reproduced by Seton-Watson, *op.cit.* note 28. For a discussion of Ignatiev's delegating the writing of the constitution, see Pundeff, *op.cit.* note 28, 222.

memorandum, he wanted Schuyler to propose the plan for a single united Bulgaria in order to convince British journalists, and especially the American journalist J. A. MacGahan, who worked for a British paper, that he was completely objective.[33] Had it emanated solely from Russians, the Powers would suspect that it was biased in favor of their fellow Slavs.[34] The crafty Ignatiev had another ace up his sleeve. Along with the Schuyler-Tseretelev scheme, he asked Gorchakov to keep secret Ignatiev's plan for a divided Bulgaria, which could serve as an acceptable minimum.[35] A divided Bulgaria would appear to allow Greeks to be excluded from a greater Bulgaria so that it would be more readily accepted among the Powers and the Turks. In Ignatiev's view, what then would appear to be a compromise would have been Russia's goal all along. Ignatiev pointed out to Gorchakov that a divided Bulgaria would make no difference since all the provinces would have their own government "removed entirely from Ottoman administrators appointed by the *Porte*, along with a local militia and all the germs necessary to prepare for the creation of a politically autonomous state in a more or less near future".[36] In short, Schuyler would propose the maximum plan and Ignatiev would agree to the minimum, which would ultimately result in a Greater Bulgaria. Schuyler was not informed of Ignatiev's minimum plan so he earnestly argued at all times for a greater Bulgaria.

Whereas Ignatiev was relying all along on Bulgarian local self-government as his memo to Gorchakov explicitly states, he let Schuyler believe that it was his idea. Schuyler boasted that he was even more liberal than his Russian colleagues in proposing local self-government by diminishing the power of the general legislature.[37] Perhaps knowing as he did of the

33 Ignatiev wrote that:

> "Drawing into this academic work the secretary of the American legation, I wanted to engage his personal participation in a way favorable to our ideas and to influence through him the English journalists, who are in touch with him, more particularly the correspondent of the *Daily News* [that is, MacGahan] who has already rendered essential services to the Bulgarian cause. I hope that they will be helpful in making reasonable ideas prevail in the English press and that their opinion, as coming from competent and disinterested persons who had just traveled through Bulgaria will carry weight with the diplomats who shall assemble in Constantinople."

Pundeff, *op.cit.* note 28, 231, n. 84.

34 *Osvobozhdenie*, *op.cit.* note 3, 487. Cited also by Jensen, *op.cit.*note 5, 33.

35 David MacKenzie, *Count N. P. Ignat'ev: The Father of Lies?*, Boulder, CO 2002, 383.

36 *Osvobozhdenie*, *op.cit.* note 3, 488.

37 Cyril E. Black agreed: "It was, in short, in all respects a liberal and progressive scheme." See his *The Establishment of Constitutional Government in Bulgaria*, Princeton, NJ 1943, 22 for details of the proposal.

Russian recent adoption of the *zemstvo* system of local government, he felt that this system would work in Bulgaria as well. But again, Ignatiev had anticipated local self-government as a basis for a future united Bulgaria, so this was not an idea that originated entirely with Schuyler.

As Ignatiev had planned, his proposals sounded more moderate than Schuyler's. The Marquess of Salisbury, one of the two British delegates sent to the Conference at Constantinople, wrote to the Earl of Derby on 8 December 1876: "General Ignatiew read to me yesterday another scheme, less encumbered with details, and which, in some parts, seemed to me, as far as I could judge, preferable to that of Mr. Schuyler."[38]

On 15 November Schuyler wrote his sister:

> "I am fearfully busy. Just now I am getting up a Constitution for Bulgaria. General Ignatief is to present it at the Conference, and as Russia threatens to fight unless she gets what she wants, I am anxious to make it a good one."[39]

Later he wrote that he had received "a letter from the Russians telling me I must work harder and come after lunch and help finish the Bulgarian Constitution".[40] By 12 December, Schuyler is happy to report:

> "[T]he Bulgarian Constitution is done and has been accepted by Salisbury as the basis of discussion. I think it will get through without a great many modifications, and what I am chiefly interested in is that Bulgaria be left as a unity, instead of being divided in several separate provinces."[41]

Salisbury wrote the Earl of Derby on 8 December 1876, an abbreviated message concerning the proposals by Ignatiev, including the stipulation that Bulgaria become a single province.[42]

Contents of the Draft

According to the draft by Schuyler and Tseretelev: "Bulgaria will constitute an autonomous province of the Ottoman Empire, formed by the Danube and Sofia *vilayet*s, of the Philippolis and Slivno *sandjak*s and the

38 *Correspondence*, *op.cit.* note 12, 43.

39 Schuyler, *op.cit.* note 1, 88.

40 *Ibid*., 91.

41 *Ibid*., 92.

42 *Correspondence, op.cit.* note 12, 28-31, and 57-58 for text. Henry Elliot, British Ambassador at Constantinople and delegate to the conference, called it a proposal "concerted by him (Prince Tseretelev) and Mr. Schuyler" whereas Walter Baring (British consul at Constantinople and later Philippopolis) attributed the proposal to Schuyler who had drawn it up in conjunction with Prince Tseretelev, 28. Baring sent to Henry Elliot on 1 December 1876, "Project of Government of Bulgaria, by Mr. Schuyler and Prince Tcherelew [*sic*]", 29-31. A later version is given to Derby on 17 December, 83-88, and was the proposal that the Plenipotentiaries agreed to provisionally at the preliminary conference.

Bulgarian districts of Macedonia."[43] The administrative unit would be the canton with approximately five thousand inhabitants. An attempt would be made to retain existing cantons with new ones formed only in the case of insufficient population. Muslims and Christians would be grouped into separate cantons. Each canton would enjoy self-government without any interference by higher authorities in apportioning taxes, establishing communication lines or the police. Each canton would elect a council composed of delegates from each commune, no matter of which religion. The canton councils would elect two candidates for the position of mayor with the governor general choosing one of the two to serve one year.

Cantons would be grouped into *sanjak*s under governors, to be appointed by the *Porte* with the approval of the guaranteeing Powers. Depending on the majority of the population, administrators could be Muslim or Christians, whose duties would be to keep order and to supervise the mayors and canton councils. Serving each governor for one year would be a chancellery and a council consisting of four members chosen by the governor general from candidates put forward by the cantons and the heads of communes. The canton authorities would appoint the police, members of which must represent proportionally the number of Christians and Muslims in the canton population. The *Porte* with the consent of the guaranteeing Powers would appoint as the head of Bulgaria for five years the governor general who must be a Christian and who knows the language of the country. He would keep order, calling on troops if necessary, and would be the intermediary between the province and the central government. He would be assisted by a provincial assembly consisting of members elected by the cantons according to the number of inhabitants. The assembly would meet one month a year in the area where the governor general resides, deliberating on all matters pertaining to the province and they would chose a permanent commission, which together with the heads of communes, would act as an administrative council for the governor general. The assembly could propose modifications to the constitution, which would have to be approved by the *Porte* and the guaranteeing Powers.

Temporarily the mayors and the canton councils would appoint the Justice of the Peace. Ecclesiastical courts would resolve religious issues. Civil and criminal courts would be established in the *sanjak*s with a court of appeal for the entire province. The official language of the province would be Bulgarian but where there are mixed populations, the two languages

43 See *Osvozhdenie*, *op.cit.* note 3, 489-495, for the texts of both the minimum and maximum proposals in French and 495-502 for the same texts in Russian.

would have equal rights in the administration and in the courts. There would be complete freedom of religion and public education.

The Ottoman government could collect tithes and other taxes fixed for a period of five years based on the annual average of revenues collected over the past ten years. The provincial assembly would establish general rules concerning the imposition of taxes to be spread over the cantons, and it would report how they would apportion and collect the taxes. The taxes, after deductions for administrative and judicial expenses, would be deposited in the Ottoman Bank to service the imperial debt. Provincial and canton councils would have the right to impose additional taxes for their own needs.

Ottoman troops could be stationed only in the fortresses and in certain cities to be determined by the *Porte* and the guaranteeing Powers. A national guard would be formed with Christians and Muslims having officers of their own religion under the command of the governor general. Christians serving in the Ottoman Army would have the same rights as Muslims. An international commission should at least for one year supervise elections and oversee administrative and judicial procedures.

To San Stefano and Berlin

The Schuyler-Tseretelev proposal as outlined above was to be presented to the Conference of Constantinople, which began in December 1876. The goal was to persuade the Sultan to agree to reforms in order to pacify Balkan national agitation and counteract negative European public opinion against the *Porte* so that war would not break out between Russia and the Ottomans. Official representatives from Russia, Britain, Germany, France, Austria and Italy arrived in Constantinople to attend the first of nine sessions in late December. The first session took place on 21 December 1877, between the Turkish authorities and the Six Powers with nothing accomplished and the second session postponed until 28 December.[44]

The United States did not participate in the conference, of course, but Schuyler has been described as an unofficial delegate working actively behind the scene.[45] As noted, it was his plan for an autonomous Bulgaria that was one of the chief bases for discussion. As the dean of European diplomats in Constantinople, Ignatiev hosted and chaired the preliminary meetings at the Russian Embassy from 11-22 December. Although Ignatiev and Salisbury, the chief British delegate, had established a friendly rapport and Salisbury was in full sympathy with the Bulgarians, he was instructed from London to insist on a divided Bulgaria. The German and Austrian

44 *Correspondence*, *op.cit.* note 12, 175.

45 Jensen, "Schuyler assumed an active and even more partisan role", *op.cit.* note 5, 32.

delegates also favored a division so that Schuyler's plan had to be amended before it was submitted to the *Porte*. As Black notes:

> "the final proposals of the Conference nevertheless bore a striking resemblance to this initial scheme, except for the fact that the original territory was now divided into two provinces [...] The essential fiscal and judicial reforms were retained."[46]

The European Powers presented this amended general proposal for reform to the Turkish government on 30 December. The Turks came up with some counterproposals, which were rejected by the Six Powers because they vitiated the spirit and purpose of the reforms. After several more difficult meetings, the Turks finally refused to accept the European Powers' proposal for reform, stating that a general constitution for the Ottoman Empire had just been issued, which would provide all the reforms needed.[47]

The Conference broke up in mid-January having apparently accomplished nothing. The refusal of the Turks to accept the plan for Bulgaria triggered the declaration of war within four months by Russia against the Turks.[48] Schuyler bitterly blamed the British:

> "Lord Salisbury first divided the province [Bulgaria] into two by an arbitrary north and south line; and then the other English representative, Sir Henry Elliot, in his zeal for Turkey, persuaded the *Porte* to reject the proposed arrangement, and this brought upon his dear friends a bloody, expensive, exhausting, and what was worse, utterly useless war, which resulted in the dismemberment of the Empire."[49]

A Russian victory in 1877 resulted in the Treaty of San Stefano, which established a large Bulgarian state, an autonomous principality, under the nominal suzerainty of Turkey, embracing nearly all the lands identified as Bulgaria in the maximum proposals at the conference.[50] Thus, Schuyler's

46 Black, *op.cit*. note 37, 22-23. For a list of the areas included in the Eastern region and in the Western, see S. Balamezow, *La Constitution de Tirnovo*, Sofia 1925, 4-5.

47 MacKenzie, *op.cit*. note 35, 391-397.

48 The Constantinople Conference of Six European Powers began 21 December 1876, and ended 18 January 1877. See Edwin Pears, *Life of Abdul Hamid*, New York, NY 1917, 65-67. On 3 March 1877, the European Powers issued a Protocol at the British Foreign Office urging the *Porte* to take measures to satisfy the disaffected Balkan provinces. When the sultan refused outright on 9 April, then Tsar Alexander II issued a manifesto, on 9 April, declaring that—all pacific measures having failed—Russia would have to take more decisive measures. War then was inevitable. See, also, Edwin Pears, *Turkey and Its People*, London 1911, 219-227.

49 Eugene Schuyler, "A Political Frankenstein", V *New Princeton Review* May 1888, 306.

50 The map largely conformed to the extent of the exarchate, which was created in 1870, see Pundeff, *op.cit.* note 28, 25. See Barbara Jelavich, *St Petersburg and Moscow: Tsarist and Soviet Foreign Policy, 1814-1974*, Bloomington, IN 1974, 183, for maps of Bulgaria

proposal for a Greater Bulgaria stretching from the Aegean to the Black Sea was incorporated into the Treaty of San Stefano in 1877.

The European Powers, which had endorsed a large, but divided Bulgaria in their proposal to the Sultan in 1876, now opposed the creation of such a huge state that would fall under the powerful influence of Russia. To deprive Russia of the fruits of her victory in the war, the European Powers convened in Berlin. Britain and Austria were particularly anxious not to allow Russia to exert influence over a Greater Bulgaria. The Treaty of Berlin in 1878 cut Bulgaria's size considerably.[51] But the Bulgarian Constitution of 1879 "differed only in degree from the Schuyler-Tseretelev charter".[52] As Pundeff writes:

> "after the Congress of Berlin the program of Bulgarian nationalism could only be the unification of the nation's land dismembered by Great Power rivalries and 'through no fault of the Bulgarian people.' Its simple but enormously appealing formulation was 'Reestablishment of San Stefano Bulgaria'."[53]

according to the Treaties of San Stefano and Berlin. For details on how Schuyler and Tseretelev determined the borders of Bulgaria, see Kerner, *op.cit.* note 9, 390:

> "The intrepid Schuyler also faced and attempted an equitable delimiting of the boundaries of the new Bulgaria. This work had lasting importance for it was the basis of the Greater Bulgaria which was drawn up at San Stefano, rejected at Berlin, and has been the goal of Bulgarian irredentists ever since."

[51] The Treaty of Berlin

> "redrew the Balkan map to satisfy England and Austria. Bulgaria was dismembered: of its three main provinces, Moesia and an area to the southwest including Sofia were constituted as the Bulgarian principality under Turkish suzerainty and Russian administration for nine months. Thrace without the Aegean coast was returned to the Ottoman Empire as a distinct province (Eastern Rumelia) with a Christian governor and Turkish garrison. Macedonia and the Aegean coast were also returned to the Ottoman Empire, but without privileged status or protection."

Pundeff, *op.cit.* note 32, 27. See, also, Balamezow, *op.cit.* note 46, 6-7, for the terms of the "mutilation" of Bulgaria. Coincidentally, Schuyler's wife's brother-in-law, Henry Waddington, was the chief French delegate to the Congress of Berlin, which whittled down Schuyler's plan for a Greater Bulgaria. See Mary A. Waddington, *Letters of a Diplomat's Wife*, New York 1903, v. Russia, by then, had also second thoughts about creating a single Bulgarian state; see Roumen Daskalov, *The Making of a Nation in the Balkans: Historiography of the Bulgarian Revival*, Budapest and New York, NY 2004, 219.

[52] Black, *Establishment*, 50. For an English translation of the 1879 Bulgarian Constitution, see *ibid*., 291-309. Balamezow, *op.cit.* note 46, 471-476, states that the framers of the 1879 Constitution borrowed from the Belgian Constitution by way of elements borrowed by the Romanian Constitution, incorporating also some Greek articles. Schuyler also gives a good description of the 1879 Constitution and subsequent changes in "United Bulgaria" in "A Political Frankenstein", *op.cit.* note 49, Schuyler claims that the 1879 Tirnovo Constitution was modeled after that of Serbia, 309.

[53] Pundeff, *op.cit.* note 28, 27.

Consequences for Schuyler

If Bulgarians were grateful to Schuyler for his aid in publicizing the massacres and in writing the constitution accepted at San Stefano, the Turks were furious at his interference. Aristarchi Bey, the Ottoman Envoy at Washington, was particularly incensed and did what he could to persuade the US State Department to dismiss Schuyler. He complained that Schuyler had been sending out news reports of the massacres to European newspapers, but as Schuyler explained to the American Secretary of State Fish, Aristarchi Bey:

> "showed you two telegrams purported to be from me, but they were not. They were sent by J. A. MacGahan to the *Daily News* and by Dr. Carl Schneider to the *Kölnische Zeitung*. They are correspondents to those papers. They were by accident my traveling companions during my investigations in Bulgaria."[54]

Schuyler continued to explain that since he believed the telegrams had to do with soliciting funds to help the victims of the massacres, he counter-signed the telegrams so that they would pass censorship. "It might have been a want of judgment on my part, but I had no intention to cause trouble between the US and Turkey." He averred that he had never written to either paper except for a letter to the *Daily News* responding to a review of his Turkistan book. The State Department, however, believed that the telegrams were indeed his stories. And diplomats were not allowed to publish

> "reports regarding the political state of the country within which you exercise your functions and that you communicate to and correspond on pending public questions with and through the public press without previously communicating to and obtaining the assent or approval of your government."[55]

Ironically, some speeches by Gladstone revealed that Schuyler was continuing to feed information to him, more violations of the regulations issued to diplomatic agents.

Amazingly, the Secretary of State in the United States did not know of Schuyler's authorship of the proposal for the Conference at Constantinople until January since the US Minister in Constantinople Maynard neglected to tell him for some time and once he informed him, it took six weeks for the information to reach Fish. Angry and embarrassed, Fish wrote Maynard:

> "the President [Grant] hesitates to recall Mr. Schuyler at this time solely for fear that the doing so might be misinterpreted in Europe as indicating a want of sympathy

54 US National Archives, State Department, Consular Dispatches from Constantinople, T194, Roll 12, 22 February 1877 from Eugene Schuyler to Hamilton Fish, Secretary of State.

55 Secretary of State Hamilton Fish to Eugene Schuyler, 26 January 1877, in Harris, *op.cit.* note 8, 411.

> in behalf of those who are represented by Mr. Schuyler as suffering at the hands of the Turks. He hopes that there will be no repetition of the improprieties which are herein disapproved, to compel him to recall a Gentleman, whose efficiency and intelligence heretofore, and in another post of duty, have attracted his attention and have met with his warm approval."[56]

Although the United States did not want to become involved in Balkan affairs, this was a clear expression of sympathy for Bulgarians. Maynard also defended Schuyler, writing to Fish, that although Schuyler might have been imprudent to decide to investigate the killings in Bulgaria:

> "it entailed upon him personally great labor, some expense and infinite annoyance. The beneficent results to his own countrymen and to the wretched Bulgarians are unquestionably vast."[57]

The Turkish diplomat had not only accused Schuyler of improperly sending information to European newspapers, but he also alleged that the American Consul declared while attending a dinner in Adrianople that he was an enemy of the Ottoman government. Indignantly, Schuyler replied:

> "I am surprised that the Turkish Government would officially bring this slander as an accusation against me. I was present at no public dinner whatever in Adrianople [...] Neither there nor elsewhere did I make any such remark as is attributed to me, or say anything of a similar purport."[58]

To his family, Schuyler admitted: "I think the Government would be glad to get rid of me, but will not dare to say so." And on 16 February 1877, he wrote home: "It seems that the Turks attacked me at Washington and accused me of all sorts of things, among others putting into my mouth 'that I had come here to destroy the Ottoman Empire'."[59] He had enemies in Constantinople as well. He wrote his family that the English residents

> "are all more Turkophile than the Turks, and have the most horrible ideas about me—without knowing me—call me a Russian spy, a *Turkenfresser*, say I had no business to come here and meddle, etc. Some of them, I think positively hated me."[60]

Fish was more than annoyed with Schuyler's writing the constitutional proposal:

> "It was a delicate and somewhat hazardous step for the Secretary of the Legation of the United States to venture upon; and whatever may be the merits or demerits of the plan, it is conceived that it would have been more in conformity with the general

56 *Ibid.*

57 *Ibid.*, 416.

58 *Ibid.*, 415.

59 Schuyler, *op.cit.* note 1, 103.

60 *Ibid.*, 89-90.

> instructions and the duty of the Secretary of the Legation to have refrained from entering into the political questions of the country in which he is acting."[61]

A month later Fish was even more irked: "There appears to be no room to question the fact that Mr. Schuyler has been guilty of an official breach of official propriety and of the laws and regulations governing our representatives in foreign countries in their dealings with the government to which they are accredited."[62]

An anonymous author writing in *Blackwood's Magazin*e in 1877, criticizing the US State Department, used Schuyler as an example of its shortcomings. While claiming not to know Schuyler personally, he accused him of being a Pan-Slav and causing trouble:

> "It was at the moment when all Europe was agitated by the events which were transpiring in Turkey and when a question pregnant with the gravest consequences, exclusively European in character, was on the point of exploding that the American consul general and secretary of legation in Constantinople plunges into the arena and without the knowledge of his government energetically enters upon a campaign in the newspapers against the government to which he is accredited. Had Mr. Maynard, the U.S. Minister been a trained diplomat, he would probably not have tolerated such a breach of propriety on the part of his subordinate."[63]

The critic further vilified Schuyler, saying that if he wanted to continue to be a public champion of a certain class of Ottoman subjects, he had a perfect right to his hobby, but that he was bound to resign his appointment, especially after repeated requests by the Ottoman Ambassador to the United States for his removal from Constantinople. While Schuyler denied all the accusations leveled at him from various quarters, it is certainly true that while serving in Constantinople, he was no friend of the Ottoman *Porte*. And he was clearly very close to Russian officials. As the anonymous critic wrote: "Secretary of State Fish immediately communicated to Maynard at Constantinople his disapproval of Schuyler's proceedings but the mischief had been done."[64] A final report by the State Department concluded:

61 Fish to Maynard, 5 January 1877, quoted in Kerner, *op.cit.* note 9, 397, n. 12.

62 Fish to Maynard, 1 February 1877, *ibid*., n. 18.

63 "American Diplomacy in the East", CXXII *Blackwood's Edinburgh Magazine*, New York July-December 1877, 467-468. Peter Bridges, "Eugene Schuyler: The Only Diplomatist" 16 *Diplomacy and Statecraft* March 2005, 16-17:

> "A Republican, Maynard who had spent years in Congress, and after failing to be elected governor of Tennessee had been given a diplomatic post as a sop. By this time the European countries had created career diplomatic services, while America continued its diplomatic spoils system."

For details on Maynard's career before and during his service in Constantinople, see Kerner, *op.cit.*, note 9, 291-300.

64 *Ibid*., 470.

> "his unauthorized and self imposed mission to Bulgaria and his active participation in the preparation of the Russian project presented to the Conference, have been through the endorsement of Mr. Maynard, invested with all the sanction due to his diplomatic and consular duties."[65]

The wonder is that Schuyler remained at his post for two years.

Schuyler's Later Career

Finally, in 1878, the State Department transferred Schuyler to Birmingham, England. This assignment could only be perceived as a demotion. In his correspondence Schuyler had often remarked how happy he and his wife were to be living in Constantinople. The next year the New York *Tribune* noted:

> "Mr. Schuyler has, I suppose, an unrivalled knowledge of Russian and Turkish politics. He is a Russian scholar, speaks three or four European languages, knows Asia, has written the best book on that central part of it just now in dispute, and has withal a European reputation as a diplomatist. Hence we send him to a midland manufacturing town in England to certify invoices."[66]

Schuyler's sister also thought it "a curious appointment for a man whose specialty was the Eastern Question".[67] As a matter of fact, he was writing a report on pig exports from England when in 1878, the Bulgarian National Assembly sent him in Birmingham a telegram, which said in part:

> "the free Bulgarian nation hastens to thank you heartily for your great services, and to assure you that your honoured name will hold an enviable place in the history of the liberation of our nation."[68]

The only other two individuals so honored were Tsar Alexander II, who had declared war against the *Porte*, and William Gladstone, the British former prime minister, who popularized Schuyler's report on the massacre of Bulgarians by the Turks.

Schuyler's interest in Bulgaria never abated. While he was serving as *Chargé d'Affaires* in Romania, the Prince of Bulgaria, Alexander of Battenberg, sent his secretary and boat to fetch him over to Bulgaria where he dined with the Prince and other Bulgarian dignitaries.[69] On 10 May 1881, Schuyler wrote home excitedly: "I am much worried over Bulgaria. The Prince is going to try to upset the constitution. I shall do what I can

65 *Ibid*., 412.

66 Quoted by Normal Saul, *Concord and Conflict: The United States and Russia, 1867-1914*, Lawrence, KS 1966, 122.

67 Schuyler, *op.cit*. note 1, 131.

68 *Ibid*., 132-133.

69 *Ibid*., 138-139. Schuyler Papers also contains telegrams exchanged between Schuyler and Prince Alexander in 1880 when the latter was made the ruler of Bulgaria.

to support the Constitutional party."[70] Later Schuyler wrote that he was pleased that in 1883, the Prince restored the Constitution with very slight changes. He was even happier to report: "the condition of Bulgaria has been uniformly prosperous". Nothing was more gratifying, however, than Rumelia's recent integration with Bulgaria.[71]

Criticisms of Schuyler's activities on behalf of Bulgarians dogged him until the year before he died. He had been nominated to become Assistant Secretary of State, but many detractors wrote to the State Department accusing him of being unfit for the position. In a secret memorandum sent to the State Department in 1889, Schuyler defended himself:

> "My reports on the Bulgarian massacres were certainly not pleasing to some of the Turkish Pashas; but when they ascertained that I was shielded by the instructions of my chief, Mr. Maynard, they found fault with me for having assisted in preparing a draft constitution for the autonomous province of Bulgaria to be submitted to the Conference at Constantinople before the war. Even then no instructions on the subject were sent from Constantinople, but Aristarchi Bey, whose own position was very insecure (and to whom I had just lent a helping hand at the request of his brother) thought to ingratiate himself at the Porte by procuring my withdrawal. If I had known what he was about, his peculations and thefts would have been exposed much sooner, and he would have retired to that obscure exile which he is now enjoying. And to think that twice when this man was dismissed he was kept in office at the special request of our State Department although he was doing his best to prevent the settlement of all questions which we had with Turkey!"[72]

His nomination for Assistant Secretary was withdrawn while Schuyler was serving as US Consul General in Cairo. Within a year he died in Venice on 17 July 1890, at the age of fifty. One of his admirers wrote:

> "without doubt it was his peculiar treatment by the Senate, which finally refused his confirmation as Assistant Secretary of State, a post he would have peculiarly advanced, and then appointed him to Egypt and left it unconfirmed for a year with always the doubt if he would be confirmed and the difficulty in adjusting his daily life—it was such treatment that greatly hastened his death."[73]

70 Schuyler, *op.cit*. note 1, 145.

71 Schuyler, *op.cit.* note 7, 474-476.

72 United States National Archives, General Records RS 59, Appointment Records Applications and Recommendations for Public office 1797-1901, Administration of Cleveland and Harrison 1885-1893, Eugene Schuyler, Confidential Memorandum, Washington, DC, 18 April 1889.

73 Cornell University, Division of Rare Books and Manuscripts, Schuyler #923 Account Folder, undated and unsigned letter. It should be noted that in addition to his activities in Constantinople, Schuyler was bitterly criticized for his book, *American Diplomacy and the Furtherance of Commerce*, New York, NY 1886, which decried the patronage system used in filling the ranks of US diplomats. The cause of his death is not clear. In April 1890, two months before he died, Schuyler wrote his friend Williard Fiske that he had been ill with influenza and bronchitis. On 11 June 1890, five days before he died, he wrote Fiske again:

To Bulgaria Schuyler was a hero, to the Ottoman authorities he was a Russian spy, to Russia a friend, and to the United States Consular Service he was something of a puzzle at best and an embarrassment at worst. To his friends and family he was a martyr as a result of ill treatment by the United States Senate and Department of State.[74]

We must give due credit to Schuyler for his contribution to the making of the Bulgarian State, but one must also consider that the Russian Ambassador Ignatiev was using him for Russian ambitions. Schuyler's influence in helping to stir up anti-Turkish sentiment was sought after by the Russians as much as his legal and political skills in drawing up a constitution. In a sense, even if he was being used for propaganda, his accomplishments on behalf of Bulgaria are not diminished. Jensen expressed this idea when he wrote:

> "the fact that the American diplomat agreed to lend his prestige and that of his country to a Russian proposal, without the knowledge of his government, testifies more to the imprudence of Eugene Schuyler than the persuasive skills of Ignatiev [...] Schuyler's sympathy for Bulgarians and his wish to avert a war between Russia and the Ottoman Empire determined his behavior."[75]

Peter Bridges writes:

> "perhaps no other American official either before or after Eugene Schuyler ever did as much to bring about the independence of a European country as Schuyler did in the case of Bulgaria, after it had been under Ottoman rule for five centuries."[76]

Petrovich's testimonial (despite his disparagement of Schuyler's contribution to the drafting of the constitution) reads: "very few Americans have been as closely linked with the destinies of the Bulgarian nation as Eugene Schuyler".[77] James F. Clarke, a noted specialist in Bulgarian his-

> "I fear that I am getting to be as confirmed an invalid as you think you are. I seem to have given out generally, especially my liver."
>
> Cornell University Rare Books and Manuscripts Division, Fiske Correspondence.
>
> His sister wrote, however, in "Sunrise to Sunset", *op.cit.* note 6, 95:
>
> "Stopping for a rest at Venice he was prostrated by an attack of malarial fever. The physician in attendance did not consider him in immediate danger, but in any attack or illness a weak heart should be taken into account. On the evening of 16 July 1890, suddenly without any warning he died."
>
> Peter Bridges suggests, in a personal communication, that he might have been stricken with schistosomiasis.

74 "Cyrus Hamlin, founder of Robert College, accused Schuyler of being 'to all intents and purposes a Russian,' while the Ottoman ambassador in Washington claimed that he was not only in sympathy with Russians, but reputed to be in their employ." Jensen, *op.cit.* note 5, 35.

75 *Ibid*., 35.

76 Bridges, *op.cit.* note 53, 15.

77 Petrovich, *op.cit.* note 3, 51.

tory, ranked the following men according to their importance in liberating Bulgaria: George Washburn (the missionary who first reported the massacres), Eugene Schuyler, J. A. MacGahan, William Gladstone, and Alexander II.[78]

The American journalist J. A. MacGahan's tombstone in Ohio is inscribed: "Liberator of Bulgaria".[79] It could be argued that Schuyler's simple and neglected grave on the island of S. Michele near Venice equally deserves the epithet. Both Americans galvanized British public opinion against the Ottomans. Schuyler the diplomat, Slavophile, and nation-builder, however, was the only American who played an important role in mapping Bulgaria and in writing its first constitution.

78 Dennis P. Hupchick, *The Pen and the Sword: Studies in Bulgarian History by James F. Clarke*, Boulder, CO 1988, 389.

79 Each year, MacGahan's death is marked with solemn ceremony in New Lexington, OH; see, also, <http://themacgahanfoundation.netfirms.com/>.

The Role of the European Union in Rebuilding Serbia as a *Rechtsstaat*

Ljubica Djordjević

Introduction

The overthrow of Milošević in October 2000 created a perfect opportunity for Serbia to remove the authoritarian regime and to initiate a transformation of its political and social environment toward a "functional democratic order". In the transformation process Serbia is facing not only the problems of the Communist past, but also the legacy of wars, economic collapse, and international isolation in the 1990s. The extensive degradation of the Serbian State and society by the authoritarian Milošević regime requires an intensive and all-inclusive transformation, covering not only the political sphere, but also the economy, society, and culture. Transformation can produce the desired results only when there is a broad consensus on the reforms among the political, economic, and social elites, and when the citizens support the necessary reforms. In an ever globalizing world, the support of the "international community" is also of great importance.

This chapter deals with the influence of the EU on the democratization process in Serbia. It is divided into three main sections. The first one deals with the reasons for the EU to promote democracy in the region of the Western Balkans, including Serbia. The second section focuses on the instruments of EU leverage (conditionality, concrete assistance, and monitoring process). In the third section, the chapter looks at the effectiveness of EU leverage on Serbian state reform by identifying the difficulties both on the EU and the Serbian side.

The European Union as the External Player in the Serbian Reform

The eastern enlargement of the European Union in May 2004 brought its borders to the region of the Western Balkans. At the moment Serbia borders on the EU in the north (Hungary), and once Bulgaria and Romania join the Union, the Serbian eastern border will be with the EU. This proximity to the EU largely determines the level and extent of international involvement and the role the EU plays in the transformation of the states in the region of the Western Balkans, including Serbia.

The interest of the EU in promoting democratic values in the region lies primarily in bringing stability. The recent wars in the Balkans have shown the conflict potential of the region. Although the wars are over,

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 185-201

the disputes have not been settled definitively. In this respect it is of great importance that the main political players in the region accept democratic values and that the states in question function according to the principles of the *Rechtsstaat*. On the basis of the experience of the twentieth century one can assume that democratic systems are more capable of peaceful and "fair" dispute resolutions than authoritarian ones.[1] The beneficiary of such "stability-through-democracy-export" is not solely the region of the Balkans, but the EU as well. Keeping (armed) conflicts away from the European continent, the EU strengthens its own security, stability, and prosperity. Once a conflict erupts, it is very difficult to control its intensity and reach.[2] In addition, conflict prevention is cheaper than costly peacekeeping missions.[3]

Apart from stability, the EU benefits from democratization of the region because of better cooperation opportunities. Because structurally similar or identical systems can more easily cooperate, successful political systems are inclined to spread themselves.[4] Thus, by promoting the incorporation of the values on which it is based in the Western Balkans, the EU fosters the building of state systems that will be lasting political allies and economic partners.

Apart from these general considerations, the evolving relationship between the EU and the Western Balkans gives special weight to the possibility of full integration of the countries in question in the EU structures.[5] Although the region remained outside the EU borders after the

1 See L. Diamond, "Lessons of the Twentieth Century", *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives. A Report to the Carnegie Commission on Preventing Deadly Conflict*, Carnegie Corporation, New York 1995.

2 The problem of seemingly small, local events that can provoke system-wide disruptions has been tackled in the so-called "chaos theory". It launched the expression of the "butterfly effect" ("a tiny butterfly flapping its wings in Beijing can set forces in motion that can blow thunderstorms into Washington and New York") to describe the international repercussions of communal or intrastate conflicts, which increasingly display a capacity to spill across borders through arms transfers, refugees, and the spread of disease. See C. A. Crocker, F. O. Hampson and P. Aall (eds.), *Managing Global Chaos, Sources of and Responses to International Conflict*, Washington, DC 1996, Introduction XIII.

3 "During the 1990s, seven violent conflicts around the globe cost the international community € 200 billion that could otherwise have been used for peaceful purposes." The European Commission, *A World Player, The European Union's External Relations*, Luxembourg 2004, 10.

4 E. Sandschneider, *Externe Demokratieförderung: Theoretische und praktische Aspekte der Außenunterstützung von Transformationsprozessen. Gutachten für das Zentrum für angewandte Politikforschung*, Munich 2003, 17, also available at <http://www.cap.lmu.de/download/2003/2003_sandschneider.pdf>

5 "The Western Balkans and support to their preparation for future integration into

EU's eastern enlargement, it is not excluded from integration. And this integration perspective is the key element of the impact that the EU has on the reforms in the region. The demands concerning the implementation of the principles of liberal democracy, the *Rechtsstaat*, the free market, and the open society should not be understood as abstract ideals, but in the perspective of integration in the EU. Thus, the promotion of democracy in the Western Balkans by the EU goes beyond pure foreign policy. The purpose of EU support in the region is not just to make national systems conform to democratic principles, but to align them to EU principles, make them compatible with the EU system, and enable their integration in the EU.

Instruments of EU Leverage

In general, the influence the EU gains as an actor in promoting democracy derives from its prosperity based on politically and economically open societies.[6] This encourages developing countries to copy known EU principles in order to realize the progress required. For European countries this is underpinned by the aspiration to "join the club". Possible membership of the EU is seen as a guarantee for success.

Conditionality

EU leverage on democratization processes in the world is based on the "stick-carrot-principle", in other words, involves conditionality. The EU is willing to provide specified amounts of assistance (usually financial or technical), if the government of the beneficiary country takes, or promises to take, certain policy actions.[7] The EU can apply conditionality in a positive or in a negative manner by up- or downgrading the relationship. The EU applies the policy of conditionality at different levels of relations with third countries (accession, trade/cooperation agreements, autonomous measures and in diverse aspects: politics, economy, law).

EU leverage in the Western Balkans rests on the potential candidate status offered to the countries in the region,[8] and on the instruments of

European structures and ultimate membership into the Union is a high priority for the EU. The Balkans will be an integral part of a unified Europe." *The Thessaloniki Agenda for the Western Balkans, European Council Conclusions on Western Balkans, Annex* A, 16, Luxembourg 16 June 2003.

6 M. Skak, "Stability of Democracy and Institutions and the Rule of Law", in P-C. Müller-Graf (ed.), *East Central Europe and the European Union: From Membership to a Member Status*, Baden-Baden 1997, 304.

7 J. T. Chekel, "Compliance and Conditionality", *Arena Working Paper* 2000 No.00/18, at <www.arena.uio.no>, 2.

8 "All the countries concerned are potential candidates for EU membership". Santa

the Stabilization and Association process (SAp). In implementing the strategy for the region within the scope of the SAp, the EU uses three main incentives: the Stabilization and Association Agreement (SAA), autonomous trade preferences, and "Community Assistance"—CARDS. The benefits arising from each one of these instruments are directly connected with the diverse conditions. The SAA is connected with the range of democratic principles, both before the beginning of negotiations,[9] and after the Agreement has been concluded.[10] The granting of autonomous trade preferences is linked to, among other things, respect for fundamental principles of democracy and human rights.[11] Respect for the principles of democracy and the rule of law and for human and minority rights and fundamental freedoms is a precondition of eligibility for CARDS assistance.[12]

An important instrument for EU influence on the reforms in the countries of the Western Balkans is the so-called European Partner-

Maria de Feira European Council (19 and 20 June 2000), Presidency Conclusions, No.67.

9 The beginning of negotiations on an SAA is linked to meeting the predominantly political conditions defined by the EU General Affairs Council in April 1997; see Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of south-east Europe, 27 April 1997; *Bullettin of the European Union* 1997 No.4. The list of the relevant conditions as well as the elements for the examination of compliance with relevant standards are to be found in Annex 1 of this chapter.

10 "Respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for international law principles and the rule of law [...], shall form the basis of the domestic and external policies of the Parties and *constitute essential elements of this Agreement*" (italics added); Article 2 Stabilization and Association Agreement both with Former Yugoslavia Republic of Macedonia and Croatia; Proposal for a Council and Commission Decision on the conclusion of the Stabilization and Association Agreement between the European Communities and their Member States, on the one part, and the former Yugoslav Republic of Macedonia, on the other; COM(2001) 90, *Official Journal*, C 213 E, 31 July 2001, 23-226; Proposal for a Council and Commission Decision concerning the conclusion of the Stabilization and Association Agreement between the European Communities and their Member States, on the one part, and the Republic of Croatia, on the other; COM(2001) 371, *Official Journal*, C 332 E, 27 November 2001, 2-222.

11 *Cf.* Council Regulation (EC) No.2007/2000 introducing exceptional trade measures for countries and territories participating in or linked to the European Union's Stabilization and Association process; *Official Journal* L 240, 23 September 2000, 1-9; Preamble argument No.7.

12 Council Regulation (EC) No.2666/2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia; *Official Journal* L 306, 7 December 2000, 1-6; Article 5(1).

ship.[13] The function of the European Partnership is double: on the one hand it identifies priorities for action in order to support efforts to move closer to the EU and on the other it serves as a checklist against which to measure progress.[14] It is a framework covering the priorities resulting from the analysis of Partners' different situations, on which preparations for further integration into the European Union must concentrate in the light of the criteria defined by the European Council, and the progress made in implementing the Stabilization and Association process including Stabilization and Association agreements, where appropriate, and in particular regional cooperation.[15]

In the European Partnership a distinction is made between short-term priorities, which are expected to be accomplished within one or two years, and medium-term priorities, which are expected to be accomplished within three to four years.[16] The priorities refer to the three main issues: political situation, economic situation, and the European standards. In the framework of the political situation the European Partnership contains the priorities/measures that have to be accomplished in the fields of democracy and the rule of law, human rights and protection of minorities, and regional and international cooperation.[17]

Financial and Technical Assistance

The EU impact on the (national) reforms of the states in the Western Balkans is not limited to the stipulation of conditions at diverse levels and of different kinds. In order to help the countries to meet the criteria, the EU provides them with financial and technical support. The three EU programs underpinning the strengthening of democracy and the *Rechtsstaat* in Serbia are: CARDS, TAIEX and Twinning. The first one is of a financial nature: within the scope of CARDS, the EU provides grants for, *inter alia*, "the creation of an institutional and legislative framework to underpin democracy, the rule of law and human and minority rights, reconciliation and the consolidation of civil society, the independence of

13 Council Regulation (EC) No.533/2004 on the establishment of European partnerships in the framework of the Stabilization and Association process; *Official Journal* L 86, 24 March 2004, 1-2.

14 EC Regulation 533/2004; Preamble argument No.5.

15 EC Regulation 533/2004, Article 1.

16 Council Decision (EC) No.520/2004 of 14 June 2004 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999; *Official Journal* L 227, 26 June 2004, 21-34; see under Annex, No.3. Priorities.

17 Council Decision (EC) No.520/2004, Annex.

the media and the strengthening of legality and of measures to combat organised crime".[18] TAIEX and Twinning are technical programs: TAIEX provides centrally managed short-term technical assistance in the field of approximation, application and enforcement of legislation; and cooperation under the Twinning program envisages occasional visits of public administration experts from the Member/Candidate Country to the relevant institution in the partner country, with a previously clearly defined need and aim of the visit.[19]

Monitoring

The European Commission plays the key role in the (EU) monitoring and measuring of the reform progress. The European Commission analyzes the situation in Serbia on the basis of the facts gathered by its office in Belgrade, and especially on the basis of meetings with Serbian officials within the scope of the Consultative Task Force (CTF) and the Enhanced Permanent Dialogue (EPD).[20]

Since April 2002, the Commission has published the findings in the Annual Report on the SAp.[21] These Reports are of twofold importance.

18 Council Regulation (EC) No.2666/2000, Article 2 (2).

19 For details about TAIEX and Twinning see <www.seio.sr.gov.yu> (programs).

20 The Consultative Task Force is a technical working group, co-chaired by the Presidency of the Council of the European Union, the European Commission and the Federal Republic of Yugoslavia. During Consultative Task Force meetings, experts from the Federal Republic of Yugoslavia and from the European Commission engage in detailed discussion of various sectors, identifying the state of play and deciding together how best to begin to put in place EU-compatible reforms. Discussion has been on the basis of replies, by Ministries, to expert technical questionnaires in each area. The work of the Consultative Task Force was followed by a long break in the formal dialogue regarding the preparations for the Stabilization and Association Agreement. A new formal mechanism of cooperation, the Enhanced Permanent Dialogue (EPD), was established in July 2003**.** In essence, EPD was not different from CTF. It was introduced in EU-Serbia-Montenegro relations in order to ensure positive evaluation of the Feasibility Study and make good use (expert consultations and assistance) of the time left until the SAA negotiations started. See <http://europa.eu.int/comm/external_relations/see/fry/ctf/> and <www.seio.sr.gov.yu> (Serbia and the EU: Enhanced Permanent Dialogue).

21 See The European Commission, Commission Staff Working Paper; Federal Republic of Yugoslavia—Stabilization and Association Report; 4 April 2002; SEC (2002) 343; The European Commission, Commission Staff Working Paper; Serbia and Montenegro—Stabilization and Association Report; 26 March 2003; SEC (2003) 343; The European Commission, Commission Staff Working Paper; Serbia and Montenegro—Stabilization and Association Report; 30 March 2004, SEC (2004) 376. All reports are available on <http://europa.eu.int/comm/external_relations/see/sap/rep3/cr_s-m.htm>.

First, the findings determine further EU policies for the country in question. Secondly, the reports contain the guidelines/directions for the improvements necessary in different fields and sectors.

The Annual Reports are not to be confused with the so-called Feasibility Reports (feasibility study). The former are the regular reports and the latter refer to the eligibility of the country to negotiate an SAA and focuses on the ability of the country to meet the obligations from the Agreement.[22] A positive feasibility study is a *conditio sine qua non* for the opening of negotiations on the SAA with the country in question.

The Efficiency of EU Leverage on the Serbian State Reform

Five years after the regime change in Belgrade the reform evaluation is mixed. Comparing the achievements with the situation under Milošević rule, progress is noticeable. On the other hand, bearing in mind the pace of the reforms (delays and hesitation), as well as what is left to be done, one cannot be satisfied. The reasons for the lack of desirable reform efficiency lie both in the EU approach and the Serbian attitude to the necessary reform measures.

Problems in the EU Approach to the Serbian Reform

The weakness in EU leverage on the democratization process in Serbia is mainly determined by the following factors: (1) EU failure to decide on the Western Balkans' place in the future architecture of Europe, (2) EU measures that sometimes do not meet the specific requirements of the Balkan situation, (3) and the complicated bureaucratic procedures connected with EU financial and technical assistance.

In spite of EU statements on the Balkans as an integral part of unified Europe, clear EU decidedness to open up the Union for membership of the countries in question is failing. The reasons for such irresolution lie in the general "identity crisis" the EU is facing, as well as in the instability potential of the region. A year after the "big bang" (the Eastern enlargement) the EU faces the results and effects thereof, its own ability for new enlargement and its necessity, and the needs for internal restructuring. In balancing between "enlarging" and "deepening", the EU is guided by its main goals—stability, functionality, and prosperity. Bearing in mind the ongoing constitutional crisis in the Union, it is obvious that the need for "deepening" prevails at the moment. The issue of enlargement remains

[22] See The European Commission, Commission Staff Working Paper; Report on the preparedness of Serbia and Montenegro to negotiate a Stabilization and Association Agreement with the European Union; 12 April 2005; SEC (2005) 478.

in the background, and it seems that the "window of enlargement opportunity" has temporarily been closed.

The general question of enlargement (perspective) acquires a specific dimension when applied to the Western Balkans. Burdened with the legacy of the wars, latent (political) crises, states and territorial units under international protectorate, weak states, etc., the region shows itself clearly incapable for EU integration. Although integration is seen as a powerful method for the relativization of potential conflict issues (*e.g.*, unsolved border questions) and as a stabilizing factor, it is questionable whether the need for stability is a sufficient incentive for the integration of the Western Balkans in the EU. If the region could be stabilized to an extent that it would not threaten the stability of the continent without its full integration in the EU, one could ask whether the EU really has an interest in a "south east" enlargement.

The indecisiveness of the EU, vacillating between stabilization pure and simple and the (stabilization and) integration of the region, affects the efficiency of its policy in the region. If the EU would merely promote stability and democratization in the region in order to facilitate cooperation, its "requirements" are on a lower level than when its goal would be integration (accession). In the latter case, the EU is not only interested in the "external effects" of the national order but in its democratic character and structures compatible with the EU. Thus, for countries aspiring to membership, the EU will set more comprehensive conditions and will be deeper involved in national reforms. Ambiguous about the position of the Western Balkans in a new Europe, the EU does not always pursue a consistent policy. Using the vague potential candidate "status" for the countries in question, the EU adopts an ambivalent position: it does not turn the region completely away, but neither is it welcoming its accession. As a result, the conditionality of EU policies is not always effective.

In its Balkan policy the EU relies on its experience of previous enlargements, as well as on the experience in promoting democracy worldwide. Yet, it appears that such considerations are too general and not effectively applicable to the specific situation in the countries of the Western Balkans. It seems that the EU sometimes deals with the region in general terms of post-conflict stabilization, reconciliation, and state-building, while overlooking its historical peculiarities, its authoritarian past and weak state(s) (institutions), lack of political tradition, and its specific mentality.

The EU (mainly through the CARDS program) plays the leading role in the reconstruction of the region. However, due to its complex bureaucratic (program and projects) procedures, the funding does not always effectively meet the needs. Such procedures are indeed necessary

to prevent abuse and fraud, and to control financial operations, but on the other hand they exclude certain potential beneficiaries and do not take the weakness of the state administration of the beneficiary countries into account.

Obstacles in Serbia for the Effectiveness of EU Support

EU support for democratic reforms in Serbia has produced mixed results, due to specific problems of the Serbian transition. The unsolved state-status issues, the legacies of the past, weak state institutions, and the Serbian attitude to European values are just some of the noteworthy specifics of the Serbian transition that make EU support not always as effective as would be desirable.

Statehood is an important precondition for a "functional democratic order". Democratic reforms can only be implemented successfully within a state.[23] The unsolved sovereignty issues in Kosovo as well as the non-functional State Union with Montenegro seriously block the reform processes in all these three entities. Neither of the entities takes the common state into account. The State Union of Serbia and Montenegro is seen as an international protectorate and a *provisorium*. It lacks a comprehensive legal and political order, and the communication and coordination among the three entities is missing. Within one *de jure* state there are actually three *de facto* states. Such a constellation considerably affects the effectiveness of the EU democratization policy in the state. Although the EU only accepts the State Union, as an internationally recognized state, as its legitimate partner, in practice the EU often develops and implements reform measures and projects for each of the tree entities separately. However, in some aspects (especially in contractual relations) the EU expects a unified or common policy on the side of the State Union. In this matter problems can occur in respect of negotiating the SAA,[24] and—what is more important—in taking responsibility for the SAA.

The legacy of the past is a significant obstacle for the democratization efforts, supported by the EU, as well. The manifestation of the legacy of the past could be seen as twofold; with a personal and a factual (political) aspect. For a successful transition from authoritarian to democratic rule, power transfer is of great importance. It is necessary to deprive

23 *Cf.* J. Linz and A. Stepan, "Toward Consolidated Democracies", *Journal of Democracy* April 1996, 14-33, at 14.

24 Taking reality into account, the EU developed a so-called "twin-track approach" which would imply a single SAA with distinct negotiations with the Republics on trade, economic and possibly on other relevant sectoral policies. Council of the EU (General Affairs and External Relations), Council Meeting of 11 October 2004; 12770/04 (Presse 276).

(former) authoritarian individuals and groups of power and any relevant influence on the (socio-)political life of the young democracy.[25] Political power needs to be transferred to the new democratic structures with depersonalization and institutionalization of power as the main goal.[26] In this respect, the Serbian transition can be seen as not quite successful. The Serbian October revolution—5 October 2000—has brought the overthrow of Milošević and the change of the top-level executives, but the vertical power structure remained the same. Moreover, the important "power institutions"—army, police and secret service—remained *de facto* under the control of the old structures. The democratic revolution thus changed into a slow and gradual evolution. Unwilling to accept the institutional limits to their power, influence and privileges, the old structures showed remarkable resistance to the democratic changes. These changes are thus often only superficial and do not threaten the position of the old structures. Such a constellation seriously affects the pace and the scope of the "Europeanization" of Serbia.

Apart from the personal *status quo*, the transition in Serbia suffers from an ambivalent attitude towards the past and the authoritarian regime. For a successful democratization it is necessary that the authoritarian regime is unequivocally condemned. The "authoritarian rules of the game" and authoritarian policies must be completely rejected. Yet, although the protagonists of the Serbian transition have reached a necessary level of agreement concerning the democratic future of the country, they do not quite agree on the issue of the authoritarian past.[27] A clear and resolute break with the Milošević regime and its policies was and is still lacking. It seems sometimes as if the old policies are implemented by new methods. Such policies, incompatible with common European values, negatively affect the effects of the democratization efforts in the country.

Problems with the institutionalization of democracy and the weakness of state institutions in Serbia hamper the effectiveness of EU support as well. The institutionalization of democracy is an important phase in the

25 See W. Merkel and H-J. Puhle, *Von der Diktatur zur Demokratie: Transformationen, Erfolgsbedingungen, Entwicklungspfade*, Opladen 1999, 107.

26 *Cf*. W. Merkel; "Institutionalisierung der Demokratie in Ostmitteleuropa", in W. Merkel, E. Sandschneider and D. Segert (eds.), *Systemwechsel 2: Institutionalisierung der Demokratie*, Opladen 1996, 76; W. Weidenfeld, "Einführung: Entwicklung und Transformation als Thema des Carl Bertelsmann-Preises 2001", in W. Weidenfeld (ed.), *Den Wandel gestalten–Strategien der Transformation*, Band I, Güntersloch 2001, 12; F. W. Rüb, "Zur Funktion und Bedeutung politischer Institutionen in Systemwechselprozessen. Eine vergleichende Betrachtung", in Merkel *et al.*, *supra.* note 26, 48.

27 N. Dimitrijević, "Srbija kao nedovršena država", in D. Vujadinović *et al*. (eds), *Izmedju autoritarizma i demokratije: Srbija, Crna Gora i Hrvatska*. *Knjiga II Civilno društvo i politička kultura*, Beograd 2004, 60.

transitional process and a necessary step towards the consolidation phase of democracy.[28] The key element of the institutionalization of democracy is a new democratic constitution that establishes the (new) democratic institutions and the (new) democratic rules that guide the functioning of these institutions.[29] To this day, Serbia's legal and political order is still functioning under the Milošević constitution—of September 1990—suffering from an insufficiently democratic character and a lack of legitimacy. One can assume therefore that the Serbian legal and political order still finds itself in a kind of legal *vacuum*. In direct relation to the problem mentioned there is the problem of institutional weakness. With the formal "rules of the game" not completely and clearly established and partially implemented, the Serbian institutions "function" on the basis of the informal rules. These institutions suffer therefore from a strong political (in terms of political parties) and personal dependence. Five years after the overthrow of Milošević, the state institutions still do not incorporate the sources of political power. These sources are still much more informal then institutionalized. In this way the lack of a clear institutional structure in Serbia negatively affects the effectiveness of EU support. Although EU programs and projects may be well-organized and meet the needs, the results are often short-lived. Applied to an unstructured "system", assistance does not produce a self-sustaining process or institution.

One of the major obstacles for EU democratization efforts in Serbia is a peculiarly Serbian attitude to European values. Unlike the CEE countries that joined the EU in May 2004, Serbia does not unquestionably conform to the (Western) European cultural model. Orthodox Christianity, Byzantium, the Ottoman Empire, and the traditional relations to Russia have been the main influences on the development of the Serbian collective identity. The processes on which (Western) European culture is based (Feudalism, Renaissance, Reformation, Enlightenment, the French Revolution, the Industrial Revolution) have affected the development of Serbian culture in a much more modest way. Thus, the principles and values that arose in Western Europe as the result of the processes mentioned (such as individualism, liberalism, constitutionalism, human rights, equality,

[28] According to theories of system change (*Systemwechsel*), the process of the change from an authoritarian to a democratic system goes through three phases: the breakup of the old regime, the institutionalization of democracy, and the consolidation of democracy. The first two phases could also be considered together, as the "democratic transition". Merkel and Puhle, *op.cit*. note 15, 13; Merkel *et al.*, *op.cit.* note 26, 13; G. Pridham and P. Lewis, "Introduction. Stabilising Fragile Democracies and Party System Development", in G. Pridham and P. Lewis (eds.), *Stabilising Fragile Democracies: Comparing New Party Systems in Soutern and Eastern Europe*, New York 1996, 2.

[29] Merkel *et al.*, *op.cit.* note 26, 13.

freedom, the rule of law, democracy, the free market, and the separation of church and state) have never been dominant in the Serbian cultural model. If some of these principles are to be found in Serbian society, they did not emerge in society itself, but were "imported" by reception. It is therefore not surprising that the supporters of the idea that Serbia should be based on "traditional" values are not keen on a rapprochement to the EU that would incorporate Western European values.

Conclusion

The EU's contribution to the democratization of Serbia is significant. By offering the possible membership opportunity it has given an important impetus for the democratization efforts in the state. The EU has developed a number of programs and projects that directly support the democratization process in Serbia. However, the results of EU support are ambiguous. The reasons thereof are twofold. They lie in the lack of a clear position of the EU towards the region of the Western Balkans resulting in inconsistent policies. Additionally, EU support does not meet the expectations because of as lack of, or insufficient, feedback from the beneficiary partners. Thus, the effectiveness of EU support can be improved by strengthening a clear EU perspective for the state (Serbia as an independent state or in federation or confederation with the other entities) and by strengthening the national capacities ("ownership") for democratic reforms, since democratization can be successful only when it is supported and carried out from inside.

Annex 1

Council Conclusions on the Principle of Conditionality Governing the Development of the European Union's Relations with Certain Countries of Southeast Europe

29 April 1997; *Bull. EU* 4-1997

[abridged]

To permit the beginning of negotiations, the following general conditions shall apply to all countries concerned:

1. Credible offer to and a visible implementation of real opportunities for displaced persons (including so called "internal migrants") and refugees to return to their places of origin, and absence of harassment initiated or tolerated by public authorities;
2. Readmission of nationals of the States concerned who are present illegally in the territory of a Member State of the EU;
3. Compliance of the countries which are signatories of the GFAP with the obligations under the peace agreements, including those related to cooperation with the International Tribunal in bringing war criminals to justice;
4. A credible commitment to engage in democratic reforms and to comply with the generally recognised standards of human and minority rights;
5. Holding of free and fair elections at reasonable intervals on the basis of universal and equal suffrage of adult citizens by secret ballot, and full and proper implementation of the results of these elections;
6. Absence of generally discriminatory treatment and harassment of minorities by public authorities;
7. Absence of discriminatory treatment and harassment of independent media;
8. Implementation of first steps of economic reform (privatisation programme, abolition of certain price controls);
9. Proven readiness to enter into good neighbourly and cooperative relations with its neighbours;
10. Compatibility of RS/FRY as well as the Federation/Croatia agreements with the Dayton peace agreements.
11.

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Elements for the examination of compliance with:

- Democratic principles
— Representative government, accountable executive;

— Government and public authorities to act in a manner consistent with the constitution and the law;
— Separation of powers (government, administration, judiciary);
— Free and fair elections at reasonable intervals by secret ballot.

• Human rights, rule of law
— Freedom of expression, including independent media;
— Right of assembly and demonstration;
— Right of association;
— Right to privacy, family, home and correspondence;
— Right to property;
— Effective means of redress against administrative decisions;
— Access to courts and right to fair trial;
— Equality before the law and equal protection by the law;
— Freedom from inhuman or degrading treatment and arbitrary arrest.

• Respect for and protection of minorities
— Right to establish and maintain their own educational, cultural and religious institutions, organisations or associations;
— Adequate opportunities for these minorities to use their own language before courts and public authorities;
— Adequate protection of refugees and displaced persons returning to areas where they represent an ethnic minority.

Annex 2

Council Decision (EC) No.520/2004 of 14 June 2004 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999; *OJ* L 227, 26 June 2004, 21-34

[abridged]

SHORT-TERM PRIORITIES

Political Situation

Democracy and Rule of Law

- **Constitutional issues:**
  Revise the republican Constitutions in line with the Constitutional Charter.
- **Electoral law reform:**
  In *Serbia:* complete the ongoing electoral law reform (including electorate register) to bring the electoral system up to international standards notably by revising electoral laws, in line with ODIHR recommendations and fully implementing legislation on financing of political parties.
- **Public Administration Reform:**
  Strengthen and maintain administrative capacity of the instittions dealing with European integration at the state and republican level (in terms of staff, training, equipment) and improve co-operation among them.

  In *Serbia*: Adopt a comprehensive strategy on Public Administration Reform including a precise calendar of actions, in particular address civil service pay system reforms and related human resource development measures; establish and maintain the relevant institutions and allocate the necessary resources; prepare the legislation on Government and Civil Service.
- **Judicial reform:**
  In *Serbia*: Modernize and increase efficiency and independence of the court system, in particular its commercial courts; ensure the functional independence of war crime prosecutor. Prepare for the setting-up of administrative and appellate courts.

- **Fight against corruption:**
  In *both republics*: Prepare a comprehensive anti-corruption strategy in line with Council of Europe standards and adopt law on conflict of interests.

MEDIUM-TERM PRIORITIES

Political Situation

Democracy and Rule of Law

- **Continue Public Administration Reform:**
  Further develop the European Integration structures, notably by strengthening the European Integration Offices, establishing smooth cooperation mechanisms as well as European Integration Units in the line of Ministries of State and Republican level.

  In *Serbia*: Adopt civil service and Public Administration Laws. Implement civil service human resources development measures. Strengthen capacity (policy making and inter-ministerial coordination) of the public administration at government and local levels, notably by establishing a centralized payroll system. Strengthen the economic policymaking process, e.g. through continued support to strengthen the statistical services and the creation of a medium term economic planning unit.
- **Parliament:**
  In *Serbia*: Develop and implement a reform strategy for the Parliament to bring its working standards and resources to a level at which it can act as an effective institution.
- **Promote local government:**
  In *Serbia*: Adopt and implement decentralization reform and ensure sufficient local capacities to deal with, among others, administrative and financial issues and forthcoming regional programmes.
- **Continue the judicial reform:**
  In *Serbia*: Ensure full legal and practical safeguards for independence and efficiency of the courts, including the reform of the current system of appointment procedure; implement legislation on mandatory training and ensure budgetary sustainability of the Judicial Training Centre; create an IT network for prosecutors at all levels; ensure enforcement of court decisions. Develop the capacity to try war crimes domestically in full compliance with international obligations as to cooperation with ICTY. Set up appellate and administrative courts.

- **Prison conditions:**
  In *Serbia*: Improve prison conditions in line with Council of Europe standards, in particular as regards vulnerable groups such as juvenile offenders; ensure further training of penitentiary staff and improvement of facilities.
- **Fight against corruption:**
  In *both republics:* Adopt and implement a comprehensive anti-corruption strategy.

The Rule of Law in Russia in a European Context

Ferdinand Feldbrugge

Reading through the papers in this volume, one discerns common threads, general outlines, of which the individual authors may not have been aware, but that emerge as a composite picture when the papers are viewed together. What is seen depends, however, on what one is looking for. The legal practitioner, the comparative lawyer, the legal historian, for example, each cherish their own perspective. If the editor and, therefore, the first reader of this volume attempts to contribute something to the discussion in this respect, he ought to clarify his own position. It is the point of view that could be summarised as "law and politics". To some extent this is a matter of personal taste and interest, subjective therefore, but one could defend such a position also as "objectively" justified. It was impossible to understand Soviet law, and communist law generally, without taking into account its political dimensions, or to be more explicit, without recognising that law under those circumstances was almost totally dependent on political determinants. The political watershed represented by *perestroika* occasioned a complete overhaul of the legal system, but, more intriguingly, manifested itself through, and was brought about by, law reform. The questions the authors of the papers in this book have asked themselves prominently concern the political implications of the legal developments discussed.

Students of the psyche profess a keen interest in first impressions and associations, so for what it is worth: the image that came to my mind after an initial reflection on the collection in its entirety was the famous troika of Gogol', darting along the forest road, the horses galloping (the centre horse trotting), and then Russia herself being compared to this very Russian vehicle, pressing on headlong, leaving us to wonder where the race will take it and to what purpose.[1] It was different in the past, during the Soviet era, when Sovietologists had reached a certain amount of consensus about the nature of the Soviet system and its relationship with law. Then, in the course of the transition years, there was again much agreement about where they were coming from and where, in a general sense, they were going. Uncertainty prevailed with regard to the exact sequence of the transitional process and to its eventual outcome. For this

[1] "Do you, Rus', not also rush ahead like a smart troika, not to be outrun by anyone?" and: "Rus', where are you going, answer!" (at the end of the last chapter of the first part of *Dead Souls*). When Gogol' wrote, before the arrival of trains, about the excitement of the ride in a troika ("What Russian does not like a fast ride?"), this small carriage, drawn by three horses, must have been one of the fastest means of transport.

Ferdinand Feldbrugge, ed.
Russia, Europe, and the Rule of Law, 203-216

reason, the legislative reform programs, as the central embodiment of the transition process, commanded the keenest interest of both domestic and foreign parties.

As is often observed—correctly—nowadays, every period is a period of transition. Now that pluralistic democracy and market economies have been introduced all over the countries of the former Soviet bloc—a process that undeniably constituted a major transition, indeed a metamorphosis, possible new evolutions, transitions therefore, come into view. Then again one has to acquire an understanding of the starting-point and of the direction into which things are moving. The papers in this volume may be regarded as a contribution towards such an understanding.

The Internationalisation of Law

Until recently, most observers of legal developments in Russia, domestic as well as foreign, would be inclined to pay little attention to the international aspects–whether such developments would be influenced significantly by factors from abroad, whether domestic parties would take international aspects into account, whether foreign parties would consider such developments as something in which they also had a stake, etc. This was a perfectly sensible approach to take during the Soviet era when indeed the evolution of Soviet law was by and large an autarkic process. Sovietologists were the only outsiders who had a real interest. This perspective began to change during the transition years, one of the reasons being that western governments and numerous experts from western countries became themselves involved in the reform process. Still, the predominant understanding was that the reform processes in Russia and other former communist states constituted as many similar autonomous events, to be judged as a series of more or less successful attempts to bring about the economic and legal transitions required within the politico-legal framework of the country concerned.[2]

In this volume, however, the legal world outside (the *zagranitsa*) is very much present. Alexei Trochev explicitly introduces the comparative element in his study of the legislation concerning tenure of Constitutional Court judges, and not only as an interesting sidelight, but also as a quality control instrument. The paper by Anna Jonsson reviews the role of NGOs in Russia in the protection of human rights against the unavoidable international law background of this topic. The main theme of the papers by Alexander Trunk and Vladimir Yarkov is in fact the common

[2] An example would be a collection of essays, not unlike the ones in this volume, which appeared in the same series in 2005: R. Sharlet and F. Feldbrugge (eds.), *Public Policy and Law in Russia: In Search of a Unified Legal and Political Space. Essays in Honor of Donald D. Barry. Law in Eastern Europe,* No.55, Leiden/Boston 2005.

legal space between Russia (and Ukraine) and the European Union (and the western world). The two papers providing side panels to the central topic, by Patricia Herlihy and Ljubica Djordjević, each deal, although in very different ways, with national legal developments evolving in a highly relevant international context.

Of course, the foreign element was already noticeably present in the huge codification and legislation wave of the last decade. In particular, the preparation of the civil codes and of related economic legislation was characterised by a conscious effort on the part of the drafters to utilise the achievements of other legislations and to favour, wherever appropriate, the involvement of foreign expertise. Such things would have been unthinkable under Soviet conditions. But the whole exercise remained firmly enclosed within a domestic framework: there was a perceived national need for new legislation, such legislation was then produced and fitted as well as possible within the existing national legal system.

The new internationalisation of law in Russia and other former Soviet states can be seen as a natural result and outgrowth of the efforts of the last decade. The new legal system is, by and large, in place. The politico-legal chaos of the El'tsin years has mostly been cleared up. Russia can now ask itself where it stands and what it aspires to. In this respect, the question of how Russia defines itself in relation to its major neighbours, and Europe in particular, is of decisive importance. Although this question is first of all a political one, the answers to it will have far-reaching legal ramifications. Moreover, it cannot be answered definitively before Europe itself succeeds in reaching some kind of agreed position on what it represents.

Another characteristic feature of the present situation after the massive legislative effort of the recent past is that the accent in legal policy has shifted from legislation to the role of the courts and the Constitutional Court in particular (see the papers by Fogelklou, Machura and Litvinova, Solomon, and Trochev).

What Happened During the El'tsin Intermezzo?

Even those who did not get it at the time now understand in general lines what the Gorbachev administration and *perestroika* were about. The neatest summary, in my judgment, is still Voinovich's parable of the steamship, travelling to the promised land of Lemonia. After six captains have failed and died, the seventh admits they are lost, "just the deep sea all around us".[3]

[3] He proposes to go back, but as there is only horizon all around them, he suggests to consult the old instruction book (*Das Kapital*). But the book only mentions a forward course, so they just go somewhere, while the crew and the passengers sing: "We're

Small steps were taken at first, but the consistency and tight organisation of the Soviet system had the unintended effect that removing little parts resulted in the dislodging of others, so that in the end the whole system unravelled in a relatively short time.

This process was inherently spontaneous and unplanned and it is therefore beside the point to reproach the Gorbachev administration for *perestroika* lacking an explicit strategy; it could not have one. As elements of the Soviet system were successively abandoned, they had to be replaced by something else, but because the image of the future kept changing, a comprehensive reform policy remained elusive. A survey of the major legislative monuments of the *perestroika* period provides an excellent illustration. The regulation of the closely interwoven spheres of politics and economics was the subject of a series of reforms, in the shape of either constitutional amendments or of statutes reforming the way the economy was run.[4]

In the course of *perestroika*, it became increasingly obvious that the extreme concentration of power was the fundamental defect of the Soviet system. The intentional dissipation of power, by the introduction of political pluralism and the dismantling of the state-run economy, was therefore unavoidable, although it would at the same time undermine the position of the supreme representative of Soviet power, the secretary-general himself. The downfall of Gorbachev was therefore only a question of time, but, unfortunately, also of chance. The unsuccessful coup by reactionary Party leaders of 19-21 August 1991 (the *putsch*) made this very clear. In the end it was the president of the RSFSR, Boris El'tsin, who delivered the death-blow. But El'tsin paid a high price for ousting Gorbachev; he did not step into the shoes of his predecessors and had to sacrifice the leadership of the Soviet Union in exchange for the more modest post of leader of Russia, leaving control of the Ukraine, at least for the time being, to the local communist leadership. The other republics had independence thrust upon them unexpectedly.

There is, of course, not much point in reflecting on what might have been if Gorbachev would have been able to continue the orderly and legitimate liquidation of the Soviet system. One might even query whether

still sailing, but not there, where by the plan we should be going; our first captain was a smart man, but the second was an idiot. The third was a voluntarist and the fourth a memoirist. Who the fifth and sixth were, alas, they were never able to tell us. So what do we do now? And where do we sail? It is as unclear as before, but now at least we can talk about it openly."

4 I refer to my *Russian Law: The End of the Soviet System and the Role of Law. Law in Eastern Europe*, No.45, Dordrecht/Boston/London 1993, of which this is the central theme.

such a transition from a totalitarian system to a democratic one is possible, and, if it would be, whether it would be desirable. Would not a clean break with the past be better? Perhaps, but in any case numerous objectionable elements of the Soviet past were not rejected by the El'tsin and Putin administrations, and in most other former Soviet republics the situation was worse from the very beginning. The Russian transition represented a muddling middle-way between the German scenario after 1945, when the new Germany set up by the Western Allies completely forswore the Nazi past, and the Spanish one, when the Franco regime itself took the first steps toward the establishment of a democratic order.

Whether El'tsin ever had a consistent overall policy apart from staying in power is still an open question. One certain element was his aversion against the Communist Party with which he had already broken spectacularly in 1989. During the first half of 1992, when his relations with the Russian parliament were still workable, there were indications that his government would favour a speedy transition to a market economy. 1992 and 1993 were the years of a massive privatisation campaign in Russia, coinciding with increasing deterioration in the relations between president and parliament. Privatisation was successful in Russia in that it resulted in reducing the state sector of the economy to a fairly modest level; it was a failure by leaving the bulk of the population actually worse off and concentrating most of the enormous wealth of the former Soviet state in the hands of a small number of individual operators.

After the political standoff had been ended in the autumn of 1993 in favour of the president,[5] a new constitutional balance was achieved through the adoption by referendum of the Constitution of the Russian Federation on 12 December 1993. The balance, as could be expected, concentrated vast powers in the hands of the president, at the expense of the parliament (*Duma*). Still, the *Duma* remained sufficiently powerful to make life for the government uncomfortable. And this was indeed what it did, because the new *Duma* elected under the El'tsin Constitution turned out to be no less hostile to the president than its predecessor, shot out of its building because it was said to be undemocratically elected and unrepresentative of popular opinion.

In the following years, the president's popularity deteriorated even further and his main policy appeared to be to shore up his position by buying allies wherever he could find them. The blame for the administration's failures was put on the members of the government and especially on the prime ministers who followed each other in rapid succession. Major allies were found among the members of the regional and provincial leadership,

5 Putting it as blandly as possible.

who were granted a free hand in governing their fiefdoms, provided they supported the president, especially through their membership of the Council of the Federation. Another group that came to the rescue was the small number of men who had acquired vast wealth and influence in the previous years of breakneck privatisation. When President El'tsin was up for re-election in 1996 and his chances looked poor, the oligarchs, as they were commonly known, threw their full weight behind his campaign and secured his victory through their control of the media.

It would not be unfair to say that at least the latter El'tsin years were characterised by bare-faced political opportunism and the absence of serious efforts to adopt any long-term strategy. The effect on legal developments were mixed. The 1993 Constitution offered a constitutional framework, albeit a very unbalanced one, for the proper functioning of the state. The extensive powers granted to, or arrogated by the president were then used to transform the federative aspect of the Russian state, as it could have been derived from the Constitution, into a much looser connection between the centre and the so-called federation subjects.

By the end of the El'tsin era, it was quite unclear what sort of state Russia was. And under such conditions the relationship between Russia and its neighbours, particularly its former sister republics within the USSR, the 'near-abroad' as they were often designated, became completely opaque.

In the area of private law, located at some distance from the centre of political strife, the comprehensive reform dictated by the acceptance of market principles continued and its central core, the Civil Code, was completed (except for the part covering industrial and intellectual property), along with a large swath of supporting legislation.

President Putin

On New Year's Eve 1999/2000 President El'tsin abruptly stepped down, leaving his Prime Minister Vladimir Putin as caretaker and unofficial president-designate. Putin was duly elected and then inaugurated on 7 May 2000. The third leader of the country after Lenin and Gorbachev with an education as a lawyer, Putin placed great emphasis on law. The legal policies of the Putin administration can to a large extent be explained as a reaction against the shortcomings of the foregoing period, as pointed out above.

The legal free-for-all enjoyed by the federation subjects during the El'tsin years was addressed by a series of legislative and other measures designed to increase the power of the centre in relation to the powers hitherto exercised by the federation subjects. The Putin administration has been criticised at home and abroad for replacing local elections of

executive heads of the provinces by appointment by the central government, although such a system prevails in most democratic countries.

The major part of the recentralisation drive, however, was realised, not by legislative means, but at the executive level, through insistence on proper enforcement of existing legislation, and by involving the courts, in particular the Constitutional Court, in such enforcement (see the Fogelklou, Trochev and Smith papers).

This re-centralisation did not only concern the legal-administrative framework of the Russian Federation, but also control over the economy, which had largely slipped away into the hands of the small band of oligarchs during the previous period. It is this aspect of Putin's legal policies which has come under heavy criticism, at home as well as abroad. The fundamental political and legal issues at stake emerged most dramatically in the Khodorkovskii case.

Although the official position taken by the presidential administration was that the matter did not directly concern them and was to be dealt with by the criminal court system, nobody could doubt that the political importance of the case was paramount. From a political point of view, President Putin's interest in Khodorkovskii's prosecution and conviction was obvious. The defendant was not only arguably the economically most powerful person in the country, and unquestionably the wealthiest, but he had also openly challenged Putin's political leadership. To regard the prosecution of Khodorkovskii as an ordinary criminal case was therefore disingenuous.

One of the intriguing features of the politico-legal scene in Russia over the last decade has been that political struggles were often fought out in the criminal courts. Opponents would accuse each other of corruption, bribery, fraud, tax evasion and related economic crimes. One can assume that there was usually some truth in the accusations, especially if one takes into consideration that most of the economic and political actors had extensive experience of such practices through their participation in the comprehensive 'black economy' of the final period of Soviet power. The decisive question in such struggles was then not whether the charges were true, but whether one could make them stick. This would depend for a good deal on the degree of support various government agencies would be able and willing to provide to either party. It would therefore also be disingenuous to regard Khodorkovskii as an ordinary law-abiding entrepreneur whose success in business had aroused the envy of people in power.

There were numerous allegations of procedural violations in the Khodorkovskii case; they should be taken seriously. On the other hand,

the oligarchs amassed their fortunes in circumstances which also gave rise to serious concern about the legality of their conduct. During the later El'tsin years they came close to an actual take-over of the state itself. No proper government could countenance such a state of affairs. Prosecutions forced some of the oligarchs into exile; others abandoned their political ambitions, submitted to the government, and were allowed to continue. The most powerful of them all decided to make a stand and fight, and then lost.

It appears, therefore, that important aspects of the legal policies of the Putin administration are primarily directed towards the retrieval of control over the machinery of the state. If that would be the case, the often-heard argument that Russia is back on the road to authoritarianism is too rash. Present-day Russia is not a North-West European democracy. It does raise the question, however, what the Russian leadership's long-term views on the position and status of the country are. These views will be of decisive influence on the development of Russian law.

Whither Russia?

The answer to such a simple question is inevitably very complex. Two distinctions may help to introduce some order into the process of finding it. The *first* one concerns long-term against ephemeral aspects of governmental activity; the *second* the domestic against the international aspect.

A government will always have to deal with certain challenges and issues as they arise; immediate concerns may dictate reactions which do not fit easily into existing long-term policies. Or a long-term policy may gradually emerge from a series of short-term decisions. Or the problems facing a government may be perceived as so urgent and critical that no attention is given to long-term goals (this was the situation during most of the El'tsin administration, as has been argued above). The practical conclusion is that single government actions should not too readily be interpreted as parts of a broader policy.

Both domestic and external policies are driven by certain common factors, such as economic necessities. At the basis of such factors is the self-image of the state, or to be more precise, the views held on this matter by the decisive political actors. This self-image has domestic as well as external facets. How does Russia see its role in the world and particularly in Europe? But also: what sort of state does Russia pretend to be? The answers to such questions will be interconnected in any case; but with regard to Russia the connection is reinforced and made more complicated by the past of the Russian state (the Russian Empire, the USSR, and the CIS).

The Russian Federation

One thorny problem which predominantly concerns the domestic self-image of Russia is encapsulated in Article 1 para.2 of the Constitution, which provides that "The names Russian Federation and Russia are of equal meaning [*ravnoznachny*]". There is something psychologically odd about somebody who claims to have two names. The Russian Empire did not make that mistake; the Soviets started it, who for obviously opportunistic reasons granted the (non-Russian) peoples of the former Russian Empire self-determination, including the right to secede, in the Declaration of the Rights of the Peoples of Russia of 15 November 1917. The scenario worked out during the first few months after the October Revolution and faithfully followed for many years consisted of the requirement that the right to secede belonged to the working people (represented by the Communist Party), who then set up a government, requested fraternal assistance from the Russian communist rulers to overcome any existing political opposition, and established close political and legal connections with the Russian communist government. The first to proceed in this way were the Ukrainian communists and they were also the first to use the designation "Russian Federative Republic";[6] at that time the Lenin government still used the informal designation "Russian Republic". On 28 January 1918, the Third All-Russian Congress of Soviets then decided to set up a federation, a federative republic.[7]

The designation "federative" (*federativnyi*) in the name of the Russian republic survived up to the present day. Initially, its content was political rather than legal. It referred to the multi-ethnic character of the state and implied a constitutional and/or legal recognition of this fact. Where "federal" in the traditional sense was meant, Soviet constitutional terminology used *soiuznyi* (and occasionally *federal'nyi*). The federal or "union" republics were *de iure* sovereign states (with the right to secede) who had voluntarily entered into a true federation. The *de facto* situation bore no resemblance to this, until the USSR divested itself of its totalitarian harness and some of the non-Russian union republics started to realise their right of secession.

The "federative" character of the Russian Soviet republic (the RSFSR) meant only that a number of non-Russian minority nations and ethnic groups living on RSFSR territory received some measure of official recognition by being provided with an "autonomous republic", an "autonomous province" or an "autonomous district" (depending on numerical strength,

6 In the Manifest to the Ukrainian population of 25 December 1917; see S.S. Studenikin (ed.), *Istoriia Sovetskoi Konstitutsii (v dokumentakh) 1917-1956*, Moscow 1956, 82.

7 *Ibid.*, 105-106.

local concentration, etc.). Such autonomy did not yield much more than what an ordinary Russian province was granted.

In the political chaos of the El'tsin administration the various "autonomies" claimed and were actually encouraged to claim an upgrading of their status. The more ambitious ones concluded treaties (compacts) with the central government in which they were often granted powers denied to them by the Constitution. This has all been corrected in the course of the Putin administration, especially with the help of the Constitutional Court, and the situation is now similar to what is was (but only *de iure*) in Soviet times: the status of the "autonomies" (now called "republics") is not much different from that of ordinary Russian provinces (*oblasti*). There is still much misunderstanding on this matter abroad, for instance when the admittedly intractable problem of the fate of Chechnia is discussed in terms of the violation, by the Russian government, of the Chechens' right to self-determination.

In sum, the name "Russian Federation" has a long history now and can probably not be easily abandoned. Russia, however, is not a federation like the USA, Switzerland, Germany or even the European Union (entities based on formerly fully sovereign units, which have given up some of their powers in favor of the newly created federal level), but more like Italy or Spain (unitary states, which have granted special status to certain ethnically different regions).

Why is Russia Not More Like Us?

Parallel to the image of Russia as perceived by the Russian leadership, there prevails at present a particular view of Russia in Western public opinion and among Western political actors, especially governments. It is a view which is based on the legal status quo: Russia is to be regarded as an ordinary European country, a member of the Council of Europe and other clubs of which self-respecting countries are members, a country that asserts, in its Constitution, to be democratic and devoted to the Rule of Law. In its foreign relations therefore, especially within the European space, Russia cannot claim more than any other European country. In particular, Russia should not be allowed a special position in respect of other states which used to be part of the USSR. On the domestic scene, the yardsticks used in Western Europe to judge government behaviour should be equally applicable to Russia.

Such views are legitimate from a formal legal point of view but they also disregard the historical dimension of the question and the political reality; moreover, as to the other states which were members of the USSR when it fell apart, there is the legal fact of the existence of the Com-

monwealth of Independent States. The significance of the CIS is often belittled, also by Russian officials when it suits them, but it is an existing organisation. Its leaders meet regularly; it maintains an extensive (even if perhaps not always very effective) internal treaty network.[8] One of the most important aspects of the political reality, reflecting at the same the historical dimension of the issues involved, is the presence of large ethnically Russian populations on the territory of some of the other CIS republics (see the Heuman paper).

The problems are most prominent in respect of Ukraine, as the largest, after Russia, of the former Soviet republics and a candidate for NATO and EU membership; with regard to Moldova and the Transcaucasian republics the situation is similar. Russia has officially, albeit reluctantly, recognised Ukraine's right as a sovereign state to join these organisations. On the other hand, Russia's extreme unease concerning such developments is understandable and to some extent justified. It would seem that Ukraine's accession to the EU, involving the acceptance of the *acquis communautaire*, would be incompatible with membership of the CIS. The separation between Russia and Ukraine would then become irrevocable. Considering the origin of the Russian state and nation in Kievan Rus' and the very close ethnic, linguistic and cultural ties between the two peoples who have shared a common fate for many centuries, such a separation is very hard to accept for most Russians, and for many Ukrainians as well. It would have made a difference if the Ukrainian state itself would have been established under more favourable conditions, as the result of an orderly secession procedure based on a democratic referendum, instead of through a secret deal between the Russian El'tsin government and a cabal of Ukrainian party bureaucrats.[9]

The infelicitous beginnings of Ukrainian statehood explain much of the subsequent travails of the country, which was mired in corruption and stagnation until the bloodless revolt which brought President Iushchenko to power. But the high hopes of those days have not been fulfilled and Ukraine's ambitions to join the EU look more and more like a flight ahead.

8 The argument that the Ukrainian parliament has not ratified the foundation of the CIS is largely opportunistic. The Ukrainian leaders are among the more faithful attendants of CIS summit meetings and Ukraine participates in numerous CIS treaties. Most CIS members use the organisation as an *à la carte* restaurant.

9 A national referendum on the future of the USSR, held in most of the Soviet union republics on 17 March 1991, showed 70.1% of the Ukrainian votes to be in favour of continuing the politico-legal unity of the USSR. Although this was the lowest percentage among the participating republics (Russia gave 71.3%), it would still indicate a decisive rejection of secession nine months before the USSR did fall apart. See *Izvestiia* of 27 March 1991.

The political volte-face in Ukraine made the question of Russian-European relationships more acute. The Russian government had made its support for Iushchenko's opponents quite clear and faced strong criticism on account of it. This reproach of Russian interventionism lost much of its credibility by the open and active support of the other side by a number of Western governmental leaders. If Russia felt that the strongly pro-European course advocated by the Iushchenko party was against Russian interests, one could not deny it the right to speak out against it. The Russian case was compromised however by the indisputable fact of major election fraud in favour of Iushchenko's opponents; this made the Russian position virtually indefensible. The net outcome left all sides losers: Russia lost credibility and prestige, Ukraine failed to turn itself into a suitable candidate for EU accession, and the EU, because of its internal crisis, was shown to be quite unready to welcome Ukraine.

When Georgia experienced a similar tumultuous transition to what seemed at the time to offer a more democratic and pro-Western government, many of the more autocratic governments in the other CIS countries showed alarm. One of the Russian responses was a more restrictive approach in the treatment of NGOs (see the Jonsson paper) and this in turn evoked accusations, at home and abroad, that the Putin administration was turning its back on democracy. Here, again, a realistic appraisal of the entire politico-legal situation is called for. Western observers cannot simply complain: "Why is Russia not like us?", because East-European conditions are very significantly different. Imagine, for instance, an NGO from Denmark, generously supplied with funds by the Danish government, manipulating the election campaign in Portugal and securing the victory of the opposition, creating at the same time much improved business opportunities for the Danish dairy industry.

In a more general sense, the trouble with evaluating the recent legal policies of Russia from the human rights point of view is that these policies lend themselves to different interpretations. The dominant Western approach at this moment is to add up various Russian governmental actions (such as with regard to NGOs, local government, treatment of business, relations with neighbouring countries), and to conclude from them that they indicate a regression towards authoritarianism, because a Western government would not behave in a similar way, *i.e.* would not adopt such measures. The other way to look at the problem is to consider the individual sets of measures taken by the Russian government against the background of the actual domestic and external situation; then the conclusion might be that the policies adopted represent at least to a considerable degree adequate and justified responses to particular issues,

which do not appear in such a form in Western Europe. These two approaches do not exclude each other of course; then the conclusion would be that a particular policy of the Russian government was in principle legitimate, but that the means employed exceeded the bounds indicated by internationally accepted standards.

Russia, Europe and the CIS

After the failed *Putsch* of 19-21 August 1991, the breakup of the USSR in December 1991 at least closed the door to a communist recapture of power in Russia. In most other areas Russia seemed to have lost more than it gained. In almost all the other successor states (Georgia being the exception) the local communist leaders held on to power, many of them until the present day. In some of them this resulted in economic stagnation, in others in a lack of progress towards democracy and the rule of law, or even deterioration of the political system, and in some of them in both. Whatever improvement was brought about by the recent developments in Ukraine and Georgia appears to have slowed down or stopped completely. It would not be an exaggeration therefore to describe the falling apart of the USSR as a catastrophe. This is what President Putin did not so long ago. Many took this statement as an indication of a desire to return to a more authoritarian or even totalitarian state of affairs.

As has been argued above, the way Russia understands itself (which would be of decisive importance for its legal policies) depends to a large extent on its relationship with Europe, and this in turn cannot be grasped without taking into consideration Russia's relationship with its former sister republics in the USSR, in other words the CIS, and first of all Ukraine.

This, in fact, is where the discussion temporarily comes to a halt, because Europe in this connection can practically be identified with the European Union, and the EU, although economically and institutionally in working order, is completely at sea where it concerns its strategic course. The Maastricht Treaty of 1992 still spoke of the establishment of an ever closer alliance between the peoples of Europe; but this pseudo-matrimonial model had already been abandoned in the so-called Constitution, which then failed to be accepted on account of the negative outcome of the referenda in France and The Netherlands. There can be little doubt that the French and Dutch voters also represented the views of a majority of the population in several other countries where no referendum took place. Gogol's question of "Whither Russia?" now has to be preceded by the question of "Whither Europe?".

The sensible course for Russia, while Europe tries to get its act together, would therefore be to mark time and preserve its options. In the meantime the outside world should remain aware of certain long-term determinants of Russia's self-definition. One of the most important of these is the fact that Russia's statehood is rooted in the Byzantine tradition. As noted in the Djordjević paper, this factor turned out to be of great significance in Serbia's attempt to find its place in Europe. A prominent element of the Byzantine tradition is a peculiar relationship between the state and the dominant societal ideology. In Western Europe, through the struggle between pope and emperor in the Middle Ages, the impact of the Reformation, and then the Enlightenment, the sphere of the state became circumscribed and had to compete with other spheres, of the civil society, of religion. While the designation of Holy Roman Empire became devoid of meaning, at least after the Reformation, Holy Russia (*Sviataia Rus'*) still retains its evocative power. Also, among the old European states, Russia is probably the only one that can claim an unbroken history of statehood of more than a millennium. Whatever happens to the numerous states that emerged after the breakdown of the communist bloc and the USSR, Russia is the most likely one to survive.

At the same time, continuity presents peculiar problems. Old states like Russia cannot avoid, in defining themselves, to face their past. This is not particularly difficult if past developments have been relatively smooth, as for instance in England or Denmark. But when the past, especially the recent past, has been traumatic, painful choices may be called for. There are many indications that Russia, unlike Germany, has not yet been able to digest its recent past and, in particular, the regime of Stalin. This, in my view, is a far more serious problem than certain authoritarian tendencies which many observers discern in recent legal policies of the Russian government.

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