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20 Years of New Constitutional Reforms in Eastern Europe | Eastern European Experience

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Edited by

Gennadi N.Cebotarev
Peeter Järvelaid
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CONSTITUTIONAL REFORMS IN EUROPE IN THE 20TH CENTURY AS A REPOSITORY OF LEGAL IDEAS

There is no doubt that the final decades of the 20th century have changed the world significantly. For instance, for Eastern European researchers have new possibilities opened to move freely throughout the world in order to improve their studies. Also the increasingly globalizing world has given us new technical possibilities to communicate faster which, for instance, has given encouragement to cooperate in the fields of sciences, where previously there was no cooperation at all or it was rare. It is worth remembering that the 20th century began with high expectations for comparative law, and till the world wars we can see a sort of "triumph" of comparative law – first in Europe and then after the Second World War in the whole world. For me personally, the French historian Jacques Le Goff (1924-2014) has been a great example in my scientific work. He emphasized the knowledge of European history as one of the ways for the development of a new situation, where we (including the younger generation) are trying to move simultaneously in the past and on geographical maps. I have already been applying this method to my research work now for two decades, and have to say that this has opened the opportunity not only to examine the constitutional development in Europe, but also to move around in different countries, communicating with local colleagues, which for me has increased the opportunities to understand the peculiarities in different constitutional developments, at the same time discovering many similarities in these processes. If we would take a look at the research of constitutional law made by scientists in Europe in the 20th century and the first decade of the 21st century, then we would notice a certain respect for the old traditions, which at the same time in some sense ignores one part of the ideas which influenced constitutional law to a rather great extent. Legal scientists have been characterized studying mostly so-called "doctrines of the winning ideologies" and casting aside the ideas which were developed by talented jurists in different periods, which remain for the majority of researchers into so-called "grey zone", for instance "in the final phase of the disappearing ages and which often due to the twists and turns of the history did not find its way in the constitutional practice." For instance, there is the most fascinating "sediment" of the ideas by the legal scientists who were working in different universities of the Russian Empire before the outbreak of the First World War and whose ideas, due to the subsequent regime changes, were meant never to be realized. Also for most researchers this has left a side to the discussion of the constitutional law from the period of disintegration of the Soviet Union (1985-1990), which actually gave output to the development of the national constitutions of independent states. For instance, the Constitution of the Russian Federation (1993) did not come from nothing, but it was the work of the legal scientists who were inspired by the "fruits" of the legal discussions of Perestroika. If nowadays European legal historians are preparing studies representing the history of the last one hundred years of the European state

system, then the years 1991-1992 are analogous to a new beginning, which for today has already provided a long constitutional trial practice, which is waiting for the different legal scientists to look at this interesting material afresh and to use the methods of comparative law. When the post-World War I upheavals are sometimes referred as a group of countries, ranging from Finland to Turkey (from Helsinki to Istanbul)[1],then in this case if we are focusing in the last decades of the 20th century and the first decades of the 21st century, we could also speak about a certain group of countries ranging from Finland to Mongolia[2] (from Helsinki[3] to Ulan-Bator). In scientific research the collaboration between scientists could have a varying intensity, but the best results can always be achieved in the case if between colleagues from different countries there exists a really close and practical tie. It must be acknowledged that in recent years a very good working relationship among colleagues, who are focused on researching the constitutional law has developed between Tallinn University and Tyumen State University. This collaboration has led to this collection of articles, which hopefully gives colleagues from other countries an opportunity to think along with us about the developments of the constitutional law in our countries. Of course, we cannot turn back to a wider (more global) analysis of this topic, which should provide us with a good framework for our research so the following generations of researchers could better understand the times which were given to our generation for professional and personal fulfillment. Historians have long come to an understanding that no generation has ever been able to choose their time for living. But with our own actions, we can definitely make some contributions to this world for it to be a little better and therefore make it a better place to live.

Peeter Järvelaid
Professor comparative law and history of law,
Law School, Tallinn University (Estonia)

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[1] **Brauneder, Wilhelm**. Staatsgründungen 1918. - Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Wien: Lang, 1999.

[2] The Constitution of Mongolia was adopted in January 1992, with use of the examples of the constitutions of Europe, already in force, and considering the contemporary discussions, which at that time were taking place in Europe.

[3] A new constitution of Finland was adopted in 1999 although it entered into force in 2000. In this context it is important that the discussion about the new Finnish Constitution reached a new level after the adoption of the Estonian Constitution in 1992. The Finnish constitution (in Finnish Suomen perustuslaki; Swedish Finlands grundlag) combines four constitutional laws – the Constitution Act of Finland (2000); the Parliament Act (1995); the Procedure of Parliament (2000) and the Act on the High Court of Impeachment (1995). The Constitution declares that Finland is a parliamentary republic. The official text of the constitution consists of 131 Sections, divided into 13 Chapters.

PRE-EMPTIVE MILITARY ACTION: A VALID OPTION UNDER INTERNATIONAL LAW OR A THREAT TO INTERNATIONAL PEACE?

Rein Müllerson[1]

First, it is one of those topics that necessitate starting with clarification of terminology used. Especially as the title doesn't speak, for example, of pre-emptive self-defence but pre-emptive military action, which may include, beside self-defence, actions with humanitarian aims, i.e. so-called humanitarian intervention not to stop but to prevent an imminent genocide. If we speak of pre-emptive use of military force authorised by the UN Security Council, I wouldn't find many problems with that (overstepping the mandate may be an issue). Much more complicated is the question of humanitarian intervention of a pre-emptive nature not authorised by the Security Council. However, I will leave most of that aside. Though interesting and important in themselves, these topics are not, as I understand, at the centre of our panel's discussion.

Then, there is a predicament with the term *pre-emptive*. Is it analogous with the term *anticipatory* in the sense international lawyers traditionally associate with the *Caroline case* and customary international law with their requirements of immediacy, necessity and proportionality in the exercise of the right to self-defence? *The Caroline case* has established, as we all know, that the use of force in self-defence is permitted when the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation".[2]

Or are we talking about something else, e.g., about pre-emption in the sense of *the Bush doctrine* that is often dubbed as preventive self-defence. Are we talking about self-defence only? There may also be pre-emptive military actions in the form of collective security in cases of threats to international peace and security in order to prevent such threats materializing into breaches of the peace.

In my presentation, I will concentrate on issues of pre-emption that may, or depending on circumstances may not, come within the remit of self-defence.

The Israeli first use of force in the Six-Day War in 1967 seems to be an example of an anticipatory use of force in self-defence in terms of the *Caroline case*, customary international law and, I would argue, also of Article 51 of the UN Charter since the Charter has to be interpreted in the context of existing customary international law. The withdrawal of the UN peacekeepers at the request of President

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[1] Speech made at the 12th Annual Conference of Israel Bar Association & Joint Conference with the American Bar Association, 20-24 May 2012, Eilat, Israel.

[2] 'The Caroline', J, Moore, 2 *Digest of International Law*, p. 412 . See also, R.Y. Jennings, 'The Caroline and McLeod Cases'. 32 *American Journal of International Law* (1938).

Gamal Abdel Nasser, mobilisation and movements of Egyptian forces, and last but not least, the closure of the Straits of Tiran to Israeli navigation, seemed to indicate, with a high degree of probability, that an attack on Israel would have been imminent. Israel, in the UN, referred to the closure of the Straits of Tiran, as an act of war, and therefore didn't raise the defence of anticipatory self-defence. However, I think that if Israel was relying only on this fact alone, its response may have breached the requirement of proportionality. The Israeli response, surely, was much more massive than, say, an on-the-spot reaction in the Straits or something like that. Therefore I would think of the Six-Day War as a war of anticipatory self-defence.

The developments related to the "war on terror" have given support to two hitherto somewhat controversial interpretations of self-defence: it is now more widely accepted that there is room for anticipatory self-defence as well as for what Oscar Schachter, Yoram Dinstein and some others have called *defensive reprisals*. Or rather, in responses to terrorist attacks these two wider interpretations of use of force go hand in hand. Effective responses to typical terrorist pin-prick attacks have to be either carried out *ex post facto* or in anticipation of a new probable attack from the same source. Here, responses can be characterised both as defensive reprisals or acts of anticipatory self-defence.

Now we come to the issue of pre-emption in the meaning of prevention. Michale Reisman in 2003 defined preventive self-defence as "a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that *is not yet operational* and hence is *not yet directly threatening*, but which, if permitted to mature, could be neutralized only at a high, possibly *unacceptable, cost*. It is not hard to imagine circumstances in which PSD might appear justified. Yet if universalized, the claim, by increasing the expectation and likelihood of violence, could undermine minimum order".[3] I think it is well put.

Another international lawyer, Michael Bothe believes that to adapt the right to self-defence to these new perceived threats is unacceptable and would lead to vagueness and increase the risk of abuse. He argues:

[I]f we want to maintain international law as a restraint on the use of military force, we should very carefully watch any attempt on the part of opinion leaders to argue that military force is anything other than an evil that has to be avoided. The lessons of history are telling. If we revert to such broad concepts, such as the just war concept, to justify military force we are stepping on a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal.[4] I believe this to be a dominant position among European international legal scholarship.

In my use of force classes in London I usually compared the two uses of military force that both involved Israel: the June 1967 Six-Day War that many international lawyers, including myself, have considered to be within the frame of legitimate self-

[3] M. Reisman, Self Defense in an Age of Terrorism, ASIL Proceedings, 2003.
[4] M. Bothe, Terrorism and the legality of pre-emptive force, (2003) EJIL 227.

defence and the 7 J une 1981 attack on the Osirak nuclear centre in Iraq that in the eyes of most international lawyers, as well as of the UN Security Council, has been a case of breach of international law.

The concept of self-defence is inherently linked to the concept of an armed attack. The mere possession or attempts of acquisition of nuclear weapons cannot be equated with an armed attack notwithstanding how wide an interpretation we give to the concept of "armed attack". Proliferation of WMD and self-defence are phenomena from different legal domains or branches of international law. Proliferation of nuclear weapons may be considered as a threat to international peace and security. When we talk about possible use of force against nuclear proliferation we are not in the domain of self-defence; we are in the domain of arms control or in the domain of threats to international, including regional, peace and security.

Preventive attacks, even if in breach of international law, can be explained or justified by extralegal arguments. As Dean Acheson, a distinguished American diplomat and lawyer, put it when speaking of the Cuban missile crisis: "The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power – power that comes close to sources of sovereignty".[5] I believe that many politicians today think along these lines since there has been surprisingly little said about legal implications of preventive unilateral use of force.

Can it be claimed that a unilateral use of force to preempt a state from acquiring nuclear capability, although illegal is nevertheless legitimate, using the terminology of the Report by the Commission headed by Judge Goldstone? What would that mean? It could possibly mean at least three things. First, that a case under consideration is so unique, so exceptional that existing norms, which formally should cover also that case, in their application to that case have consequences clearly contradicting the object and purpose of that norm (e.g., the application of norms of state succession to the Soviet nuclear arsenal that would have been contrary to the object and purpose of the NPT). Secondly, legitimate although illegal could also mean that existing norms have become outdated because of the radical change of circumstances and in such a case law may change through it breaches (we will have a case of *ex factis jus oritur* instead of *ex injuria jus non oritur* that is not so exceptional in international law). Finally, and bringing all that together, there should be a wide acceptance of legitimacy of such acts, especially among the actors whose opinion matters.

In my opinion, it would be difficult to give unequivocal "yes" answers to any of these propositions. Let us take a concrete situation. The Iranian threat may be, or may be perceived as, unique to Israel but globally it is not much different from other similar situations and therefore it would be difficult to argue that the general limits to the use of force in this case don't apply. This means that if Israel, or Washington for that matter, were to preventively attack Iranian nuclear facilities, such a case will serve as a precedent for further loosening the prohibition to use force. Equally, I don't

[5] *Proceedings of the American Society of International Law*, 1963, p. 14.

think that the international law prohibition of use of force has become outdated; the law of self-defence doesn't require states to behave like sitting ducks waiting for an attack to materialise in order to respond. In 1967 Israel responded within the confines of international law. Finally, I doubt whether world public opinion, the majority of governments and peoples in the region would consider such a use of force legitimate.

Now about possible political implications of preemptive (preventive) use of force in the Middle East. Nobody can be sure what these implications will be. It is not even certain whether an attack on nuclear facilities of Iran will stop, delay, accelerate or restart Iranian military nuclear programmes. In Iran there are not so much mad mullahs (or irrational Shiite clerics, as they are sometimes called) but, for example, quite liberal Iranian students who are in favour of Iran's nuclear weapons. I emphasise, weapons, not nuclear programmes within the NPT or the IAEA mandates. I know less what the Mullahs think (unfortunately, I am not alone here), but I know more about students and their views. Some 5-6 years ago I had in my masters programme at King's College, London a group of Iranian students, who were all in favour of Iran becoming nuclear. Reasons for that you may guess: there was certainly more than one. Not only will Iran quit the NPT, if attacked, but the regime and the people may become more united than they are now. Reading comments by some American politicians as well as reading various analyses of negotiations with Iran, I have a feeling that sometimes it is not only Iranian nuclear ambitions that are at issue, but also a regime change in Iran. The aim of diplomacy should be the change of behaviour not of the regime. Attacking Iran may well strengthen the regime.

Then, what effect will such an attack have in the Middle East? Some regimes, e.g., the Saudi monarchy may welcome an attack against Iran seeing it as "cutting off the head of the snake" (a Saudi euphemism for attacking Iran). But the reaction of the "Arab street" may be rather different and taking into account the current situation in the Arab world, one may be pretty sure that anti-Israeli, anti-American and generally anti-Western sentiments in the Muslim world will become considerably stronger.

Use of force to prevent a state becoming nuclear is an exercise in the balance of power, self-preservation or self-help. As Thucidides wrote about the *casus belli* of the Pelopponesian war, "The growth of the power of Athens, and the alarm, which this inspired in Lacedaemon, made war inevitable". So, Sparta attacked in order to prevent Athens from becoming too powerful.

Then there are, besides *jus ad bellum* issues, also *jus in bello* problems, if facilities containing dangerous forces are attacked. Hans Blix and some others have referred to Article 56 of AP I of 1977 to the Geneva Conventions of 1949 (Article 55 may come into play too) that prohibits attacks against facilities containing dangerous forces, like nuclear power stations. Effects of attacks against some of them may amount to use of nuclear weapons. Though Israel, Iran and the United States are not party to the Protocol, political fallout from such an attack will depend on the nuclear fallout.

To conclude: pre-emptive use of military force is beyond the parameters of self-defence. Is it a threat to international peace? What would be its consequences? To that I would respond that this is one of those situations where we have both known unknowns as well as unknown unknowns, which Secretary Rumsfeld spoke of. We know, or as lawyers say, should have known, that we cannot know whether such a use of force brings about desired aims or not and one can be sure that there will be consequences of which we know yet nothing.

In summer 2002 in Newport (RI) at a conference I attended at the US Naval War College, Adam Roberts, then Professor of International Relations at Oxford, now the President of the British Academy, warned against possible war against Iraq saying something like: listen also to your friends who disagree with you; they wish you well. Today I may say too: listen to friends of Israel who may disagree with views some of you may hold, because they wish you well.

DIVISION OF POWERS: THE CONCEPTION AND PRESENT CONSTITUTIONAL PRACTICE

Gennady Chebotarev

SUMMARY: the article describes some problems of constitutional division of powers and shows how division of powers is exercised in Russia nowadays. The author shows all branches of powers co-existing with three main branches and analyzes the mechanisms of separation as well as of cooperation of powers. The article suggests measures to improve the checks and balances system for state authorities in the Russian Federation.

KEY WORDS: integrity of state powers, division of powers, cooperation of authorities, presidential powers, system of checks and balances.

The classical concept of division of powers appeared, as the majority of researchers believe, in the XVII century in England where the first political and legal theories were formulated. John Locke citing early research formulated some ideas: the legislative power must be exercised only through the electoral representative assembly, it is impossible for the legislative authority to enforce laws, it is necessary to establish a permanent executive authority, etc.[1]

The works of Charles Louis de Montesquieu outlined the next period of this concept development. He argued that the best government would be one in which power was balanced among three groups of officials. At this time the judicial power was not defined.

There is a statement in professional literature that the founding fathers of the division of powers concept were antique philosophers Plato, Aristotle, Polibius[2] but V.S. Nersesyanz criticized this statement proving his point of view.[3]

Other theories of the origin of this concept can be found in modern literature and they are rather questionable. P.D. Barenboym writes, “important provisions for the doctrine of separation of powers are formulated in the Old Testament”.[4] He means the constitutional division between the court, legislative and executive authorities, believing that the world's first constitution was born 3000 years ago, when Samuel, doing the will of God “explained to the people the rights and duties of kingship, and he wrote them down, and deposit it before the Lord” (1 Sam. 10, 25).

In his fundamental work “Cultural Traditions of Law” G.D.Maltsev ironically suggested not to celebrate the 3000th anniversary of the constitution but first to clarify

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[1] *See*: Locke J. Soch. v 3 t., M., 1988. T. 3. P. 349-350.
[2] *See*: Abamashidze V.V. Uchenie o Razdelenii Gosudarstvennoi Vlasti i Ego Kritika. Tbilisi, 1972. P.4-5.
[3] *See*: Nersesjanz V.S. Politicheskie Uchenia Drevney Grecii. M., 1979. P.166.
[4] Barenboim P.D. 3000 Let Doktirny Razdelenia Vlastei. Sud Sjutera. M., 2003. P.10.

and to prove that Samuel's explanation of the right of kingship was constitutional and people considered it to be the constitution. "If it was a constitution, as P.D. Barenboym believes, the people had to live by its rule and it would be more famous and honored than the Torah".[5] However, G.V. Maltsev writes that "the book written by Samuel remained completely unknown; it is not mentioned in historical documents and even in subsequent texts of the Bible".[6]

G.V. Maltsev doubts that the "problematic Hebrew constitution could include the political principle of separation of powers".[7]

"The typical model of government in ancient Israel was the authorities of the judge, the supreme ruler and the military commander vested to one person".[8] King David, for example, was both the commander and the judge, he exercised the executive powers and he also legislated under the laws of Moses, and in addition he also was a prophet and a great psalmist.

Considering all these facts we should agree with G.V. Maltsev that it would be too daring to think that the idea of division of powers appeared in ancient Israel.

Resuming the fundamental and famous theories of division of powers suggested by John Locke and Charles Louis de Montesquieu the author can underline some basic ideas. In every democratic country three branches of powers – legislative, executive and judicial – are not only united by one state system but are also independent. The higher state authorities exercising legislative, executive and judicial powers are aimed at a certain balance of powers in the system of checks and balances. All three branches are regulated by a stable legal system and the main objective of this system is to prevent usurpation of power by one person or one group and to maintain integrity of the government and security of the state.

Kaarlo Tuori, the Vice President of the Venice Commission mentions: "in modern states the idea of democracy means that the Constitution can make the political system legal only if it follows basic principles such as democracy, division of powers and legitimacy of governance".[9]

The Constitution of the Russian Federation 1993 declared the division of powers as its basic principle and value for a democratic legal social state. However, as B.S. Ebzeev mentions, "there is no constitution in the world that exactly follows Montesquieu concept of division of powers".[10]

The idea of division of powers in modern countries is evolving because of different factors: forms of government, state system, political regime, historical, national and political traditions, and political practice.

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[5] Maltzev G.V. Kulturnye Tradicii Prava. Monograph/ G.V. Maltzev. – M.: NORMA: INFA-M, 2013.P. 232.

[6] *Ibid*, P. 233.

[7] *Ibid*, P. 233.

[8] Salygin E.N. Teokraticheskoe Gosudarstvo. M., 1999. P.64.

[9] Kaarlo Tuori. Voprosy Sozdania Konstitucii – Opyt Poslednih Let, New millennium constitutionalism: paradigms of realty and challenges. NJHAR. Yerevan. 2013. P. 178.

[10] Ebzeev B.S. Konstitucia, Vlast i Svoboda v Rosii: Opyt Sinteticheskogo Issledovania. – M.: PROSPEKT, 2014. P.208.

The combination of these factors can influence the classical theory of division of powers (legislative, executive and judicial powers) and its realization in a certain state in a certain historical period.

For example, in Russia, according to article 11 of the Constitution the public authority is exercised by the President, the Federal Assembly, the Government, courts. Thus, there are four systems of public bodies representing four branches of power – presidential, legislative, executive and judicial.

The author has analyzed the constitutional status of state authorities in the Russian Federation, the status and role of the President, his exclusive powers to coordinate all branches of state power and has come to the conclusion that in the Russian Federation there is one more independent branch – presidential.[11]

Many articles have recently appeared that discuss and prove the fact – in Russia there are special conditions for development of an exceptional branch of presidential power.[12]

Some authors believe that the President of Russia exercised executive power.[13] However, B.S. Ebzeev writes, that the President plays an active coordinative role in the checks and balances system, and also coordinates the interaction between federal and regional authorities in Russia. The President is legally independent from the other three branches of powers, at the same time he/she creates the rules of law, governs, settles the disputes, sets constitutional provisions for the regional authorities and in that context he/she cannot be defined as an executive power.[14] The author of this article fully agrees with this statement.

Assuming the fact that there is real presidential power in Russia we can consider article 10 of Russian Constitution to be incorrect. It says: "the state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. The bodies of legislative, executive and judicial power shall be independent." The author of the article agrees with the opinion of T.Y. Khabrieva and V.E. Chirkin that it should be mentioned that in the Constitution state power is unified and separated into branches: legislative presidential (in presidential-parliamentarian form of government), executive, judicial and controlling, all are presented by different state bodies.[15]

In his later work V.E. Chirkin clarified his statement: "it is not reasonable to set the strict frames for the concept of three separate branches of powers: life is going on and everything is changing. It was said long ago that there was no absolute division of powers. It cannot be realized in the state even because of the unified state power: all branches of power aim at similar goals and depend on one state policy".[16]

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[11] *See*: Chebotarev G.N. Princip Razdelenia Vlastei v Gosudarstvennom Ustroistve Rossiiskoi Federacii. Monograph. Tyumen: TYUMEN STATE UNIVERSITY. 1997. P. 134-157.

[12] *See*: Avakyan S.A. Konstitucionnoe Pravo Rossii. V 2h tomah, T. 1. M.: JURIST, 2005. P.356; Chirkin V.E. Glava gosudarstva. M. 2010.

[13] *See*:Avdeev D.A.

[14] Ebzeev B.S. Konstitucia, Vlast i Svoboda v Rosii: Opyt Sinteticheskogo Issledovania. – M.: PROSPEKT, 2014. P..214.

[15] Khabrieva T.Ya., Chirkin V.E. Teoria Sovremennoj Konstitucii. – M.: NORMA, 2005. P.356.

[16] *See*: Chirkin V.E. Konstitucionnaya Terminologia. Monograph/V.E.Chirkin, Institut zakonodatelstva

In fact, we can observe foreign constitutional practice and find new definitions of branches of powers: electoral branch (Nicaragua), civil branch (Venezuela), control branch (previous China Constitution of 1912, this term is followed by the present Constitution of Taiwan). Article 44 of the Saudi Arabia Constitution names the judicial authority, the executive authority and the regulatory authority.[17]

In the Russian Federation, as the author mentioned in his earlier works, there are branches "that cannot be described as presidential, legislative, executive, judicial."[18]

As an example the author takes the Commissioner for Human Rights. According to the Federal Constitutional Law, through the Commissioner for Human Rights, the state guarantees the rights and freedoms of citizens, their observance and respect by state government, by local government and by officials. The Commissioner for Human Rights, who is appointed and dismissed by the Federal Assembly, acts in accordance with the Federal Constitutional Law (article 103 of the Constitution) and in the realization of his powers he is independent of and not accountable to any state organs or officials.[19]

The same example can be brought about the prosecuting authorities. The prosecutor has a special position in the system of state government. This branch of power can be defined as "prosecutor branch" because it is vested with special functions and powers.[20]

S.A. Avakyan writes: "In Russia there are several state bodies that are not part of the three branches of powers – the Central Bank, the Chamber, the Central Election Commission. Also some special branches of powers can be distinguished – the constitutive power (adoption of the Constitution by people or by the Constitutional Assembly), public power (adoption of laws by referendum or making other important decisions only except adoption of a new Constitution); electoral power; financial and banking power.[21]

We agree with the proposal of V.E. Chirkin to develop the concept of division of powers. He suggests to describe division of powers as a system which is unified, characterized by cooperation between branches and can be supplemented.[22]

By now the most detailed formulation of the unification and division of state powers is presented in the Kazakh Constitution 1995. Part 4 of article 3 says: "The state power in the Republic of Kazakhstan is unified and executed on the basis of the Constitution and laws in accordance with the principle of its division into the

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I sravnitelnogo pravovedenia pri Pravitelstve Rossiiskoi Federacii. – M.: NORMA:INFA-M, 2013. P. 218.

[17] *Ibid*

[18] *See*: Chebotarev G.N. Princip Razdelenia Vlastei v Gosudarstvennom Ustroistve Rossiiskoi Federacii. Monograph. Tyumen: TYUMEN STATE UNIVERSITY. 1997. P. 77-78.

[19] Federalnyi konstitucionnyi zakon ot 26.02.1997 №1-FKZ (v red. ot 28.12.2010) «Ob Upolnomochennom po Pravam Cheloveka v Rossiiskoi Federacii».

[20] *See*: Chebotarev G.N. Ibid. P. 77-78; Melnikov V.N. Prokurorskaya Vlast // Gosudarstvo I pravo. 2002. №2. P. 18.

[21] *See*: Avakyan S.A. Konstitucionnoe Pravo Rossii. V 2h tomah, T. 1. M.: JURIST, 2005. P.356.

[22] *See*: Chirkin V.E. Konstitucionnaya Terminologia. Monograph/V.E.Chirkin, Institut zakonodatelstva i sravnitelnogo pravovedenia pri Pravitelstve Rossiiskoi Federacii. – M.: NORMA:INFA-M, 2013. P. 219-220.

legislative, executive and judicial branches and a system of checks and balances that provides for their interaction".

Some authors think that new ideas for cooperation and unification of branches are very different from the Montesquieu concept of division of powers and can be characterized as a "sophomoric modernization of the classic idea".[23]

On the other hand, modern French lawyers express the opinion that Montesquieu wrote that powers should not be separated but also that they should act "as in concert".[24]

Many Russian authors of the last century supported the idea of integrity (unification) of the public authorities and at the same time of division of their powers – V.V. Ivanovskiy, F.F. Kokoshkin, N.I. Lazarevskiy and some other.[25] They didn't think that division of state power into branches according to their functions would prevent unification of power because the nature of the state is to be united.

The present idea of cooperation between the branches of united state power can be compared with the idea of "Russian symphony of powers". It can hardly be reconstituted nowadays. G.V. Maltsev is absolutely right when he says that "to create a symphony the ecclesiastical power and the state power must have one spirit and one faith".[26]

It is true that ecclesiastical and civil power could not be exercised at one and the same state but the participation of the church in state affairs is an old Russian tradition based on the principles of orthodox spirituality, unity and mutual support. This tradition will promote harmonization of the relationship between the branches of power, renaissance of the best cultural traditions and spirituality for further progressive development of Russia.

The "symphony of powers", V.I.Fadeev thinks, is the best idea for public governance and public authority ethics. The concept of the "symphony of powers" could become the basic principle for organization of the government and also this concept could be the alternative to division of powers in which the branches tend to confront and to protect their own rights and interests".[27]

In January 2014 a Christmas parliamentary meeting was organized in the Federation Council and Patriarch Kirill in his speech noted that the Church is not willing to replace the authorities, but "it has the right to make a moral assessment of the bill and adopted laws. The reason is that the Church is represented primarily by Russian citizens, who have their opinion about the country and what is happening in it. People who go to Church have their own attitude and they would like to share their opinion with the authorities." "In

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[23] *See*: Suchilin V.N. Teoria Razdelenia Vlastei Ch.L. Montesquieu I Sovremennye Politico-Pravovye Realii / Vestnik Tyumen University. 2013, №10. P.193-194.

[24] See: Droit constitutionnal, 1955. P.47.

[25] See: Ivanovskii V.V. Uchebnik Gosudarstvennogo Prava. Kazan, 1908. P. 227-229; Kokoshkin F.F. Lekcii po Obschemu Gosudarstvennomu Pravu. Ed. 2, M., 1912. P. 221-222; Lazarevskii N.I. Russkoe Gosudarstvennoe Pravo. T.1. Konstitucuionnoe Pravo.Ed. 3. SPb., 1913. P. 88-111.

[26] Maltzev G.V. Ibid. P.562.

[27] Fadeev V.I. Idei Simfonii Vlastei i Sobornosti i Razvitie Narodnogo Predstavitelstva v Rossii. Sovremennoe Obschestvo i Pravo. 32 (3), 2011, P.9.

this regard, Patriarch Kirill said, it would be useful to develop forms of systemic interaction between the Orthodox Church, other religious organizations and the government and civil society at the regional level".[28]

The same point of view is expressed by V. Matvienko, the Chairperson of the Federation Council. She suggested to organize the Christmas meetings annually and to make them an effective mechanism of harmonizing the relationships between the Church, the authority and the civil society.[29]

The author has already mentioned that the principle of unification of the government and division of its powers is one of the fundamental principles of the society aiming at harmonizing political relationships. The principle prevents concentration of power in one authority or one official representative of the government and it provides for balance between the branches of power which is necessary in any democratic state and civil society.

Thus, the prime objective of the researchers and politicians is to suggest measures for strengthening all three branches of power. There is an opinion expressed in well-known legal publications that it is necessary for the Federal Assembly of Russia to exercise control over the Government, also it is reasonable to change the procedure of formation of the Federal Council to the form of direct elections of senators, to improve the judicial system and to strengthen judicial independence. President V.V. Putin mentioned the necessity to start democratic reforms of the political system in Russia.[30] Some measures have already been taken. For example, the procedure of formation of the Federal Council has been changed. Now the candidate for the Federal Council – the representative from regional legislative authority (Republics, Krais, Oblasts, Autonomous okrugs and Federal Cities of Moscow and St. Petersburg) – can only be a legislature member, i.e. a citizen of Russia elected to the regional legislative authorities.[31]

At the same time it is necessary for the Constitution to define the role and powers of the President and presidential bodies in the system of government in Russia. The present Constitution of Russia sets up the main functions and authorities of the President but there is an uncertainty about how the President exercises his powers, what the limits are of the President's authorities and what constitutional guarantees there are for executive and judicial independence. The author believes, it is very important to adopt a Federal Constitutional Law "On the President of the Russian Federation" (following the pattern of the Federal Constitutional Law "On the Government of the Russian Federation"). A new Constitutional Law should regulate the procedure of implementation of presidential powers, namely, the formation of the Administration of the President, State Council, Security Council, appointment and

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[28] Speech of His Holiness Patriarch Kirill on occasion of the first Christmas parliamentary meetings at the Federation Council, Available at: http://www.patriarchia.ru/db/text/3544704.html.

[29] Speech of V. Matvienko on the Open ceremony of the first Christmas parliamentary meetings at the Federation Council, Available at:, http://council.gov.ru/press-center/news/38817/.

[30] *See*: Putin V.V. Demokratia i Kachestvo Gosudarstva. Kommersant. №20. 06.02.2012.

[31] Federalnyi zakon ot 03.12.2012 №229-FZ «O Poryadke Formirovania Soveta Federacii Federalnogo Sobrania Rossiiskoi Federacii».

dismissal of presidential representatives in the federal districts. In this law there should be rules on legal effect of directives given by the President to the Government and other state bodies.

Summing up the author can suggest some conclusions:

1. Division of powers is an effective mechanism for organization and realization of state power which depend on certain historical and political context and theoretical interpretation.
2. The state power, even if divided into separate branches, always remains unified and integrated.
3. The basic idea of division of powers is that one branch must not venture into the domain of other branches and mixed government is unacceptable.
4. The concept of division of powers suggests regulation and restraint of branches, to describe the system of checks and balances in the Constitution of a state. There has never been a typical system of checks and balances. In every country where the government's powers are divided the instruments of checks and balances are different. Also the system of checks and balances and even the form of division of powers can evolve.
5. At the present time the concept of division of powers should be completed by the cooperation and interaction of branches.
6. In the Russian Federation the Constitution establishes not three traditional branches but four branches of power – presidential, legislative, executive and judicial.

   Also there are some authorities that cannot be referred to those four branches. In this realm we understand that the principle of division of powers is widening because other branches are very specific and independent.
7. The principle of division of powers established in Russia is not effectively implemented in political and legal process. The system of checks and balances should be improved. Firstly, the constitutional legislation needs some changes, then the functions of the branches should be controlled. The Constitutional Court of Russia is the body which can exercise the control function and report to the Federal Assembly of Russia.

DEVELOPMENT OF THE MECHANISM OF CONSTITUTIONAL CONTROL IN THE RUSSIAN FEDERATION

Mikhail Kleandrov

The mechanism of constitutional control has not been developing in Russia for very long, meeting difficulties and obstacles, and nowadays it still faces some challenges. It's obvious that future difficulties and problems will be successfully overcome, as has happened in the past, but the question is what is the cost?

I would like to dwell upon the history of the constitutional control in Russia. The law of the USSR on 1st December, 1988 # 9853-X1[1] amended the Constitution of the USSR and the USSR Committee of Constitutional Supervision was established. Twenty three members were elected by the Congress of People's Deputies of the USSR for a ten year period from experts in politics (at that time! – M.K.) and law. The number of members was increased to 27 under the law of the USSR on 23rd December, 1989 # 974-1 "Amendments to the Article 125 of the USSR Constitution"[2] and they represented every social republic. The Committee was functioning from May 1990 till December 1991 and passed 23 decisions, some of them on very important matters of human rights.

The RSFSR Constitution (article 104, part 12 as amended by the Act on 27th October, 1989)[3] set up the RSFSR Committee of constitutional supervision. The article provided that ten commissioners should be elected from among the experts in the field of politics and law for a 10-year period. Later in the RSFSR Constitution as amended by the Act on 15th December, 1990 # 423-1[4] in part 1 article 10 the words "RSFSR Committee of constitutional supervision" were amended to "Constitutional Court of the RSFSR".

Thus, the RSFSR Constitution (as amended on 15th December, 1990) and the Act of the RSFSR on 6th May, 1991 # 1175-1[5] (amended on 12th July, 1991 when the Congress of People's Deputies adopted the Resolution to enact the Law "On Establishment of the Constitutional Court of the RSFSR"[6]) became the legal framework for the newly established institution – the Constitutional Court of the RSFSR. The Law "On Establishment of the Constitutional Court of the RSFSR" in its article 1 defines the Court as "the highest judicial body for constitutional control in the RSFSR, exercising the judicial power in the form of constitutional proceedings". Under this law the Constitutional Court of the RSFSR was eligible to decide cases on the constitutionality of the law enforcement and to initiate the proceedings and now

[1] Vedomosti SSSR, 1988, № 49, P. 727
[2] Vedomosti SSSR, 1989, № 29, P. 574
[3] Vedomosti VS RSFSR, 1989, № 44, P. 1303
[4] Vedomosti SND i VS RSFSR, 1990, № 29, P. 561
[5] Vedomosti SND i VS RSFSR, 1991, № 19, P. 621
[6] Vedomosti SND i VS RSFSR, 1991, № 3, P.1016

the Constitutional Court does not have these powers. On 29-30th October, the 5th Congress of People's Deputies elected 13 judges (4 of them have been serving as judges till the present time) and the Constitutional Court of the RSFSR started, its first session took place on 30th October, 1991. Up to October 1993 the Court had passed 28 important decisions including on the USSR Communist Party case, on the case of establishment of the Ministry of State Security and Domestic Affairs (integrated Ministry) and others. On 5th October, 1993 the RSFSR Constitutional Court passed a decision on the well-known Presidential Decree # 1400 dated 26.09.93 "On Gradual Constitutional Reform in the Russian Federation"[7] (dissolution of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation). In two days after this, on 7th November, 1993 the President by his Decree # 1612 actually suspended[8] the activities of the Constitutional Court for a long time. The Chairman of the Constitutional Court was recommended (by paragraph 5 of the Decree) to make proposals to the Federal Assembly of the Russian Federation "on organizational and legal framework of constitutional justice in Russia and the possibility to set up the Constitutional Division at the Supreme Court". De facto the Constitutional Court of the Russian Federation was suggested to self-destruct.

However the Constitutional Court of Russia retained its power and in the Constitution adopted on 12.12.1993 it was included in Section 7 "Judicial Power", also the Constitution has the provisions for other high courts of the country – the Supreme Court and the Supreme Arbitrary Court.

Since that time the Constitutional Court of Russia exercised its judicial power in the framework of the new Constitution of Russia (which identified its role and place in the national legal system) and the new Federal Constitutional Law "Constitutional Court of the Russian Federation" on 21st July, 1994 # 1-FKZ[9]. Under the new constitutional and legal regulations the Court consisted of 19 judges; it wasn't eligible to admit a petition for consideration by its own initiative; it was not its power to assess the constitutionality of the actions of officials, as well as the constitutionality of the political parties; the Court was only empowered to verify laws in case of requests or complaints. The constitutional proceedings were also changed – the Court considered and resolved the cases in two Chambers and in Plenum (i.e. full membership), etc. Article 1 of the Federal Constitutional Law defined the Court as the judicial body of constitutional control which exercises judicial power independently by means of constitutional judicial proceedings.

After all judges were appointed the Constitutional Court started to exercise its powers in February 1995. In the period of 1995-2000 it issued 12 judgments on the Constitution interpretation; in 2006 the Court issued 10 resolutions and 35 rulings on different cases. It's obvious that the constitutional assessment of the Constitutional

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[7] Sobranie Aktov Presidenta I Pravitelstva Rossiiskoi Federacii, 1993, № 39, P.3597

[8] Moreover, in the Attachment # 2 to the Presidential Decree on 24 December 1993 # 2288 (Rossiiskaya Gazeta, 1994, 14 January) the Act "Constitutional Court of the RSFSR" was recognized as invalid and inapplicable to state authorities, local authorities and officials

[9] SZ RF, 1994, № 13, P.1447

Court improved the basic institutions of the Russian legal system – criminal, civil, other branches of law and their procedures.

In 2008 the Constitutional Court moved from Moscow to St. Petersburg. By that time most petitions to the Court were on socio-economic matters, not human rights. This fact indicates the changes in Russian legal system and society. Violations of socio-economic rights and freedoms, in all their diversity, are often very similar in effect, and the Constitutional Court introduced new practice: the Court applied its positions on the matters where the Constitution was interpreted to the similar matters. It was suggested to make so-called "positive rulings" without public hearings. This practice was criticized, mostly in the academic community. Academicians discussed possible problems that could occur, for example different legal interpretation of one matter in two Court chambers. Also a "level arrangement" problem could occur – the plenary session of the Court might formulate an opinion different from that of any chamber, though each chamber gives the opinion on behalf of the Court. Some other contradictions were also pointed out.

The following issues were regulated by the amendments to the Federal Constitutional Law "Constitutional Court of the Russian Federation" in 2010[10] and 2011[11].

The Court organizational structure: to eliminate the divergence of opinions the law didn't establish the Court chambers and provided for all court sessions to be plenary. At the same time the amount of cases for consideration and the efficiency of the Court work didn't change.

The Court proceedings: Article 47.1 of the Law "Constitutional Court of the Russian Federation" introduced a new constitutional proceeding under which the Court may consider and resolve cases without hearings, through so-called "written procedure". It became possible because the Court had accumulated experience of constitutional judicial proceedings in Russia and even in foreign states. It is important to note that a new proceeding is held in the framework of the basic constitutional principles – the adversary system and equality of the parties, except the principle of oral hearings.

Moreover, the principle of continuity was changed and this allowed the Constitutional Court to begin consideration of a new case before the pronouncement of a decision passed on the outcome of the consideration of the previous case; so this rule was aimed to expedite proceedings.

It was necessary to eliminate the possibility of collisions in the country's judicial system and, in a reform, the conditions of admissibility of the complaint to the Court were amended: a complaint is admissible if the law has been applied in a specific case the consideration of which has been completed in the court. Before this the complaint was admissible when some rules or provisions were challenged even if they ought to be applied but were not applied by the Court.

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[10] FKZ ot 2 June 2009 № 2-FKZ (SZ RF, 2009, № 23, P. 2754)

[11] FKZ ot 3 Novebmer 2010 № 7-FKZ (Rossiiskaya gazeta, 2010, 10 November)

The status of the persons exercising constitutional justice: after the reforms the judges of the Constitutional Court don't elect the chairman and his deputies – it is the authority of the Federation Council to appoint the judges upon nomination made by the President of the Russian Federation; now the Court judges can decide on the suspension or termination of a judge's powers; they consider the reasons for early termination of the Chairman and his deputies' powers by the Federation Council upon nomination made by the President.

The provision on execution of the Court decisions was also amended. The provision implies that decisions of courts and other bodies based on acts or individual provisions thereof found to be unconstitutional by the judgment of the Constitutional Court of the Russian Federation shall not be executed and shall be reviewed in the events stipulated by the federal law. Moreover, the lawmaking process providing the decisions of the Constitutional Court was considerably improved.

The reforms of three mechanisms of constitutional control helped to stabilize the judicial power, to make it more efficient and to strengthen constitutional law and order.

Merging the Russian Supreme Court with the Supreme Arbitration Court under the Act on 5th February, 2014 # 2-FKZ (Constitution Amendment "The Supreme Court and the Prosecutor General's Office of the Russian Federation" [12]) has not changed the status and the powers of the Constitutional Court. Article 125 of the Russian Constitution which describes the Court powers now does not have a provision on the Supreme Arbitration Court. In principle merging the three top courts of the country, including the Constitutional Court, was possible. This possibility was discussed in some alternative drafts of the Russian Constitution, for example, the document proposed by the Institute of the National Strategy read: "The Supreme Court of Russia is the highest judicial body in Russia and it is composed of the constitutional, administrative and criminal chambers" (part 2 article 78)[13]. The author of this paper in 2006 in his article on the issues of economic justice wrote (in the last part of the Introduction): "Talking about the future of economic justice in Russia, we can paraphrase a joke of the famous economist Keynes: 'Long-term prospects for Russian economic justice are great if it does not die in the short term'. I mean – if there is not an obligatory (by amending the current Constitution) merging of arbitrary judicial system with the system of courts of general jurisdiction and – which is not excluded – with constitutional and statutory branch of the judiciary. And even in that case economic justice will stay alive, but it will be organized and developing differently".[14] Did it happen so in 2014 (regardless of constitutional justice)? And what will be the effect for the constitutional control bodies?

As we know the reason for merging the Supreme Court and the Supreme Arbitrary Court of Russia was often inconsistency in judicial practice of two systems.

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[12] Rossiiskaya gazeta, 2014, 7 February

[13] See, for more details: Petrov A.A. Konstitucionnoe pravosudie v Rossii. Alternativnaya istoria. Chast II//Journal konstitucionnogo pravosudia, 2010, № 3 (15), P.1-5

[14] Kleandrov M.I. Ekonomicheskoe pravosudie v Rossii: proshloe, nastoyaschee, buduschee. – M.: Volters Kluver, 2006, P. XIII.

It happened because some cases fall under the jurisdiction of both courts and the Constitutional Court has already considered such cases in its practice. Former Chairman of the Supreme Arbitration Court of the Russian Federation (up to 2004) V.F. Yakovlev (currently Advisor to the President of the Russian Federation) spoke about more underlying causes in his speech on February, 28th 2014 at the Conference "Development of Justice Systems in the Russian Federation: how the judicial reform can influence lawyers and how lawyers can influence the reform". This conference was devoted to the merging process of the top courts of Russia. He mentioned that merging courts is a necessary measure: "The Supreme Courts have forgotten about their mission". He added that when arbitrary courts (for commercial disputes) were established the idea was to let the Supreme Court and the Supreme Arbitrary Court of Russia cooperate. "Their goal was not just to consider the cases but to become a think tank of the judicial branch and to ensure uniformity of judicial practice".[15]

One of the effects of merging is that interaction of the new Supreme Court and the Constitutional Court has resulted in an imbalance in the representation of judges in the judicial system. Before merging the judicial branch in Russia was divided into independent systems – courts of general jurisdiction and arbitrary courts (they were part of the whole judicial system) and also the constitutional and statutory branch which was not the part of the judicial system. Judges representing the two systems and the constitutional branch were – on an equal footing – presented in the judicial community and were vested with much public authority under federal laws. Now, after merging the Supreme Court and the Supreme Arbitrary Court, we have the only judicial system which includes a separate system of arbitrary courts, a sub-system of military courts, with thirty five thousand judges involved in this united judicial system compared with less than one hundred judges in the constitutional and statutory system. Misbalance is evident and it restrains parity and proportionality of judges in judicial bodies. It is necessary to formulate new principles of judicial branch formation and reorganize the existing judicial bodies.

On the other hand, the fact that the Constitutional Court was not combined with the Supreme Court and the Supreme Arbitrary Court doesn't prove that there are no problems with exercising constitutional control in the Russian Federation and that the Russian society is satisfied with constitutional control functioning.

I should say that no amendments to the Federal Law on the Constitutional Court (it has been amended 8 times for 20 years) were spontaneous. For example, the regime of written judicial proceedings was introduced after deep research and analysis[16]; the catalogue of published research on constitutional justice had 11 343 works by 2011.[17] The role of the Constitutional Court (its 19 judges and several hundred experts) in the improvement of the legislation on constitutional

[15] EZH-jurist, 2014, № 10.

[16] See: Mitjukov M.A. Pismennoe razbiratelstvo v konstitucionnom sudoproizvodstve: Rossia I opyt zarubezhnyh stran// Gosudarstvo i pravo, 2005, № 10, P.5-13.

[17] Bibliografia po konstitucionnomu pravosudiju/otv. sost. M.A.Mitjukov.-2-e izd., izm., pererab., i dop. – M.: KNORUS, 2011. -1120 p.

justice and the judicial practice is very significant. Besides protection of constitutional rights, interpretation of the Russian Constitution, constitutionalization of sectoral legislation[18] (which is often criticized by researches in different branches of law[19]), creating "unwritten rules of constitutional justice"[20] and formation of constitutionally justified expediency[21] the activities of the Constitutional Court are very divergent – it is the venue for annual international, nation-wide research conferences and seminars, the Senate readings (the event has been organized twice a month for five years), etc. It makes it possible to define basic drawbacks of constitutional control in Russia – in other words before offering treatment we must know the diagnosis.

It is very important to mention that the constitutional control is exercised not only by the Constitutional Court. Russia is a federative state and the Federal Constitutional Law on 31st December, 1996 # 1-FKZ "Judicial System in the Russian Federation" [22] in its article 26 provides for the right of Russian regions to establish their own constitutional (statutory) courts. They were set up at the beginning of the 1990s but in some regions ceased to exist very soon due to different reasons. For example, in Mariy El it happened to the Constitutional Court, in Irkutsk to the Statutory Court, etc. By now there are 85 regions in Russia, and only 18 courts of the kind exist: the statutory courts of St. Petersburg, Sverdlovsk, Kaliningrad, Chelyabinsk regions and 14 constitutional courts in Russian republics; 75 judges working in all these courts. Constitutional (statutory) courts of the Russian regions are not federal; they are established in the framework of regional legislation, organizational structure and budget, the decision on establishing such courts are the prerogative of the regions. In 38 regions where these courts do not exist the constitutions have the provision on constitutional (statutory) courts, in 24 regions there are laws regulating constitutional courts. However de facto the constitutional courts are not established in more than three-quarters of regions and this violates the principle "equality of all before the court: a citizen of Sverdlovsk region, for instance, when his/her rights are violated, complains to the statutory court of his/her own region, and a citizen of Tyumen region (which is situated nearby) in the same situation has to apply to Tyumen regional court of general jurisdiction which is not intended for decision of such a case, because there is no Statutory Court in Tyumen region.

The problem can be outlined here – similar in their legal nature cases that should be considered by the constitutional (statutory) courts of the Russian regions are considered and resolved in two different proceedings: in the framework of

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[18] See: Dolzhnikov A. Vlianie konstitucionnyh prav na rossiskuyu pravovuyu sistemu// Sravnitelnoe Konstitucionnoe Obozrenie, 2012, № 6 (91), P.109-120.

[19] See., for example:Bozhjev V. «Tihaya revoljuchia» Konstitucionnogo Suda v ugolovnom processe Rossiiskoi Federacii//Rossiiskaya justicia, 2000, № 10, P. 9-11.

[20] See: Dolzhnikov A. «Rukopisi ne gorjat»: nepisannye prava v konstitucionnom pravosudii// Sravnitelnoe Konstitucionnoe Obozrenie, 2014, № 1 (98), P.120-137.

[21] About this see: Zorkin V.D. Sovremennyi mir, pravo i Konstitucia. – M.: Norma, 2010, P. 153

[22] SZ RF, 1997, № 1, P.1

constitutional/statutory legislation by constitutional/statutory courts of the 18 Russian regions where these courts are established; and in the framework of separate provisions in the Civil Procedural Code, these provisions cannot be referred to administrative procedural legislation because in Russia there is no special law regulating the administrative proceedings and which could by applied by the courts of general jurisdiction. Though more than 10 years ago bills on the system of administrative proceedings were proposed they were not enacted and by now we have independent judicial boards on administrative cases in the courts of general jurisdiction of all levels, so we cannot speak about a system of administrative courts – at least in the nearest future. The Constitutional Court of the Russian Federation and the 18 constitutional (statutory) courts of the regions of the Russian Federation (and soon there will be a few more) do not constitute any system – there is neither an organizational nor institutional nor procedural structure. However, judges at both federal and regional courts are involved in the judicial community of the country; some of them are elected to the Judicial Council, the Presidium of the Council of Judges, etc., but not more than that.

But the lacuna in the system of the constitutional and statutory branch of the judiciary is a big problem which is, so to say "knocking at the door". So, a few years ago, the Legislature of one of the Russian regions – the City of St. Petersburg – proposed a bill with the provisions vesting the Russian Constitutional Court with the right of review of decisions of constitutional (statutory) courts of the regions of the Russian Federation. The State Duma of the Federal Assembly – the lower house of the Russian Parliament – did not support this bill; however there were some other proposals on the issue.

The problem falls within one more constitutional procedural framework. Part 2 of Article 118 of the Russian Constitution proclaims: The judicial power shall be exercised by means of constitutional, civil, administrative and criminal proceedings. It means that the Russian Constitutional Court and constitutional (statutory) courts of Russian regions (those that have been established and will be established in the future) are exercising their powers through constitutional proceedings. Now there is no unified law on the issue. The norms on constitutional proceedings are included in separate ("personal") legal regulations adopted for every court of the constitutional/statutory branch of judicial power. This situation when constitutional proceedings are regulated by dozen of laws (one federal constitutional law and others are regional laws) and are not even coordinated with each other cannot be acceptable.

The author can suggest a coherent decision for the problem: a) there should be a will and a federal law stipulating for obligatory formation of a constitutional (statutory) court in every Russian region (in the situation within multiple-structured regions of Russia, when one region is a part of another but they both are equal under the Constitution, for example for Tyumen region including Khanty-Mansy region and Yamalo-Nenetz region, there should be a "united statutory court"); b) it is necessary to develop and adopt federal law (Model Law or the Foundation – for the regions of Russia) which regulates the constitutional proceedings.

The Constitutional Court of Russia also comes across various problems which are obstacles towards quality constitutional control. I'm going to describe some of them.

The powers of the Russian Constitutional Court which are provided by the Constitution and the legislation are not sufficient to analyze the whole range of issues related to the particular cases for the Court consideration. Article 74 of the Federal Constitutional Law "The Constitutional Court of Russia" provides that the Court makes decisions and passes declaratory judgments solely on the subject stated in the petition and only in relation to that part of the act or the competence of the body, the constitutionality of which is challenged in the petition. While passing the decision the Constitutional Court of the Russian Federation shall not be bound by the grounds and arguments stated in the petition. The Constitutional Court passes the decision on the case assessing both the literal meaning of the act under consideration and the meaning attributed to it by an official and other interpretations or the prevailing law-applying practices, as well as proceeding from its place in the system of legal acts. The Court is not empowered to consider the reasons for adopting the rule of law constitutionality of which is challenged or assess the unconstitutionality of law-applying practices. Even if the Court reveals the constitutional ground of specific (sectoral) relationships. Sometimes the ground of unconstitutionality of law-applying practices is subjective, it is the result of abuse of powers by a public official. Even in this case the Court is not empowered to pass a private (personal) ruling.

Also the Court is not vested with the power to initiate proceeding on any matter. It's interesting that in other countries the constitutional control bodies are vested with such powers, for example in the case when one third or one quarter of judges have the right to initiate the petition. This practice could be effective for the Russian Constitutional Court.

Lacking these powers the Constitutional Court cannot always pass a decision being absolutely sure that the decision is just, however justice for Russians is sacred.

Another problem of the current constitutional control exercised by the Russian Constitutional Court can be described – the number of petitions to the Court is more than nineteen thousand every year. On the one hand, it is good; it means increased awareness and legal literacy of the Russian people, the strengthening of civil society institutions. On the other hand, it means growing burden on judges – in 2006 the Constitutional Court passed 10 judgments and 635 rulings, in 2009 - more than 20 judgments and 1676 rulings, in 2011 - 30 judgments and 1865 rulings, and in 2013 - 30 judgments and 2278 rulings. And the fact is that since 2011 the Court has been working without the chambers, only at plenary sessions.

The decisions of the Court in which the act deemed to be unconstitutional (or in which the acts are constitutionally interpreted) and the decisions in which the Court orders the federal legislature to amend the challenged acts are often ignored. There are 39 Court decisions (as of March 15, 2014) which have not been executed. This fact can be explained to some extent – many specific acts and the Civil Code must be amended and the Civil Code of the Russian Federation is under reform now and much

work and research has to be done, but it is only one minor reason for ignoring the Court decisions. Another challenge is to increase effectiveness of the monitoring of the Constitutional Court and to improve the mechanism of execution of its decisions. To a large extent, this situation stems from the provisions of part 1 Article 80 of the Federal Constitutional Law: under this provision the Russian Government is bound to introduce bills on amendment of laws declared unconstitutional. However, other members of the legislative process, mostly the State Duma, possess the right to initiate laws – these facts are discussed in professional legal literature.23

Another reason is the absence in both the Constitution and in the Federal Constitutional Law of rules on time limits for filing a constitutional complaint after the alleged violations of constitutional rights. And this gap sometimes makes execution of the decisions of the Constitutional Court complicated and even impossible which is deemed a violation of constitutional rights. Besides, this gap complicates the work of the legislator executing the Court decision – the rule deemed to be unconstitutional could have been amended after it violated the constitutional rights of the person.

I can mention some other problems and challenges. But there is a saying in the academic community: to set the task and to identify the problem is 50 per cent success.

[23] See: Aranovskii K.V. Uslovia soglasovania praktiki mezhdunarodnogo i konstitucionnogo pravosudia //Journal Журнал konstitucionnogo pravosudia. 2013, № 3(33), P. 5

RESEARCHING THE HISTORY OF EUROPEAN PUBLIC LAW AND CONSTITUTIONAL LAW AT THE END OF THE 20TH CENTURY AND IN THE FIRST DECADE OF THE 21ST CENTURY: THE COOPERATION BETWEEN HUNGARIAN-FINNISH-ESTONIAN LEGAL SCIENTISTS

Peeter Järvelaid, Taavi Minnik

The Historical Background of Hungarian-Finnish-Estonian Cooperation

If we take a look at the world map, it might seem that Estonia, Hungary and Finland are located far enough away from each other so as to exclude the opportunities for cooperation. But as our common history seems to prove, at different times it has been achievable. Hereby one should remember that on the wall of the main building of Tartu University is a plaque for Stephen Bathory, the former sovereign of these realms, bearing Hungarian blood. Historically our perception of cultural unity has greatly been based on a perception of linguistic affinities. From the cultural perspective, the self-definition of Finns, Hungarians and Estonians distinguishes themselves from the other nations. Already in the consciousness of our ancestors there was the understanding that our nations share something more than being neighbours or being a part of one or another empire at one time or another. This common feeling has been well described by Prof. Gabor Bereczki who after examining the research works of various Hungarian linguists came to the conclusion that Estonians and Finns, who are living somewhere far away, are culturally closer to Hungarians than the immediate neighbours. Therefore, the main role here has always been played by linguists, and the impact of their studies has been much wider. Most important has been attitude formation which later, with the new opportunities, has a pretty interesting history of any of the forms of cooperation. The jurisprudence is a fine example of that.

Cooperation during the Interwar Period

The beginning of university education dates back to the 17th century in all of the three countries (in Hungary the first university was established in 1635, in Finland 1640 and in Estonia 1632), but deeper scientific connections between Hungarian, Finnish and Estonian jurists began after the First World War. Of course we can't compare the length of the statehood of Hungary with Estonia and Finland, but it is obvious that after the First World War the three new republics shared quite similar problems. One should note that in the cooperation between these nations there has been a share of lucky coincidences, as the people who have natural premises to build a bridge between different nations step forward to the stage of history. After the First World

War, both in Estonia and in Finland, but also in Hungary, there were many people in a position of power who shared a strong feeling of kinship between the Finnic peoples. For instance, the first President of Estonia. Konstantin Päts (1874-1956), who had received a law education from Tartu University, was a prominent supporter of the Pan-Uralic movement, who as a politician sensed the great importance of the cooperation between the Finno-Ugric peoples. It is worth remembering that at this point cooperation was also very specific, as during the Estonian War of Independence (1918-1920) the acting prime minister who also was fulfilling the duties of the Minister of War, Konstantin Päts, was among those politicians who sought help from Finland, receiving volunteers and material help at the most critical moments in 1918/1919. But at the same time Finno-Ugric cooperation was a part of Konstantin Päts' political programme, because even before his deportation to the Soviet Union in 1940, he drew up his political testament, which was secretly sent to the Finnish Ambassador in Tallinn, where Päts dreamed about the common state of Finland and Estonia could reach a common state in the future, as the two countries are separated by a narrow gulf, but have close cultural ties. The authenticity of his political will has caused debates in academic circles,[1] but it is important to emphasize that as the leading political figure in his country he found the time and also the ambition to be the patron of the Finno-Ugric movement in Estonia (1925-1936 chairman of the Estonian-Finnish-Hungarian Union, Honorary Chairman from 1936). One should note that only his involvement would perhaps have not been sufficient, if this movement wouldn't have been backed by the strong cultural assumptions in Estonia. In the Finno-Ugric movement some very influential people from Hungary and Finland who ended up in Estonia also played important roles. When Estonia decided to restore Tartu University as an Estonian-language institution, which would serve the goals of Estonian culture, it initially encountered large problems. The university in Tartu had been established back in 1632 and since 1802 the university had functioned consistently till the outbreak of the First World War. Russian academic staff and students largely left to Russia, where they founded Voronezh University, the German occupation authorities supported the reopening of the University of Tartu, however, the reopened German language university didn't last long. Thus, in 1919, it had become quite obvious that the ambition to hold the Estonian language university needed at least initial help from the outside and high hopes were put on the scholars from different countries, who were to be expected to contribute to the upbringing of the Estonian speaking academic staff. Great help was provided by Finnish colleagues (especially in the humanities), but one of the most significant foreign professors was the Hungarian Istvan Csekey (1889-1963), whose role cannot be underestimated in the history of Estonian legal science as well in the Finno-Ugric cultural cooperation. I. Csekey's life is a good example of the Finno-Ugric cooperation. I.Csekey was elected

[1] vt. Grabbi, Hellar. Neli presidenti. Mälestuslikud esseed. Tartu: Ilmamaa, 2014, pp. 47-56, Grabbi, Hellar. Pätsi kiri Soome saadikule juulis 1940. – Tuna, 2005, nr.1 , P. 58. Hellar Grabbi was the son of the Konstantin Päts's adjutant Colonel Grabbi, who claims that his mother personally had been delivering the last political will of Konstantin to the Finnish Embassy

with the support of Estonian law professors (J.Uluots, N.Maim, A.Piip) and he continued to work in Tartu University until 1931. I.Csekey's academic studies were devoted to describing the development of Estonia's statehood, which after being published in different languages were the first to introduce this issue abroad. After his return to Hungary in 1931, he became a law professor at the University of Szeged and later rector of the same university. As Tartu University celebrated its 300th anniversary in 1932, I.Csekey was awarded an honorary doctorate as gratitude for his work in Estonia. Besides him an honorary doctorate was granted to the acting rector of Tartu University, theologian Johan Kõpp and to the professor of legal history Jüri Uluots (1890-1945). One should note that J.Kõpp had been Uluots's religious education and Estonian language teacher in high school in Pärnu, helping him to find self-confidence to be an educated Estonian at a time when the school system before the First World War was still overwhelmingly in Russian. During 1920-1931 Istvan Csekey personally greatly contributed to the Estonian legal science. In addition, everybody who studied law at the University of Tartu at that time gained a positive contact with Hungary and Hungarians, as I. Csekey was known as an outstanding figure in the Finno-Ugric movement, who found many followers in Estonia and Finland. In order to better understand his legacy in Estonian legal science it should be pointed out that during his time in Estonia, Tartu University was the only educational institution to prepare lawyers for the small nation. Here one should remark that while I.Csekey was working in Tartu, the legal faculty was the most popular among the university entrants (in the 1920s more than 2,000 students were matriculated, from the second half of the 1930s there was already a limit set to the number of law students by the university). Therefore, it is important here to remember that, even though many of Csekey's students didn't become lawyers, they had a much wider impact on Estonian culture, which in turn gave a certain energy potential, which even the Soviet regime wasn't able to erase from the memory in 1941-1991 when Finno-Ugric cooperation was, if not fully prohibited, then suppressed to the language and literature level. Istvan Csekey wasn't forgotten in Estonia, but it must be pointed out that his life and work after 1945 remained unknown for a long time. When in the 1970s and 1980s the author of this article was trying to find out something about Csekey's fate from Tartu University, unfortunately they didn't know much about the later period of his life. For instance, as for example in the three-volume history of the Tartu University (published in 1982), Istvan Csekey is listed as a foreign professor working in Tartu from 1919 to 1931. But about his biography we cannot find anything more than just only few dry facts.[2]

[2] Tartu ülikooli ajalugu 1632-1982. Tallinn: Eesti Raamat, 1982, kd. 3 (1918-1982), P. 106.

The "restart" of the cooperation at the end of the 20th century and at the beginning of the 21st century

Cooperation between Hungarian and Estonian jurists

The Golden Age of cooperation between Hungarian and Estonian jurists ended in 1931, when Istvan Csekey left Estonia for his homeland. The 1930s paved the way for a new generation, who might have developed close ties with their Hungarian colleagues. Estonian jurists were showing interest towards Hungary and Hungarian culture before the outbreak of the Second World War. For instance, the first female lecturer in the history of Tartu University, Vera Poska-Grünthal,[3] wife of the vice president of the Estonian Supreme Court and fellow lecturer of the Tartu University Timotheus Grünthal. One might call Vera Poska-Grünthal a truly "international woman" because she had the honour to be among the founding members of the International Federation of Women Lawyers (IFWL). She was one of many Estonian jurists whose hopeful future prospects were broken by enforced exile during the Second World War. One of the most important scientific connections with Hungarian jurists was created at the end of the 1930s and during the Second World War, which probably determined the destiny of the "greatest star" of Estonian legal science. Estonia has had only one notable philosopher of law at the international level and the fact that he was looking for opportunities for self-realization with the help of his older Hungarian colleague, Julius Moor, was not just a mere coincidence. Ilmar Tammelo (1917-1982) later became a recognized legal philosopher, and if we look at his extensive scientific contacts, one might say that he was also able to find many contacts and cooperation opportunities from Finland (he also became a member of the Academy of Finland).

As after the Second World War all the official contacts between jurists were held under the tight control and supervision of Moscow,[4] the direct contacts between Estonian and Hungarian scientists basically perished. Changed historical conditions in the early 1990s gave new opportunities for direct cooperation between Hungarian and Estonian jurists. In 1993 Estonian jurists had the opportunity to participate in a conference in Budapest, later the conference materials were published.[5] One must also note that the Hungarian legal scholars attempted to find contacts in order to study

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[3] Vera Poska-Grünthal was the daughter of the outstanding Estonian jurist Jaan Poska (1866-1920). Jaan Poska was the first Minister of Foreign Affairs of Estonia

[4] Here a prominent role could have been played by the former Professor of Tartu University, Vladimir Grabar (Hrabar; 1865-1956) who, until 1893, was a citizen of Austria-Hungary and had many personal ties with Hungary. His father had been a lawyer and his brother, the famous artist Igor E.Hrabar (Grabar), had also studied law in the University of Saint Petersburg (where he also had received his doctoral degree). See: Järvelaid, Peeter. Vaimude tund Eesti õigusteaduses jätkub. – Akadeemia, 1992, nr. 11, pp. 2413-2417. (Retsensioon: Vladimir Grabar. The history of international law in Russia 1647-1917: a bio-bibliographical study. Oxford, 1990, 760 p.

[5] Järvelaid, Peeter. On the correlation of the legislative and executive power in the Republik of Estonia 1918-1940. – Theorie und Institutionsystem der Gewaltentrennung in Europe. Budapest, 1993, p. 139-148. (Studies on public administration und law, 4).

the works of Ilmar Tammelo.[6] This cooperation turned out to be fruitful and resulted in many different publications in different article collections published by Austrian colleagues.[7]

Cooperation between Finnish-Estonian jurists

The roots of the cooperation between Estonian and Finnish jurists date back to the period of national awakening in the 19th century, but in fact the visit of Finnish President Urho Kaleva Kekkonen in 1964 brought a new "awakening", as shipping traffic was established between Finland and Estonia, which in turn gave Finnish jurists a better opportunity to visit Estonia. But as access to foreigners was limited to the university town of Tartu due to large military installations on the one hand, and on the other hand the fact that the leaders of the legal faculty in Tartu were afraid of ties with "capitalist countries" because they weren't certain that after Khruschev's thaw there would not follow a period when the taps would be tightened again. Therefore, until 1990 the ties established between Estonian and Finnish jurists were mostly based on private initiative and largely depended on interest or lack of interest on the Finnish side. Professor Hannu Tapani Klami became one of the first Finnish legal scholars, who came to the Tartu University in 1988, shortly before the borders were opened.8

However, the presumptions for restoring the cooperation between Finnish and Estonian jurists definitely existed as many professors from the older generation who had taken part in the Finno-Ugric movement (and some of them even still remembered the old Estonian student songs) were still working in the legal faculties of the Finnish universities. Estonian jurists started to receive active help from Finland. Finnish colleagues invited Estonians to Finland and often visited Estonia themselves. As people from Northern Estonia had been watching Finnish television for several decades before Estonia re-established its independence, the knowledge of the Finnish language was in fact very good among Northern Estonian jurists. This also allowed Estonian students to begin their law studies in the Finnish universities with various fellowships. Basically the language problem, which is still inherent in the teaching of foreign students, didn't exist in this case. English language courses in the Finnish universities at that time were still rather rare. In the 1990s Finns were making large investments in order to bring up a new generation of researchers and lecturers in training to raise the quality of teaching. The cooperation project of Finnish and Estonian jurists resulted in the Finnish-Estonian legal dictionary and a number of important educational materials and textbooks, which undoubtedly played a

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[6] Järvelaid, Peeter. Prof. Ilmar Tammelo (1917-1982) varaste tööde uustrükk Ungaris. (Kritik zu Prof. Kliimanns noramtivistischer Unterscheidung des Privat- und des Öffentliches Rechts. – Aus Nachlass von Julis Moor. Budapest, 1995, lk. 63-148. (Philosophiae iuris). – Universitas Tartuensis, 1996, 2. veebruar, P. 4.

[7] Peeter Järvelaid. Das Frühwerk Ilmar Tammelos : der Weg zum Wissenschaftler. - Auf dem Weg zur Idee der Gerechtigkeit : Gedenkschrift für Ilmar Tammelo. Wien, Berlin, 2009. (Austria : Forschung und Wissenschaft : Rechtswissenschaft ; 3).

[8] Järvelaid, Peeter; Sootak, Jaan. Huvi on olemas, vaja oleks arendada isiklikke teaduskontakte.Intervjuu prof. Hannu Tapani Klamiga. – Nõukogude Õigus, 1988, nr. 3, pp. 209-212.

significant role in integrating the teaching of Estonian lawyers with contemporary Western European educational standards. There had also been a couple of linking points in the legal history of both countries, Finnish jurists had until 1917 received their education from the Imperial Alexander University of Finland (named after the emperor), as Estonian jurists had received their education from Tartu University, which at that time was also among the imperial universities. Secondly, during the Soviet Era in Estonia, at least in Tartu University to prepare lawyers (the period of study was five years at that time) there was an attempt to provide an education independently from the current politics by maintaining some of the old traditions. But the textbook projects began as the result of very good cooperation between the two countries legal historians. Thanks to the hard work of professor Heikki Ylikangas[9] two influential textbooks were translated to Estonian from Finnish – his own textbook *Miksi oikeus muuttuu osana?* (*Why does the law change?*)[10] and "*Suomen oikeushistorian pääpiirteet"* (*The main features of the Finnish legal history*),[11] which was jointly written by different Finnish authors. What was the main importance of that? At least some of the subjects in the *curriculum* became easily comparable from now on. At this point it provided some confidence that during the process of restructuring the Estonian legal science was moving in the right direction. After the textbook project, Finnish colleagues offered assistance for the renewing process of Estonian legislation, but as honest neighbours, they warned Estonians, that the Finnish legal system is unique and because of its history perhaps suitable only for Finland, and because of the different historical traditions might not be "innovative" for their southern neighbour. Until now, it's not entirely clear why Germany began to "take care" of the Estonian legislative system, while Finns were helping to carry out the judiciary reforms during the modernization processes of the Estonian legal system, which gave many other interesting effects. Finnish jurists had for a long time been keeping a very conservative line and until the Estonian reforms conservative attitudes towards their own justice system had been dominant in Finland. The innovation of the 21st century behind the Finnish legal system (including the new Finnish Constitution) was to some extent influenced by the experience of their Estonian neighbours, which with its reforms from the Finnish point of view had played the role of the catalyst. In the 21st century, Finland has developed an educational system for doctoral students, which involves all the legal faculties in Finland and provides the opportunity to take in jurists from abroad. But if one is looking for the positive effects of how Finns came to this marvellous system, at least a small part was played by the cooperation of the Finnish-Estonian jurists (especially

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[9] Järvelaid, Peeter. Professor Heikki Ylikangas – 60. – Ajalooline Ajakiri, 1997, nr. 4, pp. 55-56.

[10] Ylikangas, Heikki. Miks õigus muutub? Seadus ja õigus ajaloolise arengu osana. Tartu: Fontes Iuris, 1993; Järvelaid, Peeter. Õiguse muutumine Eestis. - Miks õigus muutub? Seadus ja õigus ajaloolise arengu osana. Tartu: Fontes Iuris, 1993, pp. 219-236; Järvelaid, Peeter. The changing law in Estonia. – Estnische Strafrechtsreform: Quellen und Perspektiven. Tartu, 1996, p. 33-36.

[11] Järvelaid, Peeter; Erelt, Jaan. Suomen oikeushistorian pääpiirteet. Sukuvallasta moderniin oikeuteen. Toim. Pia Letto-Vanamo. Jyvaskylä: Gaudeamus, 1991, 315 lk. – Eesti Jurist, 1992, nr. 3-4, lk. 223-224.

the cooperation between legal historians) which, besides cooperation between lecturers, also included the joint preparation program (the particularly intense period was 1992-1997) student (incl. doctoral students). Today, we can find many positive outcomes of this program, in the form of colleagues developed from this project, for instance the professor of comparative legal history of the Helsinki University, Heikki Pihlajamäki, and in Estonia there are many jurists and legal historians who received positive impulses for their further development. The joint conferences of the Baltic legal historians, organized by professor Hans Hattenhauer, basically became the cornerstone for cooperation between the legal historians in the Baltic Sea region in 1997, mostly thanks to the Finnish-Estonian cooperation (Pia Letto Vanamo - Peter Järvelaid). At this point, the normal cooperation was complicated by the poor material situation of the Estonian side and the inability of Germans to overcome their financial bureaucracy. The only sponsor, the foundation of the Nordic Council of Ministers, wasn't willing to cover the costs of the German colleagues. From a historical perspective it's good to know that cooperation between the Finnish-Estonian legal historians became a "seed" for the cooperation of the legal historians in the entire Baltic Sea region as whole. One should note that in changing times (and with changing leaders) cooperation might not be persistent in the longer term. Any kind of good cooperation definitely requires a great "dose" of charisma of its leading figures. Finnish-Estonian legal historians' cooperation most certainly left a positive mark in the form of mutual publications[12] and also in the emergence of some new research directions in Finland. Cooperation with Estonia gave the opportunity to begin to research the history of the Royal Court of Tartu (Hovrätt, the highest judicial body in Sweden), the results of which one day hopefully will see the light as the monograph by Heikki Pihlajamäkki. This period also saw intensive mutual introduction of literature in both countries as well as in third countries.[13]

The cooperation between Hungarian and Estonian legal historians

The cooperation between Hungarian and Estonian legal historians began in the early 1990s, as well as on other occasions from the personal contacts between the legal historians of both countries. The beginning could be dated back to 1991, when the then rector of Kiel University (Christian-Albrechts-Universität zu Kiel) Professor Hans Hattenhuer started a project, which was planned to help the legal historians from

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[12] Järvelaid, Peeter. Virolaisen juristikunnan sukujuurien tutkimisesta. – Genos: Suomen sukututkimusseuran aikakauskirja – Tidskrift utgiven av Genealogiska Samfundet i Finland, 1994, vol. 65, pp. 100-103; Järvelaid, Peeter. Estland i slutet av 1900-talet – pa väg mot en ny rättskultur. – Tidskrift utgiven av Juridiska föreningen i Finland, 1997, nr. 5, pp. 323-339; Järvelaid, Peeter. Viron oikeusjärjestys kolmannen vuosituhannen kynnyksella. – Oikeus, 2000, nr. 2, pp. 292-295; Järvelaid, Peeter. Oikeuskanslerin institutio Virossa – historia ja nykypäivää. – Lakimies, 2001, nr. 4, pp. 726-734.

[13] Järvelaid, Peeter. Besprechungen: Heikki Pihlajamäki. Evidence, crime and the legal profession. The emergence of free evaluation of the evidence in the Finnish nineteenh-century procedure. Lund, 1997. - Ius commune: Zeitschrift für Europäische Rechtsgeschichte, 1999, nr. 26, pp. 462-466; Järvelaid, Peeter. Soomes ilmus ülevaade protsessiõiguse ajaloost. – Ajalooline Ajakiri, 1998, nr. 3, pp. 111-114.

Eastern Europe[14] to open the gates of the Western European "treasuries" of legal science, which due to the twists of history had been closed to them for more than half century. So it happened that in the autumn term 1991 in Hattenhauer's office met legal historians from three countries (Hungary, Estonia and Slovakia), who together had received fellowships to do research work in Kiel University. Together with Josef Klimko[15] from Bratislava, Slovakia, Estonian Peeter Järvelaid from Tartu and Hungarian Mezey Barna from Budapest became colleagues and friends during their time in Kiel. One should remark that between two legal historians who had completely different research topics in Germany could begin mutual cooperation only thanks to the "seed" which more than 60 years before was planted by Professor Csekey. Fortunately there did still exist a historical continuity, because Peeter Järvelaid had received his knowledge about the work of Csekey from Professor Leo Leesment (1902-1986),[16] who had been able to listen the lectures of the Hungarian professor in his time as a student and postgraduate and had the honour to know him personally. The Conference of the German Legal Historians *(Deutsche Rechtshistorikertag)* became the development factor for the cooperation between legal historians from Estonia, Hungary and Finland, as a regular meeting place,[17] where especially Hungarian historians had been traditionally active participants. Sadly, the support of Estonians and Finns wasn't sufficient so the Hungarian colleagues were not able to keep alive the cooperation between Central European legal historians, where they were planning to involve besides Austrians legal historians from the neighbouring countries, but from Finland and Estonia as well. Undoubtedly the cooperation initiated by the Hungarians had positive outcomes.[18] For instance on 18-21 September 2003 in Tallinn the first meeting of Estonian and Hungarian legal historians was held, which was supported by the Hungarian Embassy and the Hungarian Cultural Institute.[19] The meeting was entitled "The statehood of Finno-Ugric nations", which in future could help to involve other Finno-Ugric nations.[20] The first conference in 2003 continued the earlier research topics, which had reached to the comparative studies. Therefore the conference subtopic – the development patterns in Estonia and Hungary from the second half of the 19th century to the beginning of the 20th century – seemed to have a great future in case of mutual

[14] He was at the same time improving the preparation process of the legal historians in the universities of Eastern Germany

[15] One must remark that dr Klimko was very interested in politics, so it was no wonder that he soon started his diplomatic career, representing Slovakia in many countries as an ambassador (incl. in Austria). In 2007 he was elected as rector of the Bratislava Law School.

[16] Järvelaid, Peeter. Baltische Rechtswissenschaftsgeschichte : zwei grenzüberschreitende Rechtshistoriker Friedrich von Bunge und Leo Leesment . Juridiskā zinātne = Law. Riga, 2006. (Latvijas Universitātes raksti ; 703). pp. 99-138

[17] Järvelaid, Peeter. Õigusajaloolaste kongress Austrias. – Juridica, 1996, nr. 9, tagakaanel.

[18] Järvelaid, Peeter. Kesk-Euroopa õigusajaloolaste kokkusaamisel Ungaris. – Eesti Jurist, 1992, nr. 6, lk. 160-164.

[19] The Estonian-Hungarian legal historian's conference was organized by the head of the Hungarian Institute Dr Urmas Bereczki, Prof. Peeter Järvelaid from the Nord Academy and the Learned Estonian Society. The conference was held in the building of the Estonian Academy of Sciences (Kohtu 6)

[20] In the context of Finno-Ugric statehood we could only speak about the Estonians, Finns and Hungarians. But other Finno-Ugric nations would deserve scientific study as well.

research cooperation. In 2003, Dr Andras Bereczki[21] presented a paper on the reflections of national politics of Finland and Estonia in Hungary during the interwar period, which might offer opportunities for (comparative) in-depth-studies. Also the topics concerning national minorities remain topical, regardless from the chosen aspects (comparative, historical or concerning the present time). At this background, Dr. Bereczki's example – who interestingly approached his topic through the works of Istvan Csekey (The minority policies of Estonia in the interwar period in the lifework of Istvan Csekey). The comparative studies of Estonian, Finnish and Hungarian statehood ought to be a topic which should inspire different generations of our legal historians in the future. One should not be frightened by the cooperation of Baltic historians, which resulted in the joint history textbook, which didn't satisfy the authors, but undoubtedly provided Estonian historians with the experience of making their national history understandable outside of their own culture space. From the grounds of present experience, we should begin with the public law (already in 2003 we were trying to find common ground with Professor Gabor Mathe[22] "The institutional development of nomocracy in Hungary"), there is also much potential in comparative studies of the private law before the year 1864 (cooperation with professor Maria Homoki-Nagy "The codification of the Hungarian private law in the 19th century"), also historical comparison in the field of 19th century penal law might give interesting results (Barna Mezey "The trends in the development in Hungarian penal law, in the 18th-19th century").[23] Very prospective could become comparison in the procedural law and court system, beginning from the comparison with the Russian Empire from 1864 and with Estonia after 1889. Playing an important role in this field on the Estonian side as an active partner in cooperation has been the archivist of the Supreme Court, Toomas Anepaio (The development of the procedural law in Estonia, in 19th-20th century). Clearly in the near future the study of the development of the constitutions, including the historical and comparative studies (incl. the end of the 20th century and 21st century) will become topical. In 2003, this topic was approached through the person of Istvan Csekey and his studies of the Estonian Constitution (Professor Jozsef Ruszoly "Istvan Csekey and Hungarian Constitution" and Professor Peeter Järvelaid "Istvan Csekey in the legal culture of Estonia"). Therefore we might say that the advancement of the cooperation between the Estonian, Finnish and Hungarian legal historians so far could be continued in the

[21] Current Honorary Consul General of Estonia in Budapest and the lecturer of Estonian language in the Budapest University

[22] Professor Mathe was at that time also the head of the Hungarian Lawyers Association and working as the professor of legal history in different Hungarian Universities

[23] Unfortunately dr Georg Ambach (1952-2006)(„Kriminaalõiguse kodifikatsioon Eestis 20. sajandil.") is now deceased, but his study was also published in Hungary. See: Ambach, Georg. Die strafrechtliche Entwicklung der Republik Estland in der ersten Seite des zwanzigen Jahrhunderts. Budapest : [Eötvös Loránd Universität], 2005. - 17 p. (Rechtsgeschichtliche Vorträge, 34.).

same way, investing more resources to our cooperation[24] and involving our students, who will succeed us in the future.

The Institutional Presumption for the cooperation between the Hungarian, Estonian and Finnish jurists

In 2013 the visit of the Rector of the Eötvös Lorįnd University, Barna Mezey to Estonia, took place where he visited Tallinn University in order to discuss the opportunities for closer cooperation between Estonian and Hungarian scientists. Within the framework of the present cooperation, the cooperation between Hungarian, Estonian and Finnish jurists was discussed. In Eötvös Lorįnd University in Budapest, in the Faculty of Law in Helsinki and in Tallinn University Law School are the chairs of comparative law, which in the future could become the basis for the cooperation network. It would involve the exchange of students and lecturers (incl. so-called Ringvorlesung – the series of lectures by different speakers held commonly in Helsinki, Budapest and Tallinn), establishment of virtual access to the libraries of the partner universities, but also the mutual help to replenish the libraries with the newest literature on the law of the Finno-Ugric nations. Among other things would be the replenishment of the libraries posteriorly with the literature published in each mother tongue. This problem didn't exist in the inter-war period. Should the new generations be poorer than their predecessors? Now is the appropriate moment when for instance Tallinn University would be ready to take in a highly qualified colleague from Finland or Hungary (on the assumption that the subject would be comparable and in English). If we would be able to create in Tallinn the conditions that here would be working simultaneously Hungarian and Finnish lecturers, we might be sure that this would have a positive effect on the staffing of the chair.

Possible Future Scenarios

There are many scenarios that could happen in the future. The most positive would be if we could reach to solutions which would work as tripartite cooperation. The second scenario would be that the cooperation would proceed within the present frameworks, led by persons, who have a long experience and who could involve their Finno-Ugric colleagues as the third side. The year 2014 will mark 125 years from the birth of Istvan Csekey (1889-1963) and with this occasion it would be great to link the publication of a respective anthology. For this the groundwork has been done both in Estonia and Hungary,[25] but it still lacks the final decision on its publication. In the conference of 2008 and the meeting of 2013 the preliminary structure of the commemorative book of Istvan Csekey was outlined. Because he had big personal merits in establishment of Finno-Ugric cooperation, the book should be based on the main stages of his life. Hungarian colleagues could focus on the early (childhood, university studies and work as a lawyer before being elected to become professor of

[24] Hungarian-Finnish-Estonian cooperation has been underfunded because, at the political level, the Finno-Ugric movement is perhaps even considered to be old-fashioned.

[25] In Hungary the life of I. Csekey has been studied by Jozsef Ruszoly (University of Szeged), as well by Dr. Andras Bereczki in Budapest–

Tartu University) and later stages of his life (his work in Szeged as professor and rector, and also his Pecs period). These parts would include the overview of the Hungarian history (incl. legal history and about the universities, where he worked and studied), which would cover the chapters connected with his personality and be orientated to him as a person. Professor Peeter Järvelaid is currently finishing the overview of his life in Estonia and a similar overview about Tartu University and its faculty of law. As his work wasn't limited with legal science, but involved also history, literature and the Finno-Ugric movement, we have the overview of his role in reflecting the minority policies of Estonia and Finland during the interwar period in Hungary by Dr Andras Bereczki and here we could add more overviews, taking in new authors from Estonia, Finland and Hungary.

DOCTRINAL CONVERGENCE OF THE RUSSIAN CONSTITUTIONAL COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

Mart Susi

I. The context of the relationship between constitutional courts and the European Court of Human Rights

1. Introduction to the debate

Within the doctrine of the increased constitutional role of the European Court of Human Rights (ECtHR) considerable academic debate is focusing upon the relationship between national and international courts. It appears that within national judicial systems the lower level courts have in recent years shown more and more willingness to apply directly the ECHR norms and the ECtHR jurisprudence, raising the question in the eyes of the highest national courts 'who is the master in the house?'[1] In a recent comparative analysis about the relationship between the national courts and the ECtHR jurisprudence, Janneke Gerards demonstrates that the doctrine of 'shared responsibility' between the national courts and the ECtHR for protecting human rights has stimulated the national courts to act as 'Convention courts' when directly applying the Strasbourg case-law[2]. This comparative analysis, besides being a noteworthy contribution to the ongoing discussion whether the national courts act like marionettes when following the ECtHR case-law, clearly demonstrates on the example of six Member States of the Council of Europe[3], that often national constitutional review and human rights protection architectures rely on the ECtHR setting constitutional standards. Despite the differences in the competences of national courts to review the compatibility of national legislation with international law and regarding the status of the ECHR in the national hierarchy of norms[4], the analysis of the six countries reveals that the semi-constitutional function of the ECtHR is now an inseparable part of national legal and judicial systems. As there is no sign of reverse dynamics, the discussion whether the ECtHR should define itself more as a

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[1] For context see the monograph by Mitchel Lasser, where he demonstrates how the balance of powers between the French legislature and judiciary has shifted in favour of the latter, as well as how the ECtHR jurisprudence has 'shaken' French judicial and administrative hierarchies – Mitchel Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe,* Oxford University Press 2009.

[2] Janneke Gerards, *The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility',* in: Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law (ed by Janneke Gerards and Joseph Fleuren), Intersentia 2014, at 89.

[3] The analysis covers Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom

[4] For discussion see: Janneke Gerards and Joseph Fleuren*, Comparative Analysis (chapter 9),* in: Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law (ed by Janneke Gerards and Joseph Fleuren), Intersentia 2014.

constitutional or adjudicatory court already has an answer through the legal realities in the Member States – thus the discussion may even be devoid of practical purpose[5].

Ideally then, if all national courts are to act as 'Convention courts', the ECtHR has its main or sole task of setting the applicable standards – very much similar to the tasks of a national constitutional courts. Where does this leave national constitutional courts within the European human rights system? Giuseppe Martinico has analysed the 'counter-limits' doctrine in response to the growing constitutional aspirations of the ECtHR, observing the trend of convergence within many European countries' highest courts jurisprudence[6]. Céline Lageot notes the refusal of the French Constitutional Council to interpret constitutional principles in the light of the fundamental rights guaranteed by the ECHR[7]. Or take the almost anecdotal shift from the question among German courts from "What will Karlsruhe[8] say about it?" to "What will Strasbourg say about it?"[9] Despite the growing literature about the relationships between the national and supranational courts, the question about the degree of penetration of the Strasbourg court's jurisprudence into domestic jurisprudence of the Member States' has not been researched utilizing quantitative methods[10]. Until the new academic aspirations to apply quantitative methods to human rights protection and compliance in national legal systems yield publishable results, the argument that national courts need the ECtHR constitutional principles for daily litigation remains narrative-based[11]. However, within the doctrine of 'input-legitimacy'[12], which focuses on the question whether constitutional courts are set up in a way that properly confers legitimacy on them, the constitutional function of the ECtHR receives input from the application of the ECtHR standards from the national ordinary courts and not necessarily from the national constitutional or supreme courts.

This article will address the issue of the relationship between the ECtHR and the Russian Constitutional Court from the perspective of doctrinal similarities or

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[5] The phenomenon of the national courts applying the ECtHR principles and jurisprudence seems to have appeared within the last decade. Perhaps one of the reasons behind this shift is indeed the increased ability of the ECtHR to offer for national courts a full 'judicial basket' of constitutional principles, which may overshadow the diversity of principles advanced by respective national constitutional or supreme courts

[6] Giuseppe Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts,* European Journal of International Law, Volume 23, no. 2, 401 – 424, at 423.

[7] *Supra note* 14, at 184

[8] Seat of the German Federal Constitutional Court

[9] *Supra note* 18*,* at 215

[10] For some discussion about the constraints caused by the methodological challenges facing the question see: Arthur Dyevre, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?* – European Constitutional Law Review, issue 9, 2013, 139 - 168

[11] For discussion see: Malcolm Langford and Sakiko Fukudo-Parr, *The Turn to Metrics,* Nordic Journal of Human Rights Vol 30, No. 3 (2012), pp 222 – 238. Or consider the initiative of Tallinn University Law School, Oslo University Norwegian Centre for Human Rights, Iceland University Law Institute and Tampere University initiative to establish European Human Rights Index, announced at the 2014 Human Rights Research Institutes Conference in Copenhagen.

[12] For discussion about the various doctrines of courts' judicial legitimacy, see: Christopher McCrudden and Brendan O'Leary, *Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements,* European Journal of International Law, 2013, volume 24, no. 2, 477 – 501, at 500-501

divergence on the matters of human rights and fundamental freedoms. The article will not, mainly for practical purposes due to the enormousness of the task, seek to analyse to what extent Russian ordinary courts apply the European Convention for the Protection of Human Rights and Fundamental Freedoms[13] (the ECHR) and the standards established by the ECtHR jurisprudence. The article will also not address the question of general compliance by the Russian Federation with obligations emerging from various human rights protection documents, mainly the ECHR and its Protocols.

2. The context of ECtHR perception in Russia

Recently Anatoly Kovler, the former judge from Russia at the European Court of Human Rights has pointed to a delicate balance in Russia when it comes to recognizing the Court's judgments and case-law[14]. He and Olga Chernishova write, *inter alia:* "On the other hand, voices in the professional community are calling for 'judicial sovereignty' which would allow them to free themselves from any 'outside' control imposed by a foreign body"[15]. This article may indirectly answer the question whether the recent jurisprudence of the European Court of Human Rights demonstrates such 'outside control' at least on the level of constitutional protection within the Russian Federation.

Although the ECtHR's case-law on Russia is significant, some judgments may overshadow the general jurisprudence. On July 03, 2014, the Grand Chamber of the European Court of Human Rights delivered its judgment in *Georgia vs Russia (I)*[16]*,* where it held by sixteen votes to one, that in the autumn of 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals was put in place in the Russian Federation which amounted to an administrative practice for the purposes of the ECHR case-law[17]. This judgment interferes deeply into Russian judicial independence and at the same time raises some fundamental questions about the international human rights litigation.

The Court began its reasoning by presenting principles for the assessment of evidence. Having indicated that the applicable standard of assessment is "beyond reasonable doubt", originating from the two inter-state cases decided decades ago[18], it reiterates the concept that the approach of national legal systems that use this standard in criminal cases is not applicable (para 94). The Court establishes the absence of

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[13] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 222

[14] Anatoly Kovler and Olga Chernishova, *The June 2013 Resolution No 21 of the Russian Supreme Court/ A Move Towards Implementation of the Judgments of the European Court of Human Rights,* Human Rights Law Journal, 31 December 2013, Volume 33, No 7-12, 263-266.

[15] *Supra,* page 266

[16] *Georgia v. Russia (I),* application no 13255/07, ECtHR judgment of 03 July, 2014. The judgments and decisions of the European Court of Human Rights are available through http://www.echr.coe.int.

[17] *Georgia v. Russia (I),* page 58

[18] *Ireland v. the United Kingdom*, ECtHR Judgment of January 18, 1978, application no 5310/71, Series A no. 25, para 161 and *Cyprus v. Turkey*, Grand Chamber judgment of May 10, 2001 in case no. 25781/94, ECHR 2001-IV, para 113, in this judgment para 93.

procedural barriers to the admissibility of evidence or predetermined formula for its assessment as follows:

> the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates (para 95).

When analysing the alleged existence of the anti-Georgian administrative practice, the Court reviewed the witness statements and various documents submitted by both parties. It went on to state that it has

> often attached importance to the information contained in recent reports from independent international human-rights-protection associations or governmental sources … In order to assess the reliability of these reports, the relevant criteria are the authority and reputation of their authors, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and whether they are corroborated by other sources (para 138).

It appears that at least some of the reports were submitted by the Georgian government and the Russian government disputed the probative value of information contained in them, alleging *inter alia,* that the HRW report and the report of the PACE Monitoring Committee were to a large extent based on statements by the Georgian authorities or Georgian nationals and uncorroborated by documents or other admissible evidence. The European Court disagreed with Russia, stating that

> having regard to the thoroughness of the investigations by means of which these reports were compiled and the fact that in respect of the points at issue their conclusions tally and confirm the statements of the Georgian witnesses, the Court does not see any reason to question the reliability of these reports (para 139.)

Russian judge Dedov filed a sole dissenting opinion, arguing that international organisations made their overall legal assessment of the events in their reports without providing any documentary evidence to support their conclusions, and the Court has accepted their approach without verifying the actual facts. For the judge it appeared that the Court has accepted the results of the organizations' legal assessment and established the facts on the basis of the reports (page 86). Judge Dedov expressed the opinion that the assessments and conclusions of the international organisations were in the format of value judgments, which the European Court nevertheless accepted without criticism and cited at length (page 85)[19].

[19] Judge Dedov referred to the following expressions contained in the reports as conclusions: "mass expulsion", "mass arrests", "a campaign conducted in such an ostensible manner", "repressive orders targeting Georgians", "arrestees have no right to a lawyer", "production line ... without those concerned by the expulsion orders being present", "collusion between the police and the judicial authorities", "selective and intentional persecution campaign based on ethnic grounds", "visas and registration papers legally obtained were cancelled, people were illegally detained and expelled", "organized persecution of Georgian nationals", "harassment of a specific group of people was a form of inadmissible discrimination", "mass miscarriage of justice", "evidence of collusion between the police and the courts", "[Georgians] were presented as a group before the courts", "deliberate policy of detention and expulsion", "people are being illegally detained and expelled", "flagrant denial of

Given the assumption that the international reports were decisive for the finding of the violations by Russia, the Court has not addressed three important aspects. First, it has not indicated who were the authors of the international reports or how the material was compiled, which leaves open the question whether the relevant criteria for usability of the reports indeed is met. Given that the FIDH report contains opinions of "human-rights and refugees-protection organisations present in Russia" (para 40), it opens the avenue to question if and how their reliability, independence and objectivity was verified. The second aspect is the reason for producing the reports. Interestingly, the *Georgia v. Russia (I)* judgment does not contain – in referral to the standards for assessment of evidence – that the Court can obtain materials *proprio motu*[20], suggesting that the reports were not produced independently from the parties or at least that they were submitted by one of the parties to the Court's attention – the Georgian government. Since the reports were not obtained *proprio motu,* the Court should have explained on whose request the reports were compiled and presented. Third, the Court does not cite the content of the reports, limiting itself to a statement that the investigation was thorough (para 139), but at the same time eliminating the possibility for an outsider to verify this position. Since the criterion of corroboration by other evidence was not met – the content of the reports was only confirmed by the Georgian witnesses, the Court at least should have addressed the question why the statements of the Russian witnesses were unreliable.

The acceptance of the Court's reasoning in the *Georgia v. Russia (I)* judgment depends on accepting the principle *jura novit curia*[21] in procedural context. The case legitimizes a new doctrine in inter-state matters, where the burden of proof is replaced by the principle of *jura novit testimonium.* Such reports appear occasionally as trumps in the European Court's jurisprudence. On the theoretical level the *Georgia v. Russia (I)* case underlines the need to establish clear and foreseeable standards for the usability of reports of international organizations and governments in international litigation, followed by their conservative application in concrete cases. For the respondent state – the Russian Federation – this judgment does not serve the purpose of strengthening the trust of national judiciary in the ECtHR's impartiality.

3. The broader context: matters of judicial activism and compliance

The current academic debate about the relationships between national constitutional courts and the ECtHR takes into account the broader phenomenon of the increasing judicial activity of international courts. At the time of increased political inability to reach international or regional consensus on fundamental human rights matters or issues of fundamental values, the other actors will fill the vacuum. The phenomenon

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justice and circumvention of the procedures", "arbitrary and illegal detention and expulsion", "many were effectively denied the right to appeal", and so on.

[20] This formulation is present in most judgments which discuss how the Court can obtain materials for its assessment – see for example *Saadi v. Italy* para 128.

[21] For the meaning of the principle see: Takane Sugihara, *The Principle of* Jura Novit Curia *in the International Court of Justice: With Reference to Recent Decisions,* Japanese Yearbook of International Law, Volume 55, 2012, 77 – 109.

of judicial activism[22] simply means that when the international political establishment is unwilling or unable to develop human rights or moral standards, the international courts will. Yuval Shany has developed in a recent comprehensive article about the effectiveness of international courts the hypothesis that the study of court effectiveness should be based on the specific goals set for each particular court[23]. Even though there may not be a consensus among the stakeholders that the European Human Rights Court should primarily act as a constitutional court, opponents to the constitutional function approach do not seem to offer alternatives to its constitutional goals. Thus one aspect for the analysis of the relationship which is the topic of this article is whether the Russian Constitutional Court, at least on the basis of the ECtHR case-law, predominantly establishes its own standards on the basis of Russian Fundamental Law (thereby following the pattern of strong national constitutional courts like in Germany and France) or whether it transposes into Russian judicial system the values and principles from the ECtHR jurisprudence.

The international community is increasingly focusing on the matters of state compliance with international human rights obligations, notwithstanding of what the state declares via ratifications, legal norms or judicial practice. The situation where a Constitutional Court is hailed for its achievements in recognizing and formulating principles for securing human and fundamental rights, but at the same time the general human rights protection level at the country remains critical, is not uncommon in the contemporary world. For example, the matter of high level of 'declarative' recognition of human rights and in parallel low compliance with the human rights standards applicable in the respective country is evident from the literature on human rights matters of South Africa. When the South African Constitutional Court is undeniably a beacon of human rights[24], the counter-narrative of the 'constitutional' success focuses on evidence showing obstacles in the realization of human rights and the controversy of chosen strategies[25]. Therefore possible doctrinal convergence between the ECtHR and the Russian Constitutional Court does not automatically signify practical and daily implementation of the standards established by these courts in administrative practice of the jurisprudence of ordinary courts.

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[22] For discussion about the raising trend of judicial activism see: Daniele Amoroso, *The Judicial Activity of the International Court of Justice in 2012: A Year of Human Rights Cases,* The Italian Yearbook of International Law, 223 – 243.

[23] Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-based Approach,* The American Journal of International Law, volume 106, 2012, 225 – 270, at 270

[24] The South African Constitutional Court has introduced various significant standards, which are not present in the country's constitutional of ordinary level legislation, like the prohibition of death penalty, allowing same gender marriage, recognizing the general obligation of the state to direct policy towards realising socio-economic rights, particularly for those in desperate need; for context also see: Philip Alston, *Foreword,* in: Social rights jurisprudence: Emerging trends in International and comparative law, Cambridge University Press 2008, at ix

[25] For context see: *Socio-economic Rights in South Africa. Symbols or Substance?* Edited by Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi, Cambridge University Press 2014

II. The judgments

1. Reliance on the Constitutional Court's position regarding domestic law

The first category are judgments where the ECtHR endorses the position of the Russian Constitutional Court on a specific question regarding the protection of human rights. For example, in the case *Davydov v. Russia*[26] the Court was faced with a request from the Russian Government to strike out the application, since the Government had acknowledged the Convention violation. The applicant did not agree with the request, since the applicant's principal goal was to achieve the reopening of the domestic proceedings after the establishment of the Convention violation. Having stated, that the Court is not bound by the parties' position, the Court the referred to the Constitutional Court's explanation about the grounds for reopening of domestic proceedings:

> As the Constitutional Court stated in its judgment of 26 February 2010 No. 4-P, "it is the competent court which decides on the possibility to reconsider a judicial decision relying on full and comprehensive examination of the applicant's arguments and the circumstances of the case". The Court finds this approach to be in line with the general principles governing the implementation of the Court's judgments[27].

Having endorsed the Constitutional Court's view, the ECtHR was critical of the unclarity of the position of the Plenary of the Supreme Court of the Russian Federation on the same matter:

> The recent Resolution of the Plenary Supreme Court of the Russian Federation, which refers to Recommendation No. R (2000) 2, cited above, did not clarify whether an acknowledgement of a violation of the Convention by the Government by means of a unilateral declaration constitutes a basis for reopening the proceedings. Thus, there is a substantial risk that a decision to strike out the present application might bar the applicant's request for re-examination of his case at the national level and thus formally prevent the Russian courts from considering the issue of the appropriateness of reopening the proceedings in his case. Result: declined the Government's request to strike the case out. Because only ECtHR judgment can serve as the basis of domestic reopening and not the striking out of the case on the basis of Government's unilateral declaration[28].

As a result, the Government's unilateral declaration was rejected and the Court issued a judgment of the merits.

Another example of how the Constitutional Court's position is endorsed by the ECtHR concerns the question whether it is justified to restrict the close relatives of a terrorist, whose body is under the control of the authorities, to participate in the burial.

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[26] *Davydov v. Russia,* ECtHR judgment of 30 October 2014, application no 18967/07
[27] *Supra,* para 30
[28] *Supra,* para 31

The Court analysed this question under the provisions of Convention article 8[29] – whether the right to family life was respected. The Court used the usual methodology applied in similar cases: the first question is whether there is a legal basis for the restriction, the second whether the restriction had a legitimate goal and the third whether such restriction was necessary in a democratic society.

Having established that the restriction upon applicants in the case *Sabanchiyeva and others v. Russia*[30] to have knowledge of the place and time or even participate at the burial was based of the provisions of domestic law - the Interment and Burial Act and Decree no. 164 of 20 March 2003, the Court cited at length the analysis of the Constitutional Court about the question of the legitimate goal for the restriction:

> "the interest in fighting terrorism, and in preventing terrorism in general and specific terms and providing redress for the effects of terrorist acts, coupled with the risk of mass disorder, clashes between different ethnic groups and aggression by the next of kin of those involved in terrorist activity against the population at large and officials, and lastly the threat to human life and limb". It also mentioned the need to "minimise the informational and psychological impact of the terrorist act on the population, including the weakening of its propaganda effect". Furthermore, the Constitutional Court stated that the "burial of those who have taken part in a terrorist act, in close proximity to the graves of the victims of their acts, and the observance of rites of burial and remembrance with the paying of respects, as a symbolic act of worship, serve as a means of propaganda for terrorist ideas and also cause offence to relatives of the victims of the acts in question, creating the preconditions for increasing inter-ethnic and religious tension"[31].

Having regard to these explanations, the Court was satisfied that the measure in question could be considered as having been taken in the interests of public safety, for the prevention of disorder and for the protection of the rights and freedoms of others. Exactly the same position under same referral to the Constitutional Court's practice has become repetitive – for example the case *Arkhestov and others v. Russia.*[32]

These judgments indicate that, in the views of the European Court of Human Rights, in many matters once the Russian Constitutional Court has formulated the opinion about a specific matter while interpreting Russian Constitution, there is no reason for an international court to disagree.

2. Reliance on the substantive arguments of the Russian Constitutional Court

The second category of judgments are the ones where the views of the Russian

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[29] ECHR article 8 (1) provides: „Everyone has the right to respect for his private and family life, his home and his correspondence".

[30] Sabanchiyeva and others v. Russia, ECtHR judgment of 06 June 2013, application no 38450/05

[31] Supra, para 128

[32] Arkhestov and others v. Russia, ECtHR judgment of 16 January 2014, application no 22089/07, para 83

Constitutional Court serve as the principal argument for the Court's judgment. The doctrine of the comparable human rights protection[33] is evident in these judgments, although in a somewhat different setting, since the doctrine was not developed for vertical relationships between national and supranational courts. Some examples are the following.

In the case brought to the ECtHR by a two Russian citizens concerned about the communal services the Court was faced with the question whether such services are of public nature and therefore the companies providing such services need to be treated differently during insolvency proceedings[34]. The European Court of Human Rights noted that relations arising from the management of communal infrastructure of vital importance were considered by the Constitutional Court of the Russian Federation as public in nature[35] and therefore the duties performed were public duties[36].

Russian Constitutional Court's position regarding insolvency matters was decisive also for a case where the applicant complained of access to court right violation since the domestic courts refused to hear the complaint, citing lack of jurisdiction[37]. When establishing the access to court violation, the ECtHR repeated the findings of the Constitutional Court:

> the Constitutional Court only stated that where a commercial court refused to examine a complaint by an individual creditor for lack of jurisdiction, such creditors could turn to the courts of general jurisdiction. At the same time, the Constitutional Court emphasised that the provisions of the Insolvency Act did not contain "any clause that would prevent commercial courts from giving decisions that enable[d] the persons concerned to secure in full their right to judicial protection in the context of insolvency procedures"[38].

Relying on the Russian 'counterpart's position, the ECtHR's Grand Chamber established Convention article 6 (1)[39] violation.

In the *Tereshchenko v. Russia*[40] the applicant complained that while he was held in pre-trial detention, the trial judge refused to consider as valid his counsel's status in the criminal proceedings and consequently refused visiting rights. The Court noted, that the case-law of the Constitutional Court provided clear protection of the right to privacy under ECHR article 8 such situations:

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[33] The doctrine of 'comparable' protection is developed by the ECtHR towards cases where the applicant has already turned to some international organization or court for protecting the human rights. In the event where this institution, court or applicable human rights document provides protection at least to the same level as the ECHR does, then the Court will not conduct its own analysis of the particular circumstances and will accept at face-value the findings.

[34] *Liseytseva and Maslov v. Russia,* ECtHR judgment of 09 October 2014, application no 39483/05 40527/10

[35] *Supra,* para 209

[36] *Supra,* para 210

[37] *Kotov v. Russia,* ECtHR Grand Chamber judgment of 03 April 2012, application no 54522/00

[38] *Supra,* para 124

[39] ECHR article 6 (1) provides general fair trial guarantees

[40] *Tereshchenko v. Russia*, ECtHR judgment of 05 June 2014, application no 33761/05

> the Constitutional Court clarified the situation, albeit in 2008, in favour of the continuous validity of status as counsel in the course of criminal proceedings[41].

Access to defence counsel was also the focus point of the case *Shekhov v. Russia*[42], where the authorities claimed that the applicant had waived the right to be represented by a counsel. Although the Court doubted that the applicant unequivocally waived the defence rights, the authorities were under the obligation to provide an attorney on the basis of the Constitutional Court's jurisprudence. The Court noted:

> Article 51 of the Code of Criminal Procedure, as interpreted by the Russian Constitutional Court, laid down a mandatory requirement for the legal representation of defendants who faced criminal charges of that gravity[43]

Since no legal representation was secured, there was violation of defence rights[44].

It is evident from the first and second categories of cases, that the Russian Constitutional Court through its case-law provides at least comparable protection with the ECtHR. Since the Constitutional Court does not apply the ECHR, but the Russian Constitution, it would not be correct to call the Constitutional Court a 'Convention court- but rather argue that the Russian Constitutional Court is also a strong human rights court.

3. Matters of domestic compliance with the Constitutional Court's jurisprudence

The third and perhaps most numerous category contains cases where the Russian Constitutional Court has established clear standards for securing human rights, but these standards remain unimplemented in the practice of administrative authorities or even in the case-law of ordinary courts. The matter which emerges is non-compliance within domestic judicial system with the highest constitutional authority.

As the country with the largest territory in the world, the Russian judicial system has to deal consistently with the question of expelling immigrants and detaining them in the process of expulsion. There appears an administrative practice, where someone facing extradition is detained without the authorities dealing with the case diligently and not extending effective protection of the right to liberty. For example in the case of *Kim v. Russia*[45] the Court noted the following:

> The domestic authorities do not appear to have taken any initiative to accelerate the progress of the removal proceedings and to ensure the effective protection of his right to liberty, although the decision by the Constitutional Court of 17 February 1998 may be read as expressly

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[41] *Supra,* para 131
[42] *Shekhov v. Russia,* ECtHR judgment of 19 June 2014, application no 12440/04
[43] *Supra,* para 43
[44] ECtHR established Convention articles 6 (1) and 6 (3) „c" violations
[45] *Kim v. Russia,* Judgment of 17 July 2014, application no 44260/13

> requiring them to do so. As a consequence, the applicant was simply left to languish for months and years, locked up in his cell, without any authority taking an active interest in his fate and well-being[46].

There are many judgments concerning similar situations. In some the Court has additionally indicated, that contrary to the Russian Constitutional Court's position the detention of someone facing expulsion should be applied as the 'preventive' measure as opposed to the 'punitive' measure. Holding someone in detention facing extradition in order to 'punish' the person is not normal[47].

There appears a structural problem[48] in Russia regarding the non-enforcement of domestic judgments requiring some public authority to make financial payments or extend some other material benefits, as well as in the absence of a domestic remedy to obtain compensation for the delays in enforcement[49]. The case is noteworthy, because both in establishing the structural problem, then applying the pilot-judgment principle[50] and thereafter requiring under ECHR article 46 general measures[51] the Court referred decisively to the Constitutional Court's practice. Thus when establishing the structural nature of the problem, the Court noted:

> In the Constitutional Court's view, … the public authorities could abuse their special position resulting from the impossibility of seizure of their budgetary funds through enforcement proceedings; the proper enforcement of such judgments should therefore be ensured through other means, such as the establishment of appropriate procedures for liability and effective remedies in accordance with Article 13 of the Convention[52].

Although the Court noted the Constitutional Court's position that it cannot take over the role of the legislator *(ibid.*), the Russian authorities were directed to take into account the Constitutional Court's jurisprudence when planning the execution of the Court's requirement to apply general measures: "Any legislative exercise would benefit from the Constitutional Court's case-law[53]". Interestingly the Constitutional Court enters legislative function through international court judgment.

The matter of the Constitutional Court's legislative interference emerged in the case where the applicants – Jehovah's Witnesses - complained against the disruption

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[46] *Supra,* para 54

[47] See for reference, *Rakhimov v. Russia,* ECtHR judgment of 10 July 2014, application no 50552/13 para 137; and *Egamberdiyev v. Russia,* ECtHR judgment of 26 June 2014, application no 34742/13, para 63

[48] The doctrine of a 'structural problem' was developed by the ECtHR within the last decade. The Court defines as 'structural' a problem which may affect hundreds of individuals, given that many applications alleging similar violation are pending and the Court has already issued judgments in many comparable cases

[49] *Gerasimov and others v. Russia,* ECtHR judgment of 01 July 2014, application no 29920/05 and others

[50] In a pilot judgment the Court establishes certain general principles which the respondent country needs to implement in order to avoid the repetition of similar violations

[51] Under ECHR article 46 the Court can request the respondent government to apply certain general measures, which sometimes means the change of laws or administrative or court practices

[52] *Gerasimov and others v. Russia,* para 97

[53] *Supra,* para 224

of their religious service, held in a facility not designated under law as a place for religious service, by force and their subsequent detention in a police station extending for several hours[54]. The Constitutional Court in 05 December 2012 judgment no 30-P, issued as a result of a complaint by the Russian Ombudsman on behalf of two Jehovah's witnesses, directed the federal legislature to amend the federal legislation and make necessary amendments to the procedure for conducting public divine services, other religious rites and ceremonies, including prayers and religious assemblies, that are being held in places other than those listed in paragraphs 1 to 4 of section 16 of the Religions Act[55]. It appears that the legislature had not followed the Constitutional Court's directive and therefore the ECtHR simply gave additional vigour to the Russian constitutional position by establishing the violation of the right to religious freedom[56]:

> The intervention of armed riot police in substantial numbers with the aim of disrupting the ceremony, even if the authorities genuinely believed that lack of advance notice rendered it illegal, followed by the applicants' arrest and three-hour detention, was disproportionate for the protection of public order[57].

Freedom of religion was at the heart of the application in the case *Biblical Centre of the Chuvash Republic v. Russia*[58], where the applicant organization was dissolved by the domestic court judgment as a result of not fulfilling certain requirements of the Religions Act. This Act provides that the only sanction which Russian courts can use against religious organisations found to have breached the law is forced dissolution. The Act does not provide for the possibility of issuing a warning or imposing a fine. The Constitutional Court has held this practice is incompatible with the constitutional meaning of the relevant provisions as early as 2003. Despite this clear constitutional interpretation, the Russian courts in this case did not apply the constitutional case-law. The ECtHR denounced this practice:

> In pronouncing the applicant organisation's dissolution, the Russian courts did not give heed to the case-law of the Constitutional Court or to the relevant Convention standards and their decision-making did not include an analysis of the impact of the applicant organisation's dissolution on the fundamental rights of Pentecostal believers. As it happened, their judgments put an end to the existence of a long-standing religious organisation and constituted a most severe form of interference, which cannot be regarded as proportionate to whatever legitimate aims were pursued[59].

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[54] *Krupko and others v. Russia,* ECtHR judgment of 26 June 2014, application no 26587/07
[55] *Supra,* para 29
[56] The ECtHR established ECHR article 9 violation, which protects freedom of thought, conscience and religion
[57] *Krupko and others v. Russia,* 56
[58] *Biblical Centre of the Chuvash Republic v. Russia,* ECtHR judgment of 12 June 2014, application no 33203/08
[59] *Supra,* para 61

Due to the failure of the domestic courts to uphold the Constitutional Court's jurisprudence, the ECtHR established ECHR articles 9 and 11 violations[60].

There are also cases where the Government in the proceedings at the ECtHR acknowledges that the domestic authorities have failed to uphold the Constitutional Court's jurisprudence. Thus in the case *Chuprikov v. Russia*[61] the Court established ECHR article 5 (4) violation[62] since the domestic authorities did not allow the applicant to exercise the right to appeal against detention. This was despite the ruling of the Constitutional Court of 02 July 1998, clearly establishing that any judicial decision pertaining to the examination of the parties' requests for a change of preventive measure was amenable to appeal and that the merits of such an appeal should have been examined by an appeal court[63].

Although the ECtHR has refrained from questioning whether there is a structural problem in the Russian legal system of enforcing the Constitutional Court's position once some matter has been interpreted, there indeed appears such a pattern.

4. Occasional criticism towards the Russian Constitutional Court

Fourth, the relationship between the ECtHR and the Russian Constitutional Court does not always mean international endorsement of domestic views. The ECtHR has also issued critical judgments, but in the author's view these are not overshadowing the pattern of internationally strengthening the role of the Constitutional Court as a human rights court. For 'balancing' this article, three examples of the ECtHR criticism are provided.

In *Avanesyan v. Russia* the applicant was not satisfied with the scope of judicial review of operational activities of the search of premises[64]. The Court indicated, that although the Constitutional Court recognized the individual's right for judicial review of the actions of state officials of the way in which they acted while opening an operative file against the individual concerned and took operational-search measures, such review does not touch upon the validity of the underlying judicial authorisation of such measures[65]. The ECtHR's criticism is about the failure of the Constitutional Court to broaden the scope of judicial review of the search.

In *Akram Karimov v. Russia* the applicant complained that the procedural rules governing detention violated human rights since they did not require the courts to state grounds for detention, nor set a time-limit[66]. The Court was critical of the Constitutional Court for not providing legal clarity on the matter:

> Furthermore, in its decision of 19 March 2009 specifically concerning Article 466 § 2 the Constitutional Court, whilst finding that the impugned

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[60] ECHR article 11 protects freedom of assembly and association

[61] *Chuprikov v. Russia,* ECtHR judgment of 12 June 2014, application no 17504/07

[62] ECHR article 5 (4) provides: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

[63] *Chuprikov v. Russia,* para 84

[64] *Avanesyan v. Russia,* ECtHR judgment of 18 September 2014, application no 41152/06

[65] *Supra,* para 56

[66] *Akram Karimov v. Russia,* ECtHR judgment of 28 May 2014, application no 62892/12

> provision did not violate a person's constitutional rights by not establishing any grounds or procedure for ordering detention pending extradition or time-limits for such detention, did not explain which legal provisions in fact governed such a procedure or what time-limits were to be applied in situations covered by Article 466 § 2 (of the Code of Criminal Procedure)[67]

A case on the table of the Grand Chamber concerned the constitutionality of the absence of the possibility of military servicemen to get parental leave, as opposed to 3-month leave to arrange for taking care of the child[68]. The Court notes, that it can be seen from the Constitutional Court's jurisprudence that 3-month leave is not a substitute for normal parental leave because its purpose is to give the serviceman a reasonable opportunity to arrange for the care of his child and, depending on the outcome, to decide whether he wishes to continue the military service.[69] The Court is critical of the Constitutional Court not establishing the violation of the right to peaceful family life in this legal context.

III. Conclusions

The situation in Russia regarding the European Court of Human Rights jurisprudence perception appears different from the emerging pattern within many Council of Europe Member states. In several countries ordinary courts act as 'Convention courts' and the highest court of the country may be hesitant of integrating into their judgments the standards established by the ECtHR. On the basis of the recent judgments of the ECtHR opens up a 'structural' problem whereby the Russian courts and administrative authorities do not always apply the clear standards established by the Russian Constitutional Court. In judgments towards Russia dealing with the constitutional questions the ECtHR relies to a significant extent on the interpretation of Russian law by the Constitutional Court. This article argues that in the view of the ECtHR the Russian Constitutional Court provides comparable protection of human and fundamental rights in comparison with the scope of protection provided by the European Convention on Human Rights, although the protection in Russia originates predominantly from the Russian Constitution and laws in general. The article demonstrates that the Russian Constitutional Court is acting as a national human rights court and the European Court of Human Rights recognizes this function by endorsing the standards established by the Constitutional Court. There is a pattern of convergence of standards originating from the Russian Constitution and the ECHR, although this convergence does not necessarily lead to compliance on behalf of the ordinary courts and administrative authorities.

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[67] *Supra,* para 149

[68] *Konstantin Markin v. Russia,* ECtHR Grand Chamber judgment of 22 March 2012, application no 30078/06

[69] *Supra,* para 145

THE DEVELOPMENT OF CONSTITUTIONAL BASICS OF CORRUPTION COUNTERACTION IN RUSSIA: REFLECTIONS ON THE MODERN RUSSIAN PROCUREMENT SYSTEM

Mikhail Borodach

The problem of corruption counteraction in Russia in the past few years, according to the degree of its significance, without doubt may be ranked among the most important national objectives. The efforts of public authorities at all levels, which were exercised both in the normative regulations in this sphere and in the actual execution of anti-corruption programmes, should be noted in this regard. Thus, during the previous eight years in Russia a vast array of critically significant regulatory and policy acts, which are designed to form a climate of social intolerance against corruption, has been adopted, starting with the special 'Corruption Counteraction Act', which has codified the legal basics of corruption counteraction, ending with the National Anti-Corruption Plan, which was approved by the President of Russia.

The complex nature of corruption in Russia concerns the vast majority of social activities and goes beyond a "reasonable and appropriate" degree. Low efficiency of the law execution mechanisms, inconvenient application of anti-corruption techniques, habitual voluntarism of officials, significant imbalance in the social system of welfare distribution and the absence (or "blurring") of the key professional standards amongst the working people — these comprise an incomplete list of conditions that has previously led to the widespread incidence of corruption in this country.

By its very nature the public procurement system being associated with the mechanisms of the assignment and spending of budget funds is prone to corruption and so the absence of strictly regulated procurement procedures and the imperfection of technical means to ensure transparency in bidding are leading to a cascade of growth in the selfish appetites of the engaged officials.

In the Russian Federation the public procurement system is currently regulated by the special Federal law 'About the Contractual System in the Sphere of Purchasing Goods, Works and Services for Governmental and Municipal Needs', adopted 5 April 2013, as amended 21 July 2014. The previous federal law of 2005 has been repealed. Within a short period since its adoption this federal law was significantly changed three times, each time growing in volume and becoming laden with numerous details. At the same time it was difficult to definitively assess whether these amendments were good or bad; one could state only two indisputable facts: 1) the legal basis of the procurement system in Russia was constantly evolving and consequently very

unstable, and 2) the legislative acts regulating the procurement area in Russia were very far from perfect.

Conclusive evidence of such imperfections could be detected in cases of legal collisions in regulatory regimes and technical errors in the text of the federal law of 2005, also the lack of adopted by-laws and, finally, the unfavourable statistics of infringements in the procurement system, many of which took on the character of plainly scandalous situations.

For instance, the Chief-leader of the Federal Service for the Budget and Financial Supervision (RFN) Sergey Pavlenko, in an interview with the 'Russian Gazette' on 19 July, 2011, gave a detailed recounting of the situation in the road construction and the Sochi Olympic 2014 projects. The official admitted that the crimes of corruption in this country are enormous. According to Mr. Pavlenko, the price of roads in this country could easily be 40% lower, and the Olympic construction in Sochi would need much less money if construction ran according to efficient projects. Mr. Pavlenko said that the Interior Affairs Ministry's funds are spent "as the spirit lay". The official also acknowledged that the situation with the Defence Ministry's funds is not very good, but "the efforts that the Minister has made to align the internal control, are in an order of magnitude greater than the efforts of any other minister. "The official said that the medical and educational expenditures to date are almost completely out of direct legislation on the financial operations in the public sector. Currently, the RFN is engaged in testing the effectiveness of funds assigned to ministries and agencies for public scientific research, and it faces a lot of violations, including plagiarism. According to Mr. Pavlenko, the amount of misuse of budget funds (in other words, direct and meaningful fiscal violations) is ranging from 1 to 1.5%. In the area of housing and communal services "petty theft" on a large scale comprises about 6% of total expenditures.

The official also touched on the question of the Olympic Games in Sochi 2014. For construction Olympic projects were assigned from 13 up to 18 billion US dollars (to the date of interview), while other countries spent between $2 and $4 billion, due to the scale of construction in the southern Russian resort. Mr. Pavlenko notes that the original estimates and current estimates, which were shown to his office, vary considerably. In particular, the scientists conducted one new "expertise survey" and complained about the soil on the Sochi construction yards, so the developers have demanded additional assignments for difficult construction conditions. As the official said, in his experience, such an examination is out of one's control. "For the right expertise", in terms of development, prices can range from only $50 to $250 thousand", - he noted. "Profitability, construction and honesty are incompatible concepts" - the official added. According to the Chief-leader of the RFN, the real price of construction, assuming total compliance with the technical standards, is only about 60% of the actual amount.

However, the overall results of the anti-corruption activities of public authorities in 2009 - 2012 indicate the positive changes which have begun, including corruption

counteraction in the public procurement system. The relevant statistics provided by the Russian General Prosecutor Office, is as follows.

First of all, in the field of public administration, the growth trend in the number of **reported** crimes against the governance and civil service. In total in 2010 over 43 thousand corruption crimes were registered in Russia; that is 6.5% more than in 2009. And in 2012 over 49,500 corruption crimes were registered in Russia; that is 22.5% more than in 2011. Also there were 13,565 (+13%) suspects known in 2012, including more than 10,900 (-10%) of them being prosecuted, in comparison with over than 12,000 and 9,000, and 8,200 in 2011, 2010 and 2009 accordingly. So, the amount of identified damages resulting from corruption crimes showed a greater than 9-fold increase in 2010 – RUR 45.4 billion, in comparison with 2009 – RUR 4.8 billion. In 2012 it had already decreased to RUR 20.8 billion. The amount of damages reimbursed during the prosecution period has increased more than 10 times in 2010 - from RUR 0.7 billion in 2009 to RUR 7.1 billion in 2010, instead of RUR 11.2 billion in 2012.

Russian courts examined over 10,000 criminal cases of corruption in 2010 and decided over 9,700 sentences, to compare with 9,800 cases in 2012 and 10,840 cases in 2011. Today the most common corruption crime is still bribery, including both bribe-taking and bribe-giving: among the approx. 6,750 cases of corruption crimes which were sent to court, 3,480 were criminal charges of bribery. Other wide-spread corruption crimes committed in the area of public administration include (1) theft of public property through abuse of powers and (2) embezzlement of property governed by the official.

As the Russian General Prosecutor Office notes, there is still an acute problem of suppression of established corruption schemes and organised criminal groups in governmental agencies. This is commonly due to the fact that the detective offices are often focused on quantitative growth of statistics, and therefore the detectives primarily carried out those criminal cases, the investigation of which does not require much time and effort. At the same time, it should be noted that the number of criminal cases of bribery by civil servants (i.e. top managers of public administration) has increased. Over 2012 the courts sentenced 889 of these high-ranking officials, including 244 of them which were sitting as heads of municipalities, or as heads of local administrations. Changing approaches to the organisation of detective offices has allowed the quality of their activities on the investigation of long-term corruption bindings to be improved in the past year.

The Russian General Prosecutor Office is also especially responsible for the development and implementation of measures for corruption counteraction in the procurement system. Thus, it is important to note that according to official statements the prosecutors in Russia are realistic about the scale of corruption-related offences in the procurement area, and take the relevant measures for corruption counteraction. In order to identify corruption-related offences in this area, prosecutors are focused not only on strengthening surveillance activities, but also on the analysis of law-enforcement practices in order to detect the presence of corruption risks in the

legislative rules, the establishment of a real "beneficiary" of the identified violations, including the affiliation between bidders. Also, adequate measures are being taken to exclude the factors of corruption activities from the legislation in Russia and to check out the efficiency of law execution by the authorities powered to control the procurement system. For instance, in 2010 the prosecutors identified more than 19,700 offences in this area (an increase compared to 2009, 37.4%). Because of the prosecutor's official objections 756 illegal acts were changed, 414 applications were sent to the courts; the prosecutors had introduced over 4,200 submissions to rectify breaches of legislation, by the review of which 3,600 officials were exposed to a disciplinary response, over 1,500 officials were inflicted with administrative penalties and fines, and finally, 127 criminal cases were initiated (in comparison to 2009 an increase of 41%).

The avoidance of obligatory bidding procedures contains high risks of corruption. It is the widespread unlawful practice of making contracts with a single supplier by "splitting" deliveries in order to avoid the bidding procedures. The prosecutors in Russia reveal the facts of making ante-date contracts, when they had actually already been performed by the contractors. So, making the contracts without the execution of obligatory bidding procedures has been qualified as a flagrant violation of law. The prosecutors in Russia also reveal the facts of lobbying by officials making the contracts with those companies which are affiliated to them. There have been cases of obtaining bribes by officials to ensure victory in the bidding procedures.

Meanwhile, the corruption, whatever it is, of course is a systemic phenomenon; the key to a steady decrease in the level of corruption is to change the mentality of officials and the public attitude to the facts of misuse of authority powers. If we talk about the public procurement system and the anti-corruption effects, which the adoption of the procurement legislation has had, then it must be said that the accents of corruption merely shifted from the stage of the selection of the "right" supplier (contractor) to the stage of acceptance of goods (works) from the "unwanted" winners of the bidding. The detailed legal regulation of the methods to draft the technical requirements for the contracts and to state its initial (starting) prices only leads the national economic regulatory complex to become too bureaucratic and, consequently, results in a dramatic decrease of budget funds' circulation and the appearance of new mechanisms of avoiding the legal requirements due to imperfections of language means, which are being used to express the real content of numerous legislative rules.

All of this leads to the conclusion that corruption in the procurement system, obviously, cannot be completely abolished; but the adoption of measures to reduce it, to establish an economically acceptable scale – that is the problem that should be resolved by the government at the present.

Corruption in the system of procurement leads to huge losses for any country, and not just financial losses. Damages due to corrupt practices in the procurement area, which affect the governance and the whole of society, can be classified by four types:

1. Financial losses, which are on hand, when the contracts contain disadvantageous (to the budget funds) financial conditions. First of all, it is the overpricing of deliveries in comparison to the current market levels and the inclusion of prepayment terms in the contracts instead of deferred payments, etc.

2. Quantity losses, which are introduced in overstating or understating the volume of deliveries or services in comparison with the required ones, or in ordering goods and services for officials' selfish purposes and not to meet public needs, etc.

3. Quality losses, which one meets, when the contracts are made in breach of the required technical conditions, such as the supply of goods, works or services of inadequate quality, the worse conditions of warranties, insufficient quality control requirements for works and services, etc.

4. Political losses, which come with the deterioration of the investment climate in the country, the loss of public confidence to the government and undermining the economic and financial systems, the breach of the basics of fair play competition, etc.

As already mentioned, there is not yet a country in the world, which has succeeded in eliminating corruption in the public procurement area altogether, but it does not mean the measures aimed to reduce its level are hopeless and ineffective. Corruption counteraction in the procurement system, both in public and commercial sectors in the economy, is impossible without an integrated approach to solve this complex problem. In Russian and international practice four basic approaches have been devised that have already confirmed their effectiveness:

- Psychological methods;
- Techniques;
- Regulatory procedures;
- Punitive measures.

Psychological methods can affect the root cause of corruption: the desire of servants to take illegal enrichment at the expense of the employer, in our case – at the expense of the government and, consequently, of all citizens.

The *psychological methods* include:

1. Background checks, examinations of candidate biographies and reviews from previous occupations. This is the simplest and most common method, which allows one to initially avoid the hazardous activities of corrupt employees who have been convicted or dismissed from their previous jobs for corruption offences or crimes. Currently, these checks are carried out by personnel departments of all government agencies when considering candidates for vacant civil service positions.

2. Special depth testing of candidates (up to a polygraph test). Today there are a number of specific tests and computer programmes that allow one to obtain a sufficiently accurate psychological portrait of the candidate, including his traits in terms of potential addiction to illicit enrichment.

3. Periodic checks on staff loyalty, including the use of provocative techniques, are widely used in the commercial sector. A side effect of this method is team depression and high turnover of personnel.

4. Creating a system of mutual staff control (voluntary informants). This method,

as a specially created and cultivated system, is also widely spoken of in the practice of large commercial companies. For all its ugliness this method is of extremely high efficiency.

5. Effective motivation of employees. This method includes not only a material reward for officials engaged in the procurement procedures, but also special incentive programmes to stimulate their desire for long-term relations with the government agencies and for building a civil servant's career. For example, it is known that in European countries officials engaged in the public procurement area are considered a separate pool of employees, and receive higher salaries compared to their colleagues (it is the so-called "supplement for honesty"). In Russia, unfortunately, this approach is not yet in practice.

6. Rotation of employees who are the members of the commissions for bidding.

7. Forming corporate ethics of intolerance against corruption (including the development of ethical codes, codes for managing conflicts of interests and implementation of special training programmes). Abroad such a method is one of the key elements of the anti-corruption strategy. In the civil service the ethical codes that regulate, among other things, the prevention of corruption are commonly used. However, the practice is such that the ethical codes perform their function only when combined with the special training programmes providing the participation of all the civil servants of an agency.

Techniques to eliminate or significantly reduce the likelihood of collusion between the representatives of the procurement agencies and the suppliers, minimising the possibility of personal contact between the parties of an expected contract, or increasing the risk of an offender to be unmasked. Examples of such techniques are as follows:

1. Fitting out the meeting rooms and workplaces of the officials engaged in the procurement procedures with control systems and CCTV.

2. Monitoring of e-mail. However, the legal validity of this method is a subject of controversy.

3. Using up-to-date IT-tools (online shopping and electronic trade platforms), which allows one to avoid direct contact between the officials who provide the procurement procedure, and the supplier's representatives.

4. Purchasing goods or services by the use of existing commercial or specially crafted catalogues. This method is widespread in both commercial and public sectors. A striking example of it is the experience of the U.S. government, which organises centralised logistics for all the federal agencies. The administration regularly provides call-off bidding for the purchase of a different range of products/services, the results of which (price, delivery and other conditions) are generalised in the special catalogues, then sent to all the governmental agencies; if it is necessary, the U.S. federal agencies could find the required products/services in the catalogues and purchase them at the specified conditions, without any additional procedures.

Regulatory (procedural) methods are aimed to provide all the procurement stages in full compliance with the formalised internal rules and regulations that reduce the

risk of corruption. In this case, the complex anti-corruption measures are implemented in two ways:

1. Establishing an effective system of rules governing in detail the steps of procurement procedures, which are most at risk of corruption.

2. Establishing "high-definition" mechanisms to monitor the precision of procedure observance. In the very system of rules that reduces the risk of corruption, there should be checkpoints (including cooperation between the units which are not involved in the procedural part of the procurement), allowing one to perform a current or posterior independent audit of the running procurement procedures.

Punitive measures are aimed at creating an environment in which the corrupt practices of staff responsible for public procurement become unprofitable. In the Russian legislation those measures are implemented through the specific provisions of the Code of Administrative Offences (Articles 7.29-7.32) and the Criminal Code (Articles 285-286, 288-293).

It should be noted that the use of each of the discussed methods in practice is limited by its specificity and requires the use of additional governmental resources. Thus, for example:

a). The efficiency of psychological methods is associated with:

- the qualifications of psychologists recruited to this direction, particularly for in-depth interviews, psychological testing of candidates, collecting and analysing personal information about candidates and employees, and for the use of special equipment (polygraph, etc.);

- the relativity of evaluations and conclusions: an opinion of the expert, who specialises in the relevant area, plays a leading role in assessing a particular situation or the employee, and in inventing the reaction steps. Consequently, there is a high probability of human factor and errors, including intentional;

- the rejection by the procurement staff (even quite loyal) of some of the methods, because their use violates some personal rights and freedoms.

b). The use of techniques is limited to the properties of being purchased goods or services and the availability of adequate IT-tools to the potential suppliers:

- the methods are effective for the exchange goods and services, whose characteristics are standardised and easily measurable (these include, in particular, petroleum, coal, grain, metal);

- the methods are almost useless for goods and services with unique features and immeasurable characteristics; so, in this case it requires the direct interaction of the consumer and the supplier to clarify the parameters of the technical specifications (e.g., design services, consulting or scientific research).

c). The performance of regulatory (procedural) methods can only be guaranteed by their total and precise execution and, therefore, depends on effective mechanisms for monitoring the compliance of running procedures with the established rules and legal requirements. And this, in turn, leads to the questions of:

- how does the "army" of procurement officials form the mini-"army" of "inspectors"? In other words, how much will it cost for the tax-payers?

- how will it be guaranteed that the "inspectors" don’t take a corruption collusion with audited officials after a while?

d). The effectiveness of punitive measures is negligible in the absence of the inevitability of punishment; so, in turn, it leads directly to the question of the efficiency of law enforcement in the country.

Of course, only a comprehensive approach to reducing the corruption level in the public procurement area in Russia will lead to results: balanced and reasonable use of all the discussed methods of corruption counteraction within all the phases of public procurement. If we dispense with only specific areas or methods we can merely get a short-term effect. After a while the mechanism of extraction of illegal incomes will change and move into areas not affected by the instruments of control and resistance. As a consequence, the total losses of corruption will come back to the same scale or even surpass it.

COMPLIANCE OF THE RIGHT TO ISSUE REGULATIONS OF THE BANK OF ESTONIA WITH THE CONSTITUTION AND EU LAW

Kalle Liiv, Ilmar Selge

I. Introduction

This article is concentrated on the question of whether the Bank of Estonia may issue regulations according to the constitution and on the interpretation of the constitution related to this question.

The assessment of the compliance of the right to issue regulations of the Bank of Estonia with the constitution requires theoretically and practically justified answers to the three following questions:

Which role does the Bank of Estonia play arising from the constitution and law?

Based on the principles and standards of the constitution, what kinds of remedies and legal acts need to be issued for its role (tasks)?

Can Riigikogu issue the right to also issue regulations to those bodies/persons that have no respective right according to the constitution (unless explicitly provided for by the constitution)?

II. Bases arising from the constitution and Bank of Estonia Act

Two §'s (§ 111 and 112) of the constitution of the Republic of Estonia concern the legal status of the Bank of Estonia. Estonia differs from many EU member states on the level of the legal status of the national central bank, including the fixation of the sole right of money emission on the level of the constitution (e.g. in the Federal Republic of Germany, the legal status of the national central bank is not regulated by the constitution but by a separate law - *Gesetz über die Deutsche Bundesbank*).

According to § 111 of the constitution, the Bank of Estonia has the sole right of emission of the Estonian currency. The Bank of Estonia organises the currency circulation and is responsible for the stability of the currency of the state. § 111 of the constitution provides the tasks to the emission of Estonian currency, organisation of currency circulation and ensuring the stability of the currency to the Bank of Estonia. § 111 of the constitution does not provide the competence of the Bank of Estonia to the full extent but only the tasks reflecting the purpose of the Bank of Estonia – ensuring the stability of the national currency. The Bank of Estonia is the constitutional institution performing the executive and organisational tasks (including realisation of the sole right of the emission of Estonian currency, organisation of the currency regulation and obligation of ensuring the stability of the national currency) characteristic to the executive power according to § 111 of the constitution. Pursuant to the provisions of § 112 the Bank of Estonia acts on the basis of the law and reports to Riigikogu. This provision provides the reporting to parliament – Riigikogu –, and the independence from the Government of the Republic.

The law providing the legal status of the Bank of Estonia, including the legal bases of the activity is the Bank of Estonia Act[1] (hereinafter referred to as BEA). The Bank of Estonia is the central bank of the Republic of Estonia and a member of the European System of Central Banks. The Bank of Estonia is the legal successor of the Bank of Estonia as the central bank of the Republic of Estonia founded in 1919 whereby it holds the immovables and movables that were owned by the Bank of Estonia as the central bank of the Republic of Estonia founded in 1919 and illegally transferred in 1940.

As a legal person the Bank of Estonia possesses, uses and disposes of its properties independently (section 2 of § 1 and section 2 of § 26 of BEA). It means that the property of the Bank of Estonia cannot be deemed state property because the property of a legal person or the legal person cannot be owned by other persons but the property of a legal person can be owned by itself (sentence 2 of section 2 of § 6 of Law of Property Act). The status of the Bank of Estonia as a legal person governed by public law is best characterised by the circumstance that the Bank of Estonia is not responsible for the proprietary obligations of the state and the state is not responsible for the proprietary obligations of the Bank of Estonia (section 2 of § 3). It can be concluded from the conjunction of the above mentioned provisions of the Bank of Estonia Act that the Bank of Estonia is an independent legal person governed by public law founded on the basis of §'s 111 and 112 of the constitution.

In addition to § 111, § 2 of the Bank of Estonia Act provides the purposes and tasks of the Bank of Estonia. The primary purpose therein is to ensure the stability of the fixed prices. The Bank of Estonia organises the currency circulation in Estonia and in cooperation with foreign countries and is responsible for the stability of the national currency. The Bank of Estonia holds the sole right of the emission of Estonian currency. Emission and removal of the Estonian currency shall be carried out on the basis of the law.[2] The task of the Bank of Estonia is to hold the precious metals and foreign currency reserves of the state and to organise their use. The constitution, in conjunction with the Bank of Estonia Act, gives the performance of the national currency and banking policy and directs the credit policy to the competence of the central bank whereby no governmental institution may determine how the central bank must act in the performance of these policies. Regulation of the Bank of Estonia Act in this section is in compliance with the practice developed countries have applied for decades already. In order to ensure the implementation of the financial policy, the performance of it is imposed on the independent central bank in the European legal system. This international practice is based on the ineluctable contradiction between the short-term and long-term purposes of the economy. Influencing the financial political environment for the short-term increase of economic activeness, which often interests the government for political reasons, can only give very limited results. In the long run, it may lead to the instability of the money that is in contradiction with

[1] RT I 1993, 28, 498; …; RT I, 09.05.2014, 2.
[2] This law is the Republic of Estonia Money Act (RT 1992, 21, 299; RT I 2002, 63, 387).

the long-term interests of the state. For this reason, it has become necessary to give the performance of financial policy to an institution independent of the executive power.[3]

III. Independence of the Bank of Estonia

§ 3 of the Bank of Estonia Act provides the independence of the Bank of Estonia. The Bank of Estonia acts independently from the other national institutions. It reports its activities to Riigikogu, it is not subject to the Government of the Republic or any other institution of executive power or third parties. As a member of the European System of Central Banks, the Bank of Estonia and the members of its management bodies may apply for and receive instructions only from the European Central Bank (connection with the provisions of article 130 of the Treaty of Functioning of the European Union).

Independence of the Bank of Estonia is characterised by the circumstance that the Bank of Estonia supports the economic policy of the Government of the Republic within its authorisations according to section 4 of § 4 of the BEA if it is not in contradiction with the purposes and tasks of the Bank of Estonia provided by § 2 of the law and does not prevent performing them. In practice, the Bank of Estonia cooperates with the Government of the Republic and gives advice on economic political issues to the Government of the Republic. Generally, the Government of the Republic takes no important economic political decisions without hearing the opinion of the Bank of Estonia. In addition, the Bank of Estonia represents the state at the authorisation of the Government of the Republic in the international financial organisations of which the Republic of Estonia is a member. Following the principle of the independent central bank separated from the executive power recognised in the international and European legal system, the central bank participates in national economic policy through the performance of independent financial, credit and banking policy and organisation of the currency circulation without damaging the specific, legal and constitutional purposes and tasks of the Bank of Estonia.

The institutional independence of the Bank of Estonia as the national central bank and the personal independence of the member of its management body arise from the conceptual provisions of the constitution and the Bank of Estonia Act. One of the constitutional guarantees of the independence of the Bank of Estonia is also the circumstance that the legal status of the Bank of Estonia can only be modified by amendments to the Bank of Estonia Act Amendment Act (section 1 of § 1 of BEA). Hereby the Bank of Estonia Act is a law registered in the catalogue of the constitutional laws that can only be passed and amended by majority vote of Riigikogu according to clause 12 of section 2 of § 104.

Requirement of the independence of the national central bank arises from the Treaty on Functioning of the European Union[4] (former Treaty establishing the

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[3] A. Tupits. Euroopa Liidu riikide keskpankade õigusliku seisundi võrdlus. – Juridica, 2000, No. 1, p. 59.

[4] **Consolidated versions of the European Union and Treaty on Functioning of the European Union** (in the redaction of Lisbon Treaty) - ELT C 83, 30.03.2010.

European Community) according to which the European System of Central Banks consists of the European Central Bank and national central banks. The European Central Bank is a legal person. The main task of the European Central Bank is the development and implementation of financial policy through the national central banks within the European System of Central Banks. Article 127 of the Treaty on Functioning of the European Union (former section 2 of article 105 of the Treaty establishing the European Community) provides the tasks of the European System of Central Banks as follows: determine the financial policy of the union and apply it; perform the foreign currency transactions according to the provisions of article 219; keep and administer the official foreign currency reserves of the member states; promote the fluent operation of the tax systems.

Article 130 (former article 108 of the Treaty establishing the European Community) provides that using the authorisations and performing the tasks and obligations imposed on them by the founding treaties and statutes of the European System of Central Banks and the European Central Bank, the European Central bank or any other national central bank or any member of their decisive body does not apply for and does not receive any instructions from any institutions, bodies or authorities, government of any member state or any other body. Institutions, bodies and authorities and governments of member states shall be obliged to respect this principle and shall not try to influence the members of the decisive bodies of the European Central Bank or national central banks in the performance of their tasks. Thus, none of the third parties or bodies, including the government of a member state, may influence the national central bank in the financial, credit and banking decisions taken in the performance of their tasks, nor the administration of the foreign currency reserve by the national central bank, nor foreign currency transactions by the central bank, nor the fluent operation of the payment systems because it may restrict the principle of the independence of the central bank provided by the foundation agreement.

Prohibition on the accreditation of the public institutions, authorities and bodies arising from article 123 of the Treaty of Functioning of the European Union (former article 101 of the foundation contract of the EU) shall apply to the Bank of Estonia. It is also prohibited for the European Central Banks or central banks of member states (hereinafter referred to as national central banks) to issue an overdraft facility or other types of loan facilities for the union's institutions, bodies or authorities, central governments of the member states, regional, local or other public bodies, other persons governed by public law or companies with a holding of the state. It is also prohibited for the European Central Bank or national central banks to buy the debt obligations directly from them. The analogous prohibition is also included in § 16 of the Bank of Estonia Act.

Arising from the above mentioned, the independence and distance of the Bank of Estonia from the Government of the Republic and executive power and its legal status as a legal person governed by public law arise from the principles and standards of the

law of the European Union and are in compliance with the international practice that has been applied by European countries in the last decades.

IV. Right of the Bank of Estonia to issue general legal acts to third parties

In the constitutional practice of Estonia, the Electronic Money Institutions Act arising from EU law and proceeded in Riigikogu a conceptual question has risen about the right of the Bank of Estonia to issue mandatory general legal acts to third parties, i.e. the question is generally about the right to issue regulations of the Bank of Estonia, its content and extent and compliance with the constitution of the Republic of Estonia and law of the European Union.[5]

The law detailing the competence of the Bank of Estonia in the form of the tasks fixed in the constitution and issuing the means to the Bank of Estonia to perform the tasks is the Bank of Estonia Act.

The referred law authorises the management bodies of the Bank of Estonia to issue the general and single legal acts. Section 5 of § 1 of the Bank of Estonia Act provides that the Council of the Bank of Estonia issues the decisions for the performance of the task of the Bank of Estonia and the President of the Bank of Estonia issues the regulations and directives. However, § 11 provides the competence of the President of the Bank of Estonia. The President of the Bank of Estonia issues the regulations and directives. Regulations of the President of the Bank of Estonia as legal acts of a regulatory (legislative) nature shall be published in Riigi Teataja (sections 5 and 6).

Thus, the Bank of Estonia Act provides that for the performance of the tasks of the Bank of Estonia, the Council of the Bank of Estonia and President of the Bank of Estonia issue the legal acts that comprehend the legislative acts in the form of regulation and the single legal acts in the form of decision or directive. Solutions to the questions concerning the activity of the Bank of Estonia in practice are formalised as decisions of the Council of the Bank of Estonia, and the solutions of the questions beyond the Bank of Estonia are formalised in the form of a regulation of the President of the Bank of Estonia.

The 3rd chapter of the Bank of Estonia Act provides the competence (rights and obligations) of the Bank of Estonia in the area of financial policy and organising the currency circulation. Pursuant to § 14 of the BEA, the Bank of Estonia has a right to use the following means for the regulation of the currency circulation: including the enforcement of the rules regulating the money market (clause 3); enforcement of the compulsory reserves and other standards for the credit institutions acting in Estonia

[5] On 16.06.2004, the Government of the Republic initiated draft legislation for the Electronic Money Institutions Act (415 SE I) that provided the authorisation for the Minister of finance to issue the implementing regulations of the law in several authorisation standards. Issuing the implementing regulations of the law in several issues on the basis of the Electronic Money Institutions Act differed considerably from the previous constitutional and administrative practice where the regulation of analogous issues was in the competence of the Bank of Estonia on the basis of the law. Notice: draft legislation withdrawn. See http://web.riigikogu.ee/ems/plsql/motions.show?assembly=10&id=415&t=E

(clause 4); enforcement of the interest rates of the Bank of Estonia (clause 6); enforcement of the limits of loans issued by the credit institutions (clause 7).

The Bank of Estonia enforces the rules for the import and export of foreign currency and for the formation and use of foreign currency reserves on the basis of the law. The Bank of Estonia also enforces the terms and conditions and rules of the banking foreign transactions to credit institutions and other legal persons (sections 2 and 3 of § 15 of the BEA). Thus, for the performance of efficient financial policy, the Bank of Estonia enforces several rules in the form of general legal acts for the regulation of the above mentioned questions (including the regulation of non-cash settlements carried out through credit institutions, foreign currency transactions, payments, etc.).

In addition to the Bank of Estonia Act, the specific provisions delegating authority (special delegations) for issuing general legal acts to the President of the Bank of Estonia are contained in the Credit Institutions Act[6] (section 7 of § 48, section 4 of § 49, section 7 of § 71, section 5 of § 80, section 9 of § 85, section 3 of § 86, section 2 and section 4 of § 87, section 1 of § 91, section 2 of § 92, section 8 of § 921, section 7 of § 113) and in the Electronic Money Institutions Act[7] (section 8 of § 37, section 4 of § 39, section 4 of § 44, section 2 of § 45, section 2 of § 46).

Arising from the above presented, the Bank of Estonia Act as a constitutional law provides the national central bank's right to issue mandatory general legal acts – **right to issue regulations** provided for the performance of the tasks of financial policy, organisation of the currency circulation and ensuring the stability of the currency to third parties arising from § 111 of the constitution. Hereby §'s 111 and 112 of the Estonian constitution do not provide the right to issue regulations as general legal acts *expressis verbis* and yet the constitution does not provide the respective prohibition or restriction either.

In the Estonian legal literature opinions have been published according to which the delegation of the right of standardisation to the Bank of Estonia does not arise from the constitution. Referring to the possible contradiction of the provisions of the Bank of Estonia Act, including the right to issue regulations with the constitution, the commission of the legal expertise on the constitution gives the following opinion:

"The Bank of Estonia has legal rights and functions that are considerably wider than those specified in § 111 of the constitution. These rights concern primarily the legislative drafting and supervision. Namely, the Bank of Estonia has been delegated the functions of the executive power that are within the competence of the Government of the Republic according to the constitution. Such functions are, for example, the performance of the national currency and banking policy (section 4 of § 2 and § 4 of the Bank of Estonia Act), supervision over the activity of credit institutions, issuing and cancellation of licences, imposing sanctions, enforcement of moratorium, compulsory liquidation, etc. (section 5 of § 5 and §'s 17-24 of the Bank

[6] RT I 1999, 23, 349; …; 2009, 39, 262.
[7] RT I 2005, 61, 473; 2007, 65, 405.

of Estonia Act), enforcement of the rules regulating the money market and imposing sanctions to those persons breaching these rules, enforcement of compulsory reserves and other standards to credit institutions (clauses 3, 4, 8 of § 14 of the Bank of Estonia Act), issuing licences for foreign currency transactions (section 4 of § 15 of the Bank of Estonia Act). Supervision over credit institutions and issuing legislation of general application regulating their activity is not directly related to the functions of the Bank of Estonia as the central bank provided by the constitution and revoking such rights shall not damage the independence of the Bank of Estonia and the stability of the Estonian crown. Based on the present redaction of the constitution, the Bank of Estonia should only be left the tasks concerning the emission and organisation of the currency circulation and all functions related to legislative drafting and administrative checks should be given to the Government of the Republic, i.e. Ministry of Finance and the bank inspection created in its administrative area."[8]

Lawyers K. Merusk and R. Narits have also expressed the opinion that "giving the above mentioned right to the Bank of Estonia by legislative power is problematic as it does not arise directly or indirectly from the constitution and the addressees of the regulations in relation to the bank are so-called third parties."[9]

Lasse Lehis has the opinion that "the function given to the Bank of Estonia by the constitution – organisation of the currency circulation and ensuring the stability of the currency of the Estonian crown – is also possible to practice without the right to issue general legal acts. … Thus, it can be stated that the right of the Bank of Estonia to issue general legal acts addressed to third parties does not arise from the constitution. By giving such a right, the legislative power has extended the competence of the Bank of Estonia beyond the authorised limits without authorisation."[10]

In the commented issue of the Constitution of the Republic of Estonia (chapter VIII "Finance and state budget") the opinion has been published that "…**Many rules can still be regarded as general rules and they should be replaced by the rules of the Government of the Republic or of the Minister of Finance"** (Constitution of the Republic of Estonia 2002, 499; 2008, 565; 2012, 667).[11]

V. Constitutional principles of the right to issue regulations

The basis of the constitutional and democratic implementation of the public authority is its basing on the law (preamble of the constitution) and the principles of the separation of powers and balance of powers (§ 4), democratic state based on the rule of law (§ 10) and lawfulness (section 1 of § 3).

In order to follow these principles and to protect everyone's constitutional rights and liberties, the legislative and executive and organisational functions must be separated and exactly determined and their performance must be in compliance with

[8]Available in the computer network: http://www.just.ee/10736.
[9]K. Merusk, R. Narits. Eesti konstitutsiooniõigusest. Tallinn: Juura, 1998, p 48.
[10]L. Lehis. Eesti Panga staatus ja pädevus tulenevalt põhiseaduse §-dest 11 ja 112. – Juridica, 1999, No. 10, pp 480-486.
[11]EV Põhiseadus. Kommenteeritud väljaanne (2002). Tallinn: Juura, p 499; 2008, p 565; 2012, p 667.

the constitution and principles recognised by legal theory. Interpreting the term of lawfulness, the European Court of Human Rights stated *in the case of Malone v. the United Kingdom (1984)* that "it would be in contradiction with lawfulness if the executive power implemented the legal authorisation as an unlimited power. Consequently, the law must determine the extent and manner of the implementation of the right of the decision delegated to the competent bodies having regard to the purpose of the discussed measure to give the necessary protection to the individual from arbitrary intervention."[12]

The right to issue regulations means the right of the executive power to accept the general legal acts issued to it by the legislative power.[13] The regulation is the general act of the administration issued by the executive body for the regulation of an unlimited number of cases and the rule is binding to third parties as the Parliament Act. According to the theory of administrative legislation, the rule is a *secundum legem* general act that must be in compliance with the constitution and law.

Issuing the regulations as the general acts of the executive power by the administration is practically the performance of the legislative function delegated to the administration by the regulator (parliament). The right of the executive power to issue regulations also considerably influences the principle of the separation of powers according to which the legislative power is held by Riigikogu (§ 59 of the constitution). In the legal literature it is noted that: "However, it does not mean a breach of this principle as the executive power may perform the legislative function not on its own initiative but on the basis of the formal legal authorisation, i.e. authorisation of the parliament. Section 1 of § 80 of the constitution requires that the legal authorisation must specify the content, purpose and extent of the authorisation."[14] It depends on the regulator which executive body is authorised to issue regulations in which relevant issues, and to what extent or legal limits. For the issue of the regulation as the general act of administration there must be a respective delegation or authorisation standard provided by law. This standard should specify the administrative body competent for the issue of the regulation and the clear purpose, content and extent of the authorisation. In addition, the delegation provision of the law may also enforce the other standards for the obligations of the executive power or for the restriction of its legislative function. Provision of the purpose, content and extent of the authorisation is necessary in order to make everyone understand which general act of administration may be issued.

In legal theory the opinion has been taken that "For its content and extent, the right of regulation is organised *intra, praeter* and *contra legem.* For their effects, all regulations, including so-called *contra legem* cases are subject to common laws."[15] Three kinds of regulations can be distinguished according to the extent of the right to issue regulations: 1) *intra legem*; 2) *praeter legem* and 3) *contra legem*.[16]

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[12]RKPSJKo 20.12.1996 No 3-4-1-3-96.
[13]See more T. Annus. Riigiõigus. Tallinn: Juura, 2006, pp 80-81.
[14]See more H. Maurer. Haldusõigus. Üldosa. Tallinn: Juura, 2004, pp 42-43.
[15]See more A.-T. Kliimann. Administratiivakti teooria. Tartu, 1932, pp. 181-182.
[16]See K. Merusk, I. Koolmeister. Haldusõigus. Tallinn: Juura, 1995, pp. 96.

Arising from the concurrence of the provisions of the constitution (clause 6 of § 87 and section 2 of § 94) and principles of the separation of powers (§ 4) and legality (section 1 of § 3), the executive power is only generally authorised to issue *intra legem* regulations, i.e. regulations detailing the law. In addition, the Supreme Court has referred to the need of following this principle: "In the case of an *intra legem* regulation there must be a standard in the law explicitly providing that the administrative body may issue an administrative act on the basis of it. This principle has also been expressed by section 2 of § 27 of the Government of the Republic Act. In the case of an *intra legem* regulation, the purpose, content and extent of the authorisation may also be derivable by the interpretation of the law. When being introduced to the law, the subject of the law must be able to reach a certain understanding that the executive power may issue the general act of administration in the issues regulated by law. However, a regulation issued *intra legem* may not exceed the frames of the regulation object of the law containing the authorisation standard.

Arising from the principle of separation of powers according to which the performance of the legislative function is within the competence of the regulator, a general act of administration exceeding the frame of the regulation object of the law is a *praeter legem* or *contra legem* regulation. The right of the regulator to legally authorise the administrative body to issue a *praeter legem* regulation may arise from the constitution of the state. The authorisation standard of the regulation regulating the domains not provided by Acts, i.e. authorisation standard of a *praeter legem* regulation must contain an explicit permit that the executive power may issue such regulations on the basis of this provision. When acting *praeter legem*, the government shall transpose a part of the competence of the regulator and it can only do it in the case that the regulator has *expressis verbis* authorised it to do so. In addition to the explicit permit, the authorisation standard of a *praeter legem* regulation must also contain the name of the administrative body competent to issue the regulation and the details of the purpose, content and extent of this regulation.

The laws are amended and annulled by *contra legem* regulations. Arising from the principle of the separation of powers, the *contra legem* regulations are excluded in Estonia by the constitution."[17]

In the legal literature an opinion has been published that "Based on the general principles of the state based on the rule of law, primarily on the principle of the separation of powers provided by the constitution of Estonia, the *praeter legem* regulations should be treated as exceptional cases. These can only be the so-called procedure regulations by which certain rules are enforced."[18]

According to clause 6 of § 87 of the constitution, the Government of the Republic issues the regulations and orders on the basis of the law. The same principle for the regulation of the minister arises from section 2 of § 94 of the constitution. Thus, the constitution provides *expressis verbis* the regulations and orders of the Government of

[17]RKPSJKo 20.12.1996 No. 3-4-1-3-96.
[18]See K. Merusk, I. Koolmeister. Haldusõigus. Tallinn: Juura, 1995, pp. 97-98.

the Republic and the orders and directives of the minister (section 2 of § 94 of the constitution) as the legal acts of the bodies performing the executive power (clause 6 of § 87 of the constitution). In the legal literature and in practice it has often been disputed whether the regulations can be issued by other bodies not explicitly specified in the constitution.

The Bank of Estonia Act as a constitutional law provides the national central bank's right to issue mandatory general legal acts – **right to issue regulations** provided for the performance of the tasks of financial policy, organisation of the currency circulation and ensuring the stability of the currency to third parties arising from § 111 of the constitution.

In the Bank of Estonia Act (section 5 of § 1 and section 5 of § 11) the regulator **has practically equalised** the competence of the President of the Bank of Estonia in issuing regulations **with the competence of the minister in issuing regulations** in the section of the types of legal acts arising from the constitution. **The basis for this in the constitutional practice in Estonia was the proposal of the Chancellor of Justice on 06.01.1994 to Riigikogu to bring the Bank of Estonia Act (in the redaction RT I 1993, 28, 498) into conformity with the constitution and law of the Republic of Estonia.**[19]

The requirements confirmed in the legal theory, constitution and laws and practice of the Supreme Court shall also apply to the regulations of the President of the Bank of Estonia. In the practice of the constitutional review, the Chancellor of Justice has estimated the regulations of the President of the Bank of Estonia as legal acts containing the legal standards applied to third parties. If the constitution, provisions of the Bank of Estonia Act and provisions of the Credit Institutions Act and the requirements of the authorisation standard have not been adhered to while issuing the regulation and the regulation has been issued without legal basis, the Chancellor of Justice has instituted a procedure of constitutional review and contested the regulation of the President of the Bank of Estonia as legislation of general application.[20]

VI. Conformity of the right to issue regulations of the Bank of Estonia with the constitution

Regarding financial policy as a relevant part of the economic policy of the state that § 111 of the constitution specifies through the organisational tasks of the currency circulation and ensuring the stability of the national currency imposed on the Bank of

[19]The initial redaction of section 5 of § 1 of the Bank of Estonia Act provided that the Council of the Bank of Estonia and the President of the Bank of Estonia shall issue **legal acts** on the basis of the law for the performance of the tasks of the Bank of Estonia. The Bank of Estonia Act (in the redaction of 18.05.1993) provided for the issuing of legislation of general application differing (diverging) from the constitution for the realisation of the rights and obligations arising from the constitution. The constitution has been interpreted in an extended manner, i.e. amended by this legislation of general application.

[20]Proposal No. 35 on 07.09.1999 by the Chancellor of Justice to bring regulation No. 6 on 24.03.1999 by the President of the Bank of Estonia (Checking the solvency and guarantees of local governments in issuing loans and in the acquisition of financial claims; RTL 1999, 54, 731) into conformity with the provisions of § 112 of the constitution.

Estonia that in themselves are related to the performance of the executive power, one can express an opinion that the regulator is also decisive in the issue of the means of legislative drafting (regulative acts) necessary for the performance of these tasks according to clause 12 of section 2 of § 104 of the constitution.

One possible legal remedy for the Bank of Estonia for the performance of the tasks arising from § 111 of the Bank of Estonia Act is the right of the Bank of Estonia to issue mandatory general legal acts to third parties, i.e. the right to issue regulations of the Bank of Estonia. If the Bank of Estonia were a bank subject to the Government of the Republic or a central bank subject to it, then there would probably be no question about the conformity of the right to issue regulations of the Bank of Estonia with the constitution. As the national central banking in Estonia has been built since 18.06.1993 (after the enforcement of the Bank of Estonia Act) independently and separated from the Government of the Republic according to the conceptual principle recognised in the European Union, then one legal remedy for the performance of the purposes and tasks of the Bank of Estonia as an independent central bank would definitely be the right of the Bank of Estonia to issue mandatory general legal acts to third parties. Being institutionally completely separated from the Government of the Republic, the national central bank cannot perform its tasks through the government or be under the control of it or under the control of the Minister of Finance. To compare, in the European Union, the European Central Bank constitutes a vertical banking system - management body of the European System of Central Banks with independent and specific competence and clearly distanced from the governments of member states. For the performance of the tasks of the European System of Central Banks and in compliance with the provisions of the memorandum of association and by the terms and conditions in the statutes of the European System of Central Banks, the European Central Bank also issues mandatory general legal acts - regulations to third parties, takes decisions, submits recommendations and gives opinions. In addition, the European Central Bank has a right to impose fines for non-performance of the regulations and decisions of the European Central Banks to companies. (article 132 of the Treaty of Functioning of the European Union, former section 1 of article 110 of the foundation contract of the EU). Thus, the European Central Bank is competent to issue binding general legal acts – regulations in conformity with the provisions of the Treaty of Functioning of the European Union and the conditions presented in its statutes.

The right of the Bank of Estonia to issue mandatory general legal acts to third parties or the right to issue regulations is an issue not discussed in the constitution of Estonia. The circumstance that the constitution specifies only the Government of the Republic and the ministers and the right of the Bank of Estonia to issue the regulations has not been specified or discussed separately, does not yet mean a contradiction of the right to issue regulations of the Bank of Estonia with the constitution or the law of the European Union. Herewith it cannot be concluded that the parliament as a regulator cannot or may not delegate the right to issue regulations to the Bank of Estonia. The right to issue regulations of the Bank of Estonia is

derivable from the principle of independence of the Bank of Estonia fixed in § 112 of the constitution, but also from the conceptual basic principle of the independence of the central bank of the member state of the European Union. The real independence of the Bank of Estonia cannot be achieved without the right to issue mandatory general legal acts to third parties, i.e. without the right to issue regulations. Should the Bank of Estonia apply for the issuing of the regulations necessary for the performance of its tasks from the Government of the Republic or Minister of Finance representing the executive power, then it would not be in conformity with the European basic principle of the independence of the central bank of the member state and the Bank of Estonia would become dependent on the government or Minister of Finance at issuing the regulations. For this reason, the opinion must be formed that the regulator deciding the need for the delegation of the right of the issue of the regulation to the Bank of Estonia means a question about the purposefulness of the law with the purpose of ensuring the independence of the Bank of Estonia analogously to the European Central Bank. As the Bank of Estonia acts on the basis of the law and reports to Riigikogu according to § 112 of the constitution, the decision competence of the parliament (Riigikogu) comprehends the decision of the question of the delegation of the right to issue regulations to the Bank of Estonia. Hereby the parliament/regulator is not completely free in the decision of the extent or legal limits of the right to issue regulations of the Bank of Estonia but is bound to the tasks specified in § 111 of the constitution and these tasks are the organisation of the currency circulation and ensuring the stability of the currency. In addition, the regulator must ensure that the delegation of the right to issue regulations to the Bank of Estonia would not result in the breach of the fundamental rights and liberties and values protected by the constitution (guarantees). Should the regulator in the delegation of the right to issue regulations exceed the legal limits provided by the constitution, e.g. issue the right of enforcing the restrictions on issuing loans to the local government and on taking financial obligations to the Bank of Estonia, then it would practically mean an amendment to § 111 of the constitution as the constitutional guarantees of the local government (protected area of the local government law) provided by §'s 154 and 157 of the constitution must be taken into account in providing the control over the financial activity of local governments.

To sum it up, the opinion must be formed that the right of the Bank of Estonia to issue mandatory general legal acts to third parties or the right to issue regulations is not in contradiction with the constitution or the law of the European Union. I add that in the constitutional practice in Estonia, the Chancellor of Justice in the function of the constitutional review has treated the Bank of Estonia as a constitutional institution whose performance of the tasks specified in § 111 of the constitution through the right to issue regulations does not issue but rather assumes the application of the legality principle specified in section 1 of § 3 of the constitution and adheres to it in issuing the regulation. If the Bank of Estonia has not adhered to the provisions of section 1 of § 3, then the Chancellor of Justice has also contested the respective regulation of the President of the Bank of Estonia as legislation of general application.

VII. Conclusion

The article discusses whether, according to the Constitution of the Republic of Estonia, Eesti Pank may issue legislation of general application mandatory to third persons, that is, the right of Eesti Pank to issue Regulations. The author finds that, although the right of Eesti Pank to issue Regulations is not discussed separately in the Constitution, that in itself does not mean a conflict of the right of Eesti Pank to issue Regulations with the Constitution and European Union law. The right of Eesti Pank to issue Regulations can be derived from the principle of independence of Eesti Pank fixed in the Constitution, as well as from the conceptual basic principle of the independence of the central bank of a European Union Member State. The real independence and sovereignty of the central bank was not achieved without the right to issue legislation of general application mandatory to third persons. If Eesti Pank had to request the issuing of Regulations necessary for the performance of its functions from the Government of the Republic or the Minister of Finance who represent the executive power, then that would not be in compliance with the European fundamental principle of independence of the central bank of a Member State. At the same time, certainly, the legislator is not totally free in deciding on the scope or legal limits of the right of Eesti Pank to issue Regulations. It is bound with the functions of the central bank specified in the Constitution which include the organisation of currency circulation and the objective of ensuring the stability of the national currency.

LEGAL SUPPORT OBLIGATIONS OF THE RUSSIAN FEDERATION TO CREATE THE CONDITIONS FOR DECENT LIFE RIGHTS

Larisa Zaitceva, Tatiana Anbrecht

Creating the conditions for a decent human life is one of the fundamental provisions of the Constitution of the Russian Federation contained in Article No. 7. The mentioned position is based on the principles of The Universal Declaration of Human Rights (UDHR) which was adopted in 1948 and The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966.

Favourable living conditions are provided by different measures of socio-economic development of the country and state. The constitution of the Russian Federation establishes the priority of individual rights and freedoms. Therefore, public policy in general should be focused on creating the most favourable conditions of people's lives, providing them a decent living and personal development.

Traditionally, the creation of the conditions for a decent life is regarded as a priority of social policy. The Constitution of the Russian Federation immediately after the definition of the Russian Federation as a social state, 'whose policy is aimed at creating conditions for a worthy life and free development of man', states that 'In the Russian Federation the labour and health of people shall be protected, guaranteed minimum wages and salaries shall be established, state support ensured to the family, maternity, paternity and childhood, to disabled persons and the elderly, a system of social services developed, state pensions, allowances and other social security guarantees shall be established'.[1] Therefore, the establishment of state guarantees in regard to wages and social security is considered as the main direction of state social policy. The Russian Federation as a party to the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and would take appropriate steps to ensure the realisation of this right, recognising the essential importance of international cooperation based on free consent.[2]

Today, Russia is going through a difficult period associated with the reformation of the political, economic, social, cultural, legal and spiritual spheres of life.[3] But the government realises the importance of the problems and the degree of responsibility of the authorities for the level of life of citizens. A significant role was played in this by ratification of the European Social Charter. It was necessary to determine the goals and targets which country wants to reach. Russia has demonstrated the desire to come

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[1] Constitution of the Russian Federation 1993, art 7.
[2] The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.
[3] Shevnina E., 'Crisis in the socio-economical system in the Russian Federation as necessity for change of the funded part of the pension' (2013) 3 Social and pension law 6, 9.

to the planning of a standard of living which should be worthy of a highly developed civilised state.[4]

It is not accidental that the National Security Strategy of the Russian Federation until the year 2020 "national security" is defined as a condition of protection of individuals, society and the state from internal and external threats, which allows the provision of constitutional rights, freedoms, **decent quality and standard of living** of citizens, sovereignty, territorial integrity and sustainable development of Russia, the defence and security of the state.[5]

A decent living condition is a rateable category. It can't be clearly defined or qualified. In the Russian Federation the definition of the lower boundary of qualitative criterion of the standard of living is carried out through the establishment of the minimum wage and living wage, both in the whole country and in each region separately[6].

The Labour Code of the Russian Federation (hereinafter - the LC RF) (art. 130) specifies minimum wages as basic state guarantees in the sphere of wages. Its value is set for the entire territory of the Russian Federation by federal law. According to pt. 1 art. 133 of the LC RF minimum wage cannot be lower than the subsistence minimum. But today it is the only rule of the LC RF, which still hasn't entered into force. The procedure and terms of its entry into force were delayed by the LC RF (art. 421) before the relevant corresponding federal law. At the beginning of 2014 the minimum wage in the country was 5554 roubles[7] which is approximately 75% of the subsistence minimum in the country.[8] This is somewhat lower than the corresponding figure at the beginning of 2013, when the federal minimum wage was approximately 78% of the subsistence minimum. Thus according to the Ministry of Labour and Social Protection of Russia, for the first 9 months of 2013 the average salary in the whole country amounted to 29,044 roubles[9] which is the equivalent of almost four living wages.

However, the number of employees with a minimum wage is about 1 million people and practically 50 % of them are employed further in their spare time. These official figures don't reflect the real state of affairs. Today, unfortunately, there is widespread practice of "grey salary schemes" (so-called "envelope salaries"), whereby many businesses reduce their costs for mandatory social insurance for employees. Thus, the number of wage earners in the minimum amount may be considerably less. Nevertheless, today Russia is at 23rd place among 27 countries in Europe and in 25th place in terms of purchasing power in the absolute level minimum wage ranking. At the same time this gap is large: in absolute terms the minimum wage in Russia is 10-

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[4] Kartashkin V., 'Ratification of the European Social Charter and Russia's compliance with socio-economic rights' (2004) 2 International Lawyer 2, 5.

[5] PD 537 2009 (RF) 'On the National Security Strategy of the Russian Federation until 2020'.

[6] FL 134 1997 (RF) 'On the Subsistence Minimum in the Russian Federation'.

[7] FL 336 2013 (RF) 'On Amending Article 1 of the Federal Law 'On the minimum wage'.

[8] GO 1173 2013 (RF) 'On establishing the subsistence level per capita and the main socio-demographic groups in the general population of the Russian Federation for the III quarter of 2013'.

[9] Ministry of Labour and Social Protection of the Russian Federation, 'Wages: Results 2013' http://www.rosmintrud.ru/labour/salary/48 accessed 15 February 2014.

15 times lower than in developed countries, and 2-3 times lower than in the former eastern bloc countries and the Baltic states.[10]

It seems that the increase of the minimum wage in Russia, bringing it to a living wage – is one of the priority tasks in socio-economic, financial and political spheres of life.

In the subjects of the Russian Federation an individual minimum wage may be set through the procedure of social partnership, but it should not be lower than the federal level. Today, in a similar way, 27 regions of Russia determined their own minimum wage[11]. The SMIC size in each subject of the Russian Federation should be established according to the socio-economic conditions and the subsistence level of the working population in the corresponding subject. For example, in the Tyumen region the minimum wage is set higher than the subsistence level. In regions of Russia such as Bryansk, Kursk, Novgorod, Volgograd and Krasnodar, the minimum wage is set at the subsistence level. The highest minimum wage is set in Moscow and the Moscow region (12,850 and 11,000 roubles, respectively) and in the Magadan region (15 720 roubles).[12]

However, the low ratio of the average wage in the economy with the cost of living of the working population has a negative influence on the formation of future pension rights. The average old-age pension in 2012, according to the Pension Fund of Russia was 9,500 roubles, in 2013 -10 400 roubles for the year 01.02.2014 - 11400 roubles.[13]

It should be noted that in the current Russian legislation the category of "minimum pension" is absent. The ratio of pensions to the subsistence level is the thing that guarantees a minimum standard of living for retirees. Material security of a retiree who doesn't work and lives in the territory of the Russian Federation may not be less than the established minimum subsistence level in the subject of the Russian Federation. In the case if the amount of pension is below the subsistence minimum established in the current region of the Russian Federation, the pensioner is provided with a social supplement to the specified minimum.[14]

The pension system should provide a decent standard of living for senior citizens, but in 2002 the ratio of old-age pension to the subsistence level of a pensioner became - 108.4%, in 2007 - 110.4%, in 2012 - 179.8%.[15]

By the period of years 2016 – 2020 the average size of old-age pensions according to the Concept of long-term socio-economic development of the Russian

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[10] Granik I., 'Above the lower limit' *Moscovskie novosti* (Moscow, 5 March 2013).

[11] Ministry of Labour and Social Protection of the Russian Federation, 'About minimum wages' http://www.rosmintrud.ru/labour/salary/22> accessed 21 December 2011.

[12] Shmelev A., 'Minimum wages in 2014' (21 December 2013) < http://advocatshmelev.narod.ru/mrot-minimalnyiy-razmer-oplatyi-truda.html> accessed 31 January 2014.

[13] Pension Fund of the Russian Federation. Official cite < http: www. pfrf.ru> accessed 31 January 2014.

[14] FL 178 1999 (RF) 'On State Social Assistance".

[15] GR 2524-r 2012 (RF) 'On approval of long-term development strategy of the pension system of the Russian Federation'.

Federation for the year 2020 should increase to the value that ensures the minimum reproductive consumer budget of a pensioner.[16]

However, the Constitutional Court of the Russian Federation in its decision of 15 February, 2005 No. 17-O pointed out that retirement pension by its legal nature and purpose is aimed at filling losses on the objective impossibility of continued employment. The legislator should determine the minimum size of old-age pension which provides such a standard of living which wouldn't put the possibility of a decent life for a citizen as a pensioner into question as well as the implementation of other Federation rights and freedoms of the individual enshrined in the Constitution of the Russian Federation, and thus his human dignity would not be detracted.[17]

In addition to providing a minimum level of life (protection from poverty) the pension pursues another goal – compensation of income (compensation for lost earnings).[18] In this regard, the permissible level of social pension is defined by the relation between pension and earnings of the insured citizen which is otherwise known as the "replacement rate". Calculation of the replacement rate as the ratio of a typical pension recipient and his previous income is defined by ILO Convention No. 102 'Minimum Standards of Social Security' adopted in 1952 and the European Code of Social Security adopted in 1964.

According to ILO Convention No. 102 'Minimum Standards of Social Security,' the replacement rate for typical recipients is set at a level of 40% with thirty years of contribution or employment[19], and the European Code of Social Security - 45%.[20] So these international acts work as international standards defining an adequate, satisfactory and fair level of pension.[21]

Only the European Social Charter (revised), with commitments in the respect of provisions of pt. 12 s. 1, in which the parties undertake to establish or maintain a system of social security was ratified by the Russian Federation from the list of international acts establishing standards for social security. At the same time norms 2 and 3 of pt. 12 of the European Social Charter for the maintenance of the social security system at a satisfactory level and its continuous improvement'were not taken into the ratification process.

Ratification of the European Code of Social Security, ILO Convention No. 102 "Minimum Standards of Social Security" is constrained by the inability to secure the international set replacement rate - 40%. In late 2009, the solidarity value in the replacement rate average old-age pension in Russia was 35.6%. As a result of the

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[16] GR 1662-r 2008 (RF) 'On Approval of the Concept of long-term socio-economic development of the Russian Federation for the period up to 2020'.

[17] The Constitutional Court of the Russian Federation 17-O 2005 'On the complaint of a citizen Enborisova P.F. a violation of her constitutional rights s. 8 art. 14 of the Federal Law "On Pensions in the Russian Federation'.

[18] Gruat J.-V. Principles and the adequacy of social security, *Social security: Principles and pragmatism* (2011) 12.

[19] ILO Convention 102 "Minimum Standards of Social Security"(1952).

[20] European Code of Social Security (1964).

[21] See for details: Zakharov M., 'International standards and the Russian pension system' (2012) 10 Journal of Russian law.

pension reform carried out in 2010 the replacement rate increased to 38.4%, but in later years its decline will resume and by 2050 it may reach 22%.[22]

In addition, important reasons for a negative impact on reducing pensions are demographic problems. The necessity of carrying out pension reform both in Russia and in developed countries of the world community is caused by the demographic crisis, which increases the pension burden on the working population and poses a serious threat to the financial security of public pension liabilities. In this regard, optimisation of the pension system is due to its conversion to a mandatory insurance system. A system of compulsory pension insurance should be adequate for modern economic development, consider both macroeconomic factors (structure of employment, inflation, wages, etc.) and demographic factors (life expectancy, increase in the number of pensioners and the decline in employment, etc.) and at the same time comply with international standards.

From the foregoing it can easily be seen that in the Russian Federation a paradoxical situation has formed. The minimum wage established by the federal law is not only below the subsistence minimum, but is also below the minimum social security of pensioners. The growth of pensions in the country and their indexing, even during the financial crisis, not only outpaced the growth of the minimum, but also the average salary in the country. However, the growth of pensions didn't increase the replacement rate for lost earnings and the ratio of the magnitude of the average pension to the subsistence level. On the one hand the attention paid to raising the minimum income of the most vulnerable unemployed people shows a certain priority of state social policy. But, on the other hand, the increase of incomes of the unemployed part of population which is disproportionate to the opportunities of the real economy, outstripping revenue growth of the working population, is a powerful stimulus for the growth of inflation and other negative economic phenomena. That is why the law-making process in the social sphere should be based on strong economic studies and forecasts.

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THE RIGHT TO TAKE PART IN THE CONDUCT OF PUBLIC AFFAIRS: A FOCUS ON INTERNATIONAL LAW AND CONSTITUTIONAL REGULATION IN RUSSIA

Mariya Riekkinen

From the perspective of international human rights standards of public participation, this article explores the constitutional law genesis of the right to take part "in managing state affairs" in Russia. We start our analysis with a brief outlook of the right to public participation in Russia. Then we continue studying the sources of international human rights law guaranteeing a set of participatory rights and to which the Russian Federation is a state party. Finally, the reader is provided with an analysis of the constitutional genesis of participatory rights in Russia: from the RSFSR Constitution of 1918 until the 1993 Constitution of the Russian Federation. Tentative outcomes are summarised in the concluding section.

Introduction

The process of "good administration" rests on the principles of transparency, responsibility, accountability, sensitivity for the needs and aspirations of the people, and public participation in government.[1] This article deals with the last principle in this least, namely with the principle of public participation in government. The issues of public participation are contemplated by many fundamental theories of law and democracy. Among the complexity of such theories, a theory of "Deliberative democracy," conceived by J. Habermas, would perhaps be the most relevant for legal scholarship. The Habermasian theory looks at the issues of good governance through the prism of the relationships between the steering centre of the state and civil society.[2] Public participation is understood by Habermas as the deliberation of the most contested political issues with a view to finding a compromise solution. As for the Russian constitutional scholarship, the studies of citizen involvement in decision-making are associated first of all with the name of S.A. Avakian. In his numerous works, Avakian looks at important problems related to public participation such as ensuring legal guarantees for public opinion, the mechanism of civil protests, participation in elections and in the so-called "consultative modes of democracy", i.e. meetings, demonstrations, petitions, etc.[3]

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[1] Such an understanding of the process of "good governance" was proposed by the former UN Commission on Human Rights in its Resolution 2000/64. UN Commission on Human Rights, *Commission on Human Rights resolution. 2000/64 The role of good governance in the promotion of human rights*, 27 April 2000, E/CN.4/RES/2000/64, reproduced on the official web-page of the UN High Commissioner for Human Rights, available at: http://www.refworld.org/docid/3b00f28414.html.

[2] See, e.g. Jurgen Habermas, *Between Facts and Norms* (The MIT Press, Cambridge, Massachusetts, MA, 1996), Jurgen Habermas, *Legitimation Crisis* (Polity Press, Cambridge, 1989).

[3] See e.g. S.A. Avakian, *Politicheskij plyuralizm i obshchestvennye ob"edinaniya v Rossijskoj*

Let us now consider a constitutional law genesis of the right to take part in managing state affairs in Russia, in accordance with universally recognised standards of political rights.

1. International Legal Obligations of the Russian Federation to Ensure the Right to Participation

As a fundamental political right, public participation is guaranteed by art. 25 of the International Covenant on Civil and Political Rights (the ICCPR). This article imposes a legal obligation on state parties to guarantee both the right and *the opportunity* to practice participation in the conduct of public affairs. A very similar right – the right to take part "in managing state affairs" is guaranteed to Russian citizens by art. 32 of the 1993 Constitution of the Russian Federation (the 1993 RF Constitution). The Constitutional Court of the Russian Federation emphasises that public participation is not only an individual right but also an integral part of the electoral process, which belongs to every working democracy.[4] At least formally, such an interpretation is in line with the guidelines of the UN Human Rights Committee, according to which art. 25 of the ICCPR "lies at the core of democratic government based on the consent of the people".[5] The scope of the above-mentioned constitutional article 32 differs from Article 25 of the ICCPR. The ICCPR guarantees the right and opportunity to engage in the exercise of 'legislative, executive and administrative powers'.[6] The corresponding provision in the 1993 Russian Constitution also extends to administering justice. Participation in administering justice can be implemented, for instance, through the institution of the jury in criminal trials. Furthermore, unlike the practices outlined by the ICCPR, the 1993 Russian Constitution is silent about the opportunity to participate in political life. Opportunity means not only free consensual participation, but also the presence of an effective means of enjoying this right. True, the non-coercive nature of public participation was reaffirmed by the Constitutional Court of the Russian Federation when it declared that participation in the conduct of state affairs does not belong to the duties of

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Federatsii (in Russian) (Moscow: Rossijskij yuridicheskij izdatel'skij dom, 1996), S.A. Avakian. *Publichnaya vlast': konstitutsionno-pravovye aspekty* (in Russian), in: 2 Vestnik Tyumenskogo gosudarstvennogo universiteta (2009), pp. 12-21; S.A. Avakian, *Demokratiya protestenykh otnoshenij: konstitutsionno-pravovoe izmerenie* (in Russian), in 1 Konstitutsionnoe i munitsipal'noe pravo (2012), pp. 3-17.

4 The Constitutional Court of the Russian Federation, referring to the rights under article 32 of the Constitution, proclaimed that these rights are: 'the embodiment of both the personal interests of every voter and the public interest resulting in objective outcomes of elections and consequently in the formation of public authorities'. RF, the Constitution Court, *Postanovlenie* of 29 November 2004, No. 17-P, '*Po delu o proverke konstitutsionnosti abzatsa pervogo punkta 4 stat'i 64 Zakona Leningradskoi Oblasti "O vyborakh deputatov predstavitelnykh organov mestnogo samoupravleniia v Leningradskoi Oblasti" v sviazi s zhaloboi grazhdan V.I. Gnezdilova i S.V. Pashigorova*', in *SZ RF,* 6 December, 2004, No. 49, item 4948.

5 UN Human Rights Committee, General Comment 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/ 1/Rev.6, at 168 (2003), reproduced at: http://www.un.org/ru/documents, par. 1.

6 *Ibid*., par. 5.

citizenship.[7] Russian law, nonetheless, does not specify any obligation to provide real chances to engage in public participation. One request concerning opportunities for public participation, addressed by plaintiff Osipov to the Constitutional Court, has not been ruled upon. Mr. Osipov claimed in the court that adopting federal and regional statutes without consulting citizens violates the rights guaranteed by article 32 of the Constitution. Without going into details, the Constitutional Court considered the complaint of Mr. Osipov formally inadmissible. Thus, the Russian Constitutional Court avoids confronting the issue of effective opportunities to engage in public participation.[8]

The implementation mechanism of the ICCPR is fortified with the control mechanism which is put in motion via the UN Human Rights Committee. This Committee monitors the implementation of the provisions of the Covenant by virtue of considering state periodic reports and dealing with the individual communications regarding possible violations of the rights, set forth by the Covenant. In order to acknowledge the jurisdiction of the Committee to consider individual communications, the state party to the ISSPR ratifies the Optional Protocol to the Covenant.[9] Such a protocol on the compulsory jurisdiction of the Human Rights Committee concerning dealing with individual communications entered into force for the Soviet Union on 1 January 1992.[10]

In order to implement those legal obligations which had been undertaken by Russia within the frames of the ICCPR, the Russian Federation should primarily introduce legal measures of implementing civil and political rights.[11] Of course, the measures of compliance with the provisions of this Covenant should go beyond the threshold of introducing new legislation and providing the means of vindicating the violated rights.[12] Nonetheless, in this article we consider only constitutional law foundations of implementing the right to take part in the conduct of public affairs in

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[7] RF, the Constitutional Court, *Postanovlenie* of 11 June 2006, No. 10-P, '*Po delu o proverke konstitutsionnosti polozhenii punkta i stat'i 64, punkta 11 stat'i 32, punktov 8 b 9 stat'i 35, punktov 2 i 3 stat'i 59 Federal'nogo Zakona "Ob osnovnykh garantiiakh izbiratel'nyh prav i prava na uchastie v referendume grazhdan Rossiiskoi Federatsii" v sviazi s zaprosami Verkhovnogo Suda Rossiiskoi Federatsii i Tul'skogo Oblastnogo suda'*, in *SZ RF*, 24 June, 2002, No. 25, item 2515.

[8] As far as the applicant had asked to review the constitutionality of the provisions of the basic law, his application was found inadmissible. RF, Constitutional Court, *Opredelenie* '*Ob otkaze v priniiatii k rassmotreniiu zhaloby grazhdanina Osipova Ivana Anatol'evitcha na narushenie ego konstitutsionnykh prav zakonodatelstvom Rossiiskoi Federatsii*', 21 December, 2004, No. 414-O. The document has not as yet been officially published. Derived from the Russian law database '*ConsultantPlu*s', http//www.consultant.ru (accessed 7 May, 2012).

[9] Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9, reproduced on the official web-page of the UN High Commissioner for Human Rights, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx.

[10] USSR, the Supreme Council, *Postanovlenie* of 05.07.1991 N 2305-1 CCCP, reproduced in the official Russian law database "Consultant," available at: http://www.consultant.ru.

[11] UN Human Rights Committee, *General Comment No. 31*, *Nature of the General Legal Obligation on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), reproduced at: http://www2.ohchr.org/english/bodies/hrc/comments htm, par. 6.

[12] *Ibid*., par. 15.

Russia. Our analysis of the constitutional law genesis of this right is conducted with due consideration of the opinions of the UN Human Rights Committee. Such opinions were expressed in the General Comments of this Committee on Russia. The Russian Federation has submitted six periodic reports to the Committee.

The right to take part in the conduct of public affairs in Russian constitutions.[13]

Constitutional law regulation: before Russia's accession to the ICCPR

The first Russian socialist Constitution of 1918 entrusted the Soviets - mixed-up legislative and executive organs, represented by the privileged social class, i.e. the proletariat, with all the resources of state power. The 1918 RSFSR Constitution guaranteed, however, participatory-related rights and freedoms: freedom of religious and antireligious propaganda (art. 13), freedom of expression (art. 14), freedom of assembly (art. 15), the right to organise, presupposing that workers and peasants receive administrative, financial, and other types of assistance from the state to implement this freedom (art. 16) and access to knowledge, which implied that the state provides complete and free education for workers and the poorest peasants (art. 17).

The 1924 USSR Constitution, which represented the legal basis for the newly established Soviet Union, was aimed primarily at constructing a new national state. It basically concentrated on the division of powers between the central, regional, and local Soviets. Hence, we cannot find any mention of participatory rights, either in the text of this document or in the text of the 1925 Constitution of the RSFSR, which was for the time being one of the republics, constituting the Soviet Union.

The 1936 USSR Constitution again reiterated a set of participatory rights: the right to education (art. 121), freedom of conscience and religion, including the right to anti-religious propaganda (art. 124), the rights to freedom of expression, freedom of the media, freedom of assembly and meetings, freedom of marches and demonstrations (art. 125), as well as the right to form trade unions, cooperatives, youth and sport associations, as well as cultural, technical, and scientific communities. That constitution emphasised the leading role of the Communist Party by promulgating that the most active workers, peasants, and intellectuals should be members of the Communist Party (art. 126). Similar provisions can be found in the 1937 RSFSR Constitution. In the mid 1950s Soviet power and propaganda, at least officially, emphasised the modes in which Soviet citizens could take part in public affairs. For instance, Pizhnikov remarks that a nation-wide discussion of draft legislation became a prevalent practice during the period of 1956-1965.[14] Moreover, workers' conferences were also common throughout the Soviet Union. Such conferences were initiated by the central organs of the administration or by public associations. The following data, provided by Pizhnikov, reveals the character and scale of such practices. For example, during 1953-1960 there were 80 all-Union

[13] The texts of all these constitutions (in Russian) is available on the Russian law database "Garant", available at: http://constitution.garant.ru.

[14] A.V. Pyzhnikov, *Khrushchyovskaya "ottepel"* (in Russian) (Moscow: Olma-Press, 2002), p. 137.

conferences of workers entailing altogether more than 100,000 individuals. The Soviet republics organised 80 conferences in 1958, and 125 such events in 1959.[15]

2.2 Constitutional law regulation of the right to take part in the conduct of public affairs after Russia's accession to the ICCPR

The 1977 USSR Constitution appears to be the most thorough with respect to participatory guarantees. Perhaps this is owing to the fact that the Soviet Union ratified the ICCPR in 1973, i.e. not long before the constitutional changes of the late 1970s. Hence, the 1977 USSR Constitution promulgated the enhanced participation of citizens in state affairs, the constant consideration of public opinion, the strengthening of control by citizens over state authorities, the enhancement of the activity of voluntary associations (art. 9). All citizens were guaranteed the right to take part in decision-making regarding public affairs (art. 9). The right to discuss laws and political decisions became officially guaranteed (art. 5, art. 48). The 1977 Constitution set forth a solid foundation for including labour collectives in state affairs. This document, defining itself as a socialist constitution, of course, emphasised the role of workers, not citizens in general, in the management of public affairs. Art. 8 of the 1977 Soviet Constitution stipulated that labour collectives take part in discussing public affairs. As for "state affairs", i.e. those issues referring directly to state management and administration, art. 8 mentioned the participation in planning the economy by virtue of engaging in planning the production processes. Labour collectives were also entitled to engage in issues such as discussing and resolving the issues of managing institutions and enterprises, improving the living and labour conditions of workers, educating potential employees, and managing the finances used in developing the production process, as well as social and cultural events or financial incentives to employees. Art. 8 stipulated that the labour collectives should take part in discussing and managing issues such as social development, enhancing competition regarding the best performance at work among the employees, popularising new work methods, upholding the rules of behaviour at working places, educating employees in the spirit of the main communist principles, and developing political culture, consciousness, and professional qualifications. This constitution specifically mentioned the right of trade unions, "All-Union Lenin Communist Youth Union", cooperatives, and other public associations to manage affairs and to make decisions about political, economic, and socio-cultural issues (art. 7). Consonant with the standard participatory entitlements, such as freedom of expression (art. 50), the right to association (art. 51) or the freedom of conscience and religion (art. 52), the 1977 Soviet Union constitution guaranteed other participatory rights. For example, the right to a nation-wide discussion of the most important issues of the state (art. 5), the rights of citizens to exert control over state affairs and the right to take part in the sessions of state organs (art. 48), the right to submit proposals concerning the improvement of state organs, and the right to criticise their work (art. 49). Almost identical provisions were included in the 1978 RSFSR Constitution. After the

[15] *Ibid*., p. 138.

adoption of the 1978 RSFSR Constitution various organs of public administration composed of the representatives of ordinary citizens became widely spread. Among such organs we can mention e.g. public divisions, groups, subdivisions of the councils, commissions, and inspections under the aegis of public authorities, coordinating councils dealing with educational work with youth or with professional orientation of students.[16]

In 1978 when considering the firsts Periodic report of the USSR - in the part of implementing art. 25 of the ICCPR - the UN Human Rights Committee requested more information from the Soviet representatives on the role of people in the formulation of laws and the nature of the system of people's control.[17] People's control committees represented one of the avenues for participation in the conduct of public affairs during the Soviet regime. Ordinary citizens were empowered to carry out public functions while belonging to these special supervising bodies, which were constitutive parts of the state. We can still find mention of such intermediate organs in the reports of the UN Human Rights Committee. For example, in 1985 the Republic of Belarus, which during those times was one of the Soviet republics, clarified what the "people's control committees" are for the Committee.[18] Such committees were invested with broad control functions in various areas, e.g. they exercised control over implementing the state economy plans and supervised the observance of labour law. Moreover, those committees elaborated the schemes of optimising public expenses, following all possible cases involving the misuse of public resources.[19] The 1965 All-union statute on the organs of people's control established the principles of their activity.[20] The decision of the socialist leaders to create a system of citizens' direct control over public administration was ideologically-based, anchored in the belief that the right to control the planned economy belong to the citizenry.

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[16] See for example, Ts.A. Yampol'skaya. *Obshchestvennye organizatsii i razvitie sovetskoj sotsialisticheskij gosudarstvennosti* (in Russian) (Moscow: Yuridicheskaya literatura, 1965), pp. 80-89. G.V. Barabashev, K.F. Sheremet, *Sovetskoe stroitel'stvo* (in Russian) (Moscow: yuridicheskaya literatura, 1981), pp. 560-565.

[17] UN Human Rights Committee, Concluding observations on the USSR. CCPR, A/33/40 (1978), par. 430.

[18] For example, the Republic of Belarus clarified to the Committee that the functions of these organs were to monitor the implementation of economic and social development plans, to ensure the economic use of human and material resources, to combat waste, to promote and encourage the scientific organisation of work and to supervise the progress of work in economic enterprises. In the case of persons guilty of a violation or breach of the law, the organs of people's control endeavoured to encourage criticism and to discuss the errors of their ways with such persons. Any material on misappropriation by officials under investigation by the organs of people's control was sent to the Procurator's Office for a decision on whether criminal proceedings should be initiated.
The members of the organs of people's control were elected for periods of two years by general assemblies of workers. See: UN Human Rights Committee, Concluding Observations on Belarus, UN Doc. CCPR A/40/40 (1985), available at: http://www.bayefsky.com, last retrieved 20 February, 2013, par. 375.

[19] On People's control committees see, for example: S.N. Ikonnikov & A.M. Sinitsyn, *Deyatel'nost' organov narodnogo kontrolya Moskvy: 1965-1977* (in Russian) (Moscow: *Nauka*, 1984); Makarov, *supra* note 108; V.I. Turovtsev, *Narodyj kontrol' v sotsialisticheskom obshchestve* (in Russian) (Moscow: *Politizdat*, 1974).

[20] USSR, *Zakon* of 9 December 1965 No. 4224-VI *"Ob organakh Narodnogo kontrolya v SSSR"*, *Vedomosti VS SSSR*, 1965, No. 49 item 718.

In 1985 President Gorbachyov introduced the policy of "*Glasnost',"* which implied a significant relaxation of censorship in the mass-media, the introduction of transparency in public administration, and the possibility of bringing court action against executive organs. However, the period of *post-perestroika* brought a backlash with respect to the participatory rights of Russian citizens. Although the Soviet Union acknowledged the jurisdiction of the UN Human Rights Committee in 1991, the implementation of participatory rights fell short of being effective. The era of *post-perestroika,* which started with the collapse of the Soviet Union in 1991, is known for its disregard for the main avenues of participation.[21] Nonetheless, in 1985 when dealing with the Second periodic report of the Soviet Union the UN Human Rights Committee acknowledged the progress achieved since the submission of the initial report in implementing the rights set forth by the Covenant. Nonetheless, the Committee requested a percentage of Soviet citizens successful in reaching high office who were not members of the Communist Party.[22] In other words, the Committee remained concerned with the requirement of membership in the Soviet Communist party as one of the compulsory terms for access to public office.

The period of 1988–1991 is also significant for the development of substantive participatory rights, as it characterised the further development of the culture of political associations and the rise of multi-partyism. Challenging the leading communist ideology, individuals started to establish informal political associations. De jure, these associations were non-political clubs or citizen movements. However, in practice, they pursued an oppositionist political agenda. The ideas of abolishing art. 6 of the 1977 Soviet Constitution on the leading role of the Communist Party also spilled over to the official level, having been discussed during the First Session of the People's Deputies of the Soviet Union in 1989. In 1991 Yeltsin issued several decrees, abolishing the activities of the Communist Party.[23] At present, art. 13 of the 1993 Russian Constitution guarantees ideological pluralism and multi-partyism. Nevertheless, in 1990 when considering the Third periodic report of the USSR, the UN Human Rights Committee was concerned with the lack of effective machinery for the full realisation of civil and political rights.[24]

In 1993 the present Constitution of the Russian Federation was adopted. The 1993 Constitution of the Russian Federation mentions the right to take part in public affairs (art. 32) as well as an array of participatory entitlements, e.g. freedom of conscience. and religion (art. 27), freedom of ideas and speech, freedom of mass communication, the right to freely look for, receive, transmit, produce and distribute

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[21] On the post-perestroika period see: S.E. Kurginyan, B.R. Autenshlius, P.S. Goncharov, Yu.V. Gromyko, I.Yu. Sundiev & V.S. Ovchinskii, Postperestroika: kontseptualnaya model' razvitiya nashego obshchestva, politicheskikh partij i obshchestvennykh organizatsij (Moscow: Politizdat, 1990).

[22] UN Human Rights Committee, Concluding observations on the USSR. CCPR, A/40/40 (1985), par. 267.

[23] On these decrees see, for example, Michiel Elst, *Copyright, Freedom of Speech, and Cultural Policy in the Russian Federation* (Leiden: Martinus Nijhoff Publishers, 2004), 124.

[24] UN Human Rights Committee, Concluding observations on the USSR. CCPR, A/45/40 (1990), par. 74.

information in any legal way (art. 29), the right to association, including the right to set up trade unions (art. 30), the right to assemble peacefully, to hold rallies, meetings and demonstrations, marches and pickets (art. 31), the right to address personally, as well as to submit individual and collective petitions to state organs and local self-government bodies (art. 33), and the right to education (art. 43). Commenting on the Fourth periodic report of the Russian Federation in 1995, which had been submitted after the adoption of the 1993 RF Constitution, the Human Rights Committee considered that chapter 2 of the Constitution, which enumerates the rights and liberties of the individuals, conforms to many of the basic rights provided under the Covenant.[25] However, it was pointed out that "much remains to be done to strengthen democratic institutions and respect for the rule of law".[26] Although there were clear failures in public administration in those days and the law was not always implemented by the authorities in good faith, it is impossible to disregard the fact that during the Yeltsin administration, the 1993 Russian Constitution as well as important federal legislation were introduced, representing a legal foundation for participatory opportunities, which are still in progress. Considering the Fifth periodic report of the Russian Federation in 2003 with respect to the rights under art. 25 of the ICCPR, the Committee strongly recommended Russia "to restore the rule of law and political legitimacy in the Republic of Chechnya".[27] Finally, dealing with the Sixth periodic report of Russia in 2009, the Committee was concerned about the reports of excessive use of force by the police during demonstrations, in particular in the context of the 2007 Duma elections and the 2008 presidential elections, with the possibility of criminal liability for defamation and with the excessively wide legal definition of "extremism".[28] Perhaps, it was the result of the diplomatic warning of the Committee or perhaps this amendment came autonomously, however, in 2011 defamation in the form of an insult was decriminalised in Russia.[29]

Conclusions

Although the 1948 Universal Declaration of Human Rights proclaims in art. 21 (3) that "the will of the people shall be the basis of the authority of government," the Soviet Union only included the provision about the people as a source of state power in the Soviet Constitution of 1977 (accordingly in the 1978 RSFSR Constitution). Respectively, the right of individuals to take part in the conduct of public affairs first became constitutionally guaranteed in the Soviet Union in 1977, i.e. after the USSR ratified the ICCPR.

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[25] *Ibid*., 367.

[26] UN Human Rights Committee, Concluding observations on the Russian Federation, A/50/40 (1995), par. 364.

[27] UN Human Rights Committee, Concluding observations on the Russian Federation, A/CO/79/RUS (2003), par. 23.

[28] UN Human Rights Committee, Concluding observations on the Russian Federation, A/C/RUS/CO/6 (2009).

[29] RF, Federal'nyj zakon of 07.12.2011 No. 420-FZ (the most recent amendment of 28.12.2013) "*O vnesenii izmenenij v Ugolovnyj kodeks Rossijskoj Federatsii i otdel'nye zakonodatel'nye akty Rossijskoj Federatsii*", in SZ RF, 12.12.2011, No. 50 item 7362.

Dealing with the compliance by Russia with its legal obligations to implement the right to public participation according to art. 25 of the ICCPR, the UN Human Rights Committee has sometimes remained concerned with the situation around this right in Russia. Nonetheless, it is a positive finding that Russia is gradually introducing legal amendments, following the recommendations of the Committee. This proves that the legal system of Russia is sensitive to the international standards of political rights.

LEGAL MEANS OF PROTECTING RUSSIAN SOCIETY FROM THREATS IN THE RELIGIOUS SPHERE: CONSTITUTIONAL FOUNDATIONS

Ivan Tarasevich

Introduction

The significance of the religious life of society is often underestimated. However, events taking place in the past decades in Russia and abroad demonstrate how religious beliefs prevalent in a particular society can have a global impact in the contemporary world.

In the modern world we are witnessing two major tendencies: on the one hand, the process of secularisation, on the other hand, the rise in religious consciousness and growing religious confrontation in the world, which, according to many analysts, can lead to serious threats to national security provision systems all over the world, and first of all, in Russia.[1] Thus, providing religious security in Russia seems of utmost importance.

According to Article 10 of the Russian Constitution (adopted on 12 December 1993 by popular vote),[2] the state power in Russia is based on the separation of powers into legislative, executive and judicial. In turn, Part 1 of Article 46 of the Russian Constitution contains a guarantee to everyone of judicial protection of his/her rights and freedoms. Threats in the religious sphere affect a wide range of human rights of utmost importance. Therefore, the role of the judiciary in ensuring religious security occupies a special place. Courts have the possibility to give complete and thorough consideration of cases which deal with religious security, and it is up to the courts to provide full and effective protection of individuals and citizens in this particular field.

We define religious security in Russia as a condition necessary for the protection of individuals, society and the state from internal and external threats

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[1] Zorkin V.D. Ob ugrozah konstitutsionnomu stroyu v XXI veke i neobhodimosti provedeniya pravovoj reform v Rossii [On the Threats to the Constitutional System in the XXI Century and the Necessity to Undertake Legal Reform in Russia] // Zhurnal Rosskijskogo Prava [Journal of Russian Law]. 2004. No. 6. P. 7; Shusteeva A.I. Institutsionalno-pravovoe obespechenie gosudarstvenno-konfessionalnoy bezopasnosti v postsovetskoj Rossii [Institutional and Legal Implementation of State-Confessional Security in Post-Soviet Russia]: Post-Doctoral Thesis (Law), 23.00.02. Rostov-on-Don, 2008. 165 P.; Amirokova R.A. Politicheskij ekstremism v sovremennom politicheskom processe Rossii [Political Extremism in the Contemporary Political Process in Russia]. PhD thesis (23.00.02 — political institutions, ethno-political conflict studies, national and political processes and technologies). Cherkessk, 2006. URL: http://www. scholar.ru/speciality.php?page=36&spec_id=91 (last accessed: 1.02.13).

[2] Sobr.Zakonod.RF. 2009. No. 4. Art. 445.

which emerge and exist in the religious sphere; a condition which would ensure stable constitutional development of the Russian Federation.[3]

We would like to point out several threats to religious security in Russia:[4]

A) Religious extremism, which constitutes a threat to an individual and to the state as such;

B) The threat of losing religious traditions of the Russian people as a result of globalisation, which constitutes a threat to an individual and to the state;

C) Activities of non-traditional destructive religious groups, domestic and foreign, which constitute a threat to the state as a whole and to an individual;

D) Making wrong foreign policy decisions without considering the factor of religion;

E) Proselytising as a threat to an individual;

F) Religious crimes;

G) Endogenous threats to an individual in the religious sphere.

It is not possible to find protection in court from all the enumerated threats. Russian laws and legal mechanisms do not provide for protection against some of these threats, such as proselytising, religious crimes or making wrong foreign policy decisions without taking into account the factor of religion. However, we should not underestimate the court's role in the protection against most threats which emerge in the religious sphere.

Besides, in the process of the provision of religious security, it is necessary to take into account the experience of foreign countries, in particular, post-Soviet countries. Former USSR republics have largely similar legislative frameworks, and therefore, many legal norms of one CIS state can be applicable in another state. Thus, we believe that the Constitution of the Republic of Estonia (adopted on 28.06.1992 by referendum)[5] contains norms which largely contribute to the provision of religious security. We take a closer look at these Estonian legal norms in the following parts of the article. We believe that similar constitutional norms could be applicable in Russia. Later we examine to what extent the judiciary in Russia provides protection against the above-mentioned threats in the religious sphere.

The Threat of Religious Extremism

An unquestionable threat to security in the religious sphere is religious extremism, which constitutes a threat to individuals and to the Russian state as a whole. The role of courts in the process of combating religious extremism cannot be overestimated. First of all, it is up to the court to define particular religious groups as extremist.

Besides, the courts' work is crucial when it comes to the classification of information materials distributed by religious groups and individuals as extremist. Thus, according to part 2 Article 13 of the Federal Law "On Countering Extremist

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[3] Tarasevich I.A. Religioznaya bezopasnost' Rossijskoj Federatsii [Religious Security of the Russian Federation]. Tyumen, 2013. p. 288.

[4] Ibid. Ps. 31, 50.

[5] Constitution of the Republic of Estonia (adopted at a referendum on 28.06.1992). URL: http://www.worldconstitutions.ru/archives/105 (last accessed: 25.01.14).

Activities" of 25 July, 2002 No. 114-FL (as amended on 02.07.2013)[6] information materials can be classified as extremist exclusively by a federal court**.**

The Threat of Losing Religious Traditions of the Russian People

As far as the threat of losing the religious traditions of Russian people is concerned, it must be noted that in recent years we are witnessing a tendency when Russian courts make decisions in specific cases taking into account the interests in the religious sphere of the majority of the Russian population. Thus, on 11 October 2002 Chekhov City Court of Moscow Region, after examining a complaint made by a religious group of Evangelical Christians "The Grace of Christ", which was to do with the refusal on the part of the City Administration of Chekhov (Moscow Region) to give permission to hold a public worship, decided to dismiss the applicant's demands. The Court came to the conclusion that the refusal under consideration was also within the boundaries of the law because "The Church of Evangelical Christians professes a religion which differs from the religion accepted by the majority of the local people…"[7] The Court also noted that the actions of Chekhov City Administration listed in this complaint did not violate the rights of the Church of Evangelical Christians "Grace of Christ" because they did not pose any impediment to public worship which could be held inside cult buildings and other buildings suitable for this purpose."

The fact of taking into account religious traditions of the majority of the Russian population can be welcomed, since it is a significant factor in the provision and strengthening of the religious security of Russian society.

Activities of non-traditional for Russian society destructive religious groups

Another threat to religious security is to do with the activities of religious groups (domestic and foreign) which are non-traditional for Russian society, and which constitute a threat to the state as a whole and to individuals.

In the field of religious security it is only possible to prove human rights violations by a religious group in court. Establishing the evidence base is quite difficult and depends on the peculiarities of the rights that are violated. We must note if there is at least one basis for elimination or prohibition of the activities of religious groups mentioned in Part 2 of Article 14 of the Federal Law "On the Freedom of Consciousness and Religious Groups" from 26 September 1997 No. 125-FL (as amended on 02.07.2013)[8], we can talk of the violation by such groups of human rights guaranteed in the Constitution. This can include a violation of the right to liberty, security of person, property, family, human dignity, health and life. The court plays the key role in the determination of such factors which must undergo complex analysis. It is also important to establish the cause-effect relationship between the activities of a given religious group and the harmful consequences which followed, which can only be effectively proven in a course of judicial proceedings.

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[6] Sobr.Zakonod.RF. 2002. No. 30. Art. 3031.

[7] Barankevich v. Russian Federation, 26.07.2007 // ECHR Bulletin. Russian Edition. 2008. No. 10. P. 128 - 136.

[8] Sobr.Zakonod.RF. 1997. No. 39. Article 4465.

It is important to emphasise that frequently representatives of a religious group by using their right to religious freedom guaranteed to everyone, violate not only the human right of choosing a particular religion but also rights such as personal safety, the right to information, privacy, etc. Violation of these rights is indirect, through violation of the right to freedom of religion, which makes the question of judicial protection of freedom of religion especially important. In such a situation a whole range of constitutional values and guarantees is involved, and cases of their violation must be addressed in court.

It is extremely difficult to prove a violation of a constitutional right to family by religious destructive groups non-traditional for Russian society in court. Sometimes people are forced to denounce their family. The result of such a negative influence can be a de facto or de jure dissolution of a family, conflicts between family members and destruction of a friendly atmosphere within a family. Marriage and divorce are voluntary actions. The Russian Family Code contains provisions for divorce, but does not deal with motives for divorce. However, dissolution of a family is a fact, and instigating family dissolution is a form of pressure, depriving an individual of his/her voluntary will. One of the methods to establish the fact of pressure upon an individual to denounce his/her family is examining the doctrine of a given religious group. The results of such analysis can become a basis for closing down or prohibiting the activities of the given religious group. Dissolution of family links was proven and became one of the reasons for closing down and prohibiting the activities of the "Religious Group of Jehovah Witnesses in Moscow", which is confirmed by the court decision (Golovinsky Court of the Northern Administrative District of Moscow, 26 March 2004).[9]

Thus, we can state the fact that some destructive religious groups non-traditional for the Russian society misuse their right to the freedom of conscience and religion guaranteed by the state in order to exercise psychological and physical pressure, which leads to human rights violations. It is only possible to uncover such cases of misuse by means of a relevant judicial process.

Of special interest for our research is the Decree of the Russian Constitutional Court from 05.12.2012 No. 30-P "On Checking Whether Point 5 Article 16 of the Federal Law "On the Freedom of Consciousness and Religious Groups" is in line with the Constitution, and Point 5 Article 19 of the Law of the Republic of Tatarstan "On the Freedom of Consciousness and Religious Groups" due to a complaint by Human Rights Commissioner in the Russian Federation"[10]. In this Decree the Constitutional Court of Russia confirmed that Point 5 of Article 16 of the Federal Law "On the Freedom of Conscience and

[9] Jehovah's Witnesses of Moscow and others v. Russian Federation, 10.06.2010 (No. 302/02). The case involves the right to freedom of religion, freedom of speech, freedom of association. The Court found breaches of Articles 9, 11, 14, Article 6 para. 1, European Convention on Human Rights// Rossijskaja Khronika Evropejskogo Suda [Russian Chronicle of the European Court of Human Rights]. 2011. No. 2.

[10] Sobr.Zakonod.RF. 2012. No. 51. Art. 7324.

Religious Organisations" does not presuppose consideration of differences in those worships and religious meetings which might require measures from public authorities to ensure public order and those which might not, and thus contradict the Constitution of the Russian Federation, Articles 17 (Part 3), Articles 18, 19 (Parts 1 and 2), Article 28, 31 and 55 (Part 3).

In other words, the Constitutional Court of the Russian Federation basically confirms the factual inequality of religious groups, some of which might constitute a threat to the society due to their rituals, and some groups which do not. Here we are faced with a rather difficult theoretical problem of distinguishing between the two. We believe, in order to sort this problem out, it could be appropriate to differentiate between religious groups which are traditional for society and those which are non-traditional, and enhance the legal personality of the former. In particular, it could be appropriate to simplify the requirements for public worship ceremonies and events for traditional groups, which would be spelled out in appropriate legal norms on traditional religions.

Some religious groups represent a serious potential threat to the society. Such groups must notify the authorities of any public events they plan to hold. This measure is absolutely justified - the state cannot be sure of the trustworthiness of religious organisations which have broken the law before, or whose ideology has been the basis of human rights violations. From this perspective, it seems indispensable to analyse case-law of foreign countries, since it is often the way to find information about possible threats to the society posed by a particular religious group. Special attention must be paid to religious groups which are relatively recent in Russia, which emerged in the Russian territory a few decades ago.

In considering the question of giving some religious groups the status of traditional, we must note that the utmost priority in this regard must be given to the Russian Orthodox Church (Moscow Patriarchy). As far as this section of the article is concerned, we must emphasise that the majority of public events held by the Russian Orthodox Church (with some exceptions, for example, organising swimming on the Day of Epiphany), do not seem to require notification of the relevant authorities. Russian Orthodox Church, in its more than a thousand years' history, has proven that its rituals and public events are absolutely harmless to everyone.

Division of subjects of the Russian Federation on the principle of nationality as a way of developing threats to religious security

One of the possible threats to security in the religious sphere is the federal form of the state in Russia based on the nationality principle. Such a model of state organisation poses a threat in the way of possible self-identification of various nations with a particular religion, a phenomenon which is accelerating in Russia, thus leading to the strengthening of separatist tendencies.

Ethno-religious separatism often becomes a foundation for the development of religious extremism as one of the forms of extremism as such. As a rule,

representatives of radical nationalist and religious organisations resort to religious extremism in the pursuit of their interests.[11]

To a great extent, it depends on the Constitutional Court of the Russian Federation to control and neutralise this factor which threatens religious security in Russia. The Constitutional Court of the Russian Federation is a judicial body of constitutional control, which by means of constitutional proceedings, exercises judicial power.

According to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" from 12.07.94 No. 1-FKZ (as of 05.04.2013),[12] the Constitutional Court of the Russian Federation has wide competences in the field of security provision. It is up to the Court to deal with a big number of conflicts of law, which will necessarily emerge as a result of reforming the federal system of the Russian state. This reform presupposes the creation of bigger subjects of the Federation, which we believe is necessary in the context of strengthening religious security.

Here we would like to mention the issue of possible creation in some subjects of the Russian Federation of specialised courts which would function on the basis of religious norms. This topic is frequently raised by the media.

As far as this issue is concerned, we must note that creating a parallel court system will unquestionably create a potential for a split within society, since the judicial system is in a way a spine upon which the whole construction of the state is held. Therefore, we are of the firm opinion that the Russian court system should be represented as the hierarchy. In this regard, it is unacceptable to set up courts in some subjects of the state which would function on principles other than those prescribed by the Russian Constitution.

Case of foreign and international legal bodies in the framework of security provision in the religious sphere in Russia

Among the threats to religious security in Russia we noted a threat that is to do with taking foreign policy decisions without considering the factor of religion, which can lead to serious mistakes. In this context, it is necessary to remark that decisions of foreign and international judicial bodies which deal directly with religious security in Russia must undergo mandatory scrutiny. Analysis of such decisions can give us an idea of how important the factor of religion is in international relations.

It must me noted that some ECHR cases must be regarded as direct interference in Russia's internal affairs. Thus, in the ECHR case from 01.10.2009 *Kimlya and others v. Russian Federation*,[13] it was de facto recognised that the rule set up by the norms of the Federal Law "On the Freedom of Conscience and Religious Organisations", which required religious groups to prove their existence for a period

[11] Zabarchuk E.L. Religioznyj extremism kak odna iz ugroz bezopasnosti rossijskoy gosudarstvennosti [Religious Extremism as One the Threats to the Russian State System] // Zhurnal Rosskijskogo Prava [Journal of Russian Law]. 2008. No. 6. P. 8.
[12] *Rossijskaya Gazeta*. 23 July 1994.
[13] ECHR Bulletin. Russian Edition. 2010. No. 4. P. 3, 36 - 54.

of 15 years in order to be registered as legal persons, did not meet European legal standards.

Those who criticise the Russian system of ensuring a right to religious freedom constantly point out that Russian law-makers who set up an obligation for religious groups to prove their existence for 15 years within the given territory in order to be registered as legal persons, violated Article 9 of the European Convention of Human Rights.[14] These critics, however, constantly fail to mention that point 2 of the same article of the Convention lists a number of possible limitations, such as: prescribed by law and necessary in a democratic society for the protection of public order, health or morals or rights and freedoms of others.

We believe that a 15-year requirement for a religious group is a measure directed at the provision of societal security, public order, health or morals or at the human rights protection, and thus, absolutely justified.

Besides, in the ECHR decision (01.10.2009, *Kimlya and others v. Russia*) there is information that the City Court in Nizhnekamsk in the process of examining this case came to a conclusion that in the Russian legal system, denying registration of a religious group as a legal person does not violate the right to freedom of religion. In similar cases, only the right to freedom of association can be examined. We believe that when the ECHR examines the substantive side of the decisions, it must pay more attention to the mentality, the legal particularities and traditions of the "respondent States".[15]

Religious Education and Endogenous Threats to Security in the Religious Sphere

Among the threats to security in the religious sphere we also include religious crimes. Based on the analysis of case-law in Russia, we come to the conclusion that cases which must be considered religious are practically not considered at all. Viewed from this perspective, the current judicial system of human rights protection does not have a sufficient level of legal means. This situation is due to the fact that religious motives are not considered by the Russian Criminal Code as qualifying elements. Also, a key reason in this very situation is the lack of proper training of prosecutors and judges. In order to examine cases which deal with religious crimes it is necessary to have proper knowledge, skills, methods and experience, and all of this is lacking to a very big extent.

Thus, in order to ensure security in the religious sphere in the Russian Federation, we believe it is important to raise the educational level of the representatives of the judicial branch, in particular, by organising special courses on security in the religious sphere for them. Such courses should at least give the participants necessary knowledge about religious doctrines which represent a societal threat.

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[14] Sultanov A.R. Zatshita svobody sovesti, rasprostraneniya ubezhdenij cherez prizmu postanovlenij Evropejskogo suda po pravam cheloveka [Protection of freedom of consciousness and dissemination of ideas by means of ECHR case-law]. M.: Statute, 2013, P. 544.

[15] We believe it appropriate to quote Celsus, a Roman philosopher, Plato's follower (second half of the II century): "It is wrong to make decisions or give advice based on some particular part of the law, without considering the law as a whole." (Digesta. 1.3.24).

Besides, such courses can raise the moral level of Russian judges, a condition we believe necessary for the stable development of Russia. According to a scholar O.I. Tsybulevskaya, moral and humanistic foundations are "necessarily present in the process of law implementation. It is not enough to adopt good, "wise" laws, it is necessary to implement them in the right way, which meet the moral requirements. Moral characteristics of those who implement these laws, especially of judges, are also important."[16] High moral standards can be found in the doctrine of traditional religions in Russia, in particular, the Russian Orthodox Church. Studying the foundations of Christian anthropology, apologetics and theology by the judges could lead to invigoration of the Russian judicial system.

In the beginning of this article we already mentioned that in the process of providing for security in the religious sphere it is difficult to do it without the legislative experience of foreign countries. In particular, some norms in the Constitution of the Estonian Republic are no doubt directed at the protection of morals, which, in turn, become an important way of protection against many threats which stem from the religious sphere of society.

Thus, six articles of the Constitution of the Estonian Republic, contain a possibility to limit basic human rights and freedoms for the sake of protecting morals (Articles: 24, 26, 40, 45, 47, 124). Especially relevant for our research is Article 40, which states that "Everyone is free to perform religious rituals by himself or jointly with others, as long as this does not infringe morals." In the Russian Constitution there is only one norm (Article 55, Part 3), which allows limitations on human rights for the sake of the protection of morals. We believe that the protection of morals in the contemporary world is especially important, which makes the emphasis put by an Estonian law-maker on the protection of morals quite justified and even necessary. Guardians of morality in the Estonian Republic are the court, state institutions, local committees and their officials and the legislator- Riigikogu.

It must be emphasised that quality education in the field of religion is necessary for everyone in order not to become a victim of endogenous threat. The state must make sure that individuals have a possibility to obtain relevant knowledge to avoid becoming victims of endogenous threats. The state must ensure that everyone has access to relevant knowledge in order not to fall victim to a destructive religious group or a dangerous doctrine. Many difficulties in the process of provision of religious security can be overcome by providing the Russian population with necessary religious education.

We believe that many extremist deeds, as well as activities of certain destructive religious groups take place due to incomplete knowledge about their own religion, as well as about religions of other people.

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[16] Tsybulevskaya O.I. Nravstvennye osnovy sovremennogo rosskijskogo prava [Moral Foundations of Contemporary Russian Law]: Post Doctoral Thesis, Law: 12.00.01. Saratov, 2004. p. 430.

Conclusion

Among the threats to security in the religious sphere in Russia we mentioned proselytising. At this point in time, Russian courts cannot protect individuals against proselytising, since Russian laws do not provide for such a possibility. Up to now, the very term “proselytising” has not had a clear legal definition, as well as the term “religious crime”. These terms are still to be introduced into the legal field.

We believe that if the necessary corrections to the substantive and procedural legal norms are introduced, Russian courts will be quite able to provide for security in the religious sphere for the state, for society and for an individual. Besides, Russia’s scientific and practical experience can be useful to foreign countries which have already faced the threats in the religious sphere or to those countries which might face all negative aspects of this phenomenon. This experience is especially important for post-Soviet states.

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THE PUBLIC CHAMBER OF THE RUSSIAN FEDERATION ACTIVITY AS A GUARANTEE OF CITIZENS` CONSTITUTIONAL RIGHTS TO NGOs

Irina Bakulina

In accordance with the Federal Act dated from 19.05.1995 No. 82-FZ "Non-Governmental Organisations", citizens' right of association includes the right to form voluntary organisations to protect their common interests and common goals; the right to join existing NGOs or refrain from joining an NGO, as well as the right to freely leave an NGO. Establishment of NGOs contributes to the implementation of the rights and legitimate interests of citizens; that is why the matter of guarantee of the Russian citizens' right to non-governmental organisations is highly topical today.

The legal sources define citizens' rights as the conditions and means for implementation, the implementation, the protection of the rights and freedoms of citizens by legally stated democratic values, the inviolability of democratic values; the effective work of state bodies, high level of credibility and legal culture, the efficiency of legal liability.[1] In developed democracies public community boards serve to guarantee the citizens` right to join NGOs. Community boards are present in one form or another in most advanced countries.

The governmental concern in the consideration of the citizens` opinion is expressed in the public consultations on various issues involving different social groups. The primary proof of community councils` efficiency is the actual implementation of their recommendations by the state. Therefore, in some states, community councils serve as an effective tool to express public opinion, contribute to the transparency and effectiveness of government bodies and agencies and promote citizens` engagement in policy-making.

According to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[2], due to increased access to information and public participation in decision-making the quality of the decision-making and implementation mechanism is improved, a reliable regulation procedure is secured, a reactive and trustworthy relationship between civil society and governments is introduced. However in some cases community boards effectively influence the activity of respective state bodies and in other cases the boards are formal structures.

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[1] Viskulova V.V. Guarantee of citizens` elective rights as a general methodology problem of legal guarantees // Russian legal journal. 2013. N 2. p. 101.

[2] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 23-25 June 1998 , available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en

In today`s Russia there is a necessity to form an all-Russian Public Council out of active citizens truly respected by the public who serve on existing social organisations and represent the interests of different social groups. A new means to implement and grant the citizens` rights to NGOs is the Public Chamber of the Russian Federation.

The Public Chamber of the Russian Federation is a public institution, which aims to establish a relationship between civil society and government bodies, facilitate the citizens` engagement in policy-making to improve the quality and process of implementation of decisions.

The Public Chamber of the Russian Federation in the current legislation is considered an independent civil institution. However, expert opinions disagree on this matter. Most experts believe that the Public Chamber has taken an important place among civil institutions and it has a great public response.[3] Others state that the Chamber is essential to provide public control over executive authority in the Russian Federation[4].

However, a number of scholars are sceptical about establishing another public chamber. Thus, L.Y. Grudtsyna disputes its value as a symbol of civil society, noting some elements of its illusory nature.[5]

Yu. A. Dmitriev notes that the procedure of appointing members in the Public Chamber as stated in the legislation is neither democratic nor effective in achieving its goals. Under the developing democracy in Russia it means creating another formal body unable to object to negative trends in the social development of the country[6].

According to L.J. Grudtsyna the procedure of appointing the representatives to the Chamber proves it is merely another advisory body to the head of state with the structure depending mostly on the President`s personal preferences. The Federal Assembly of the Russian Federation, the RF Government and the highest judicial authorities do not engage in the formation of the Public Chamber. It poses the risk of masked state control over civil society and its way of development in the present political Russian life.[7]

V.V. Goncharov questions the legitimacy of the RF Public Chamber as a body empowered to exercise control over the legislative (representative) state bodies which contradicts the RF Constitution. Article 3 of the Constitution reads that the holder of sovereignty and the only source of power in the Russian Federation shall be its multinational people who exercise their power both directly and through state and local bodies and local self-government. The ultimate expression of the people`s power is the referendum and free elections. The Russian Constitution states that anyone who would arrogate the power of the people shall be held liable, therefore, the Public

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[3] Kabyshev S.V., Vekshin A.L. The Public chamber: its role and function in Russian politics // Formula of law. 2005. N 1(4). p. 46.

[4] Goncharov V.V., Kovaleva L.I. Control of executive powers in the Russian Federation by public institutions // Authority. 2009. N 1. p.72.

[5] Grudtsyna L.Yu. Pro et contra. The Public Chamber: a symbol of civil society or its illusion? // Laws in Russia: experience, analysis, practice. 2006. N 10. p. 120.

[6] Dmitriev Yu.A. Dangerous nostalgia for the past // Law and life. 2004. N 77(13). p. 9.

[7] Grudtsyna L.Yu. Ibid. p. 120.

Chamber established by the President`s directives (not through free elections) a priori cannot exercise control on behalf of the people.[8]

V.V. Goncharov stresses the inconsistency of the Russian President`s stand concerning the membership limitation in the Chamber for political parties` representatives (Art. 11 of the Act). The President`s Letter dd. from 26.05.2004 particularly notes the need for the close cooperation of political parties and civil structures with the Public Chamber of Russia meant to be the most important council among others. It is particularly reasonable that political parties could serve as instigators for the mechanism of public control over public authorities due to their large number, the rich political experience and historical tradition.

V.V. Goncharov points at the mismatch in the powers of the Public Chamber. For example, it has the right to issue reports on violations of law by any of the executive bodies but it cannot conduct expertise of the President`s draft law. V.V. Goncharov argues that the Act intentionally disables the Public Chamber to control Presidential activities and his legislation. Thus, the actual powers of the Public Chamber define its status only as of a body of presidential control over the activities of other governmental branches.[9]

The existence of the aforementioned problems requires improvement of the Federal Act "The Public Chamber of the Russian Federation." According to the author, for this purpose it is reasonable to turn to the practice of similar institutions in foreign countries today.

An important role in the civil society of foreign countries is given to public advisory bodies. Public participation in the adoption process of governmental acts increases the legitimacy of law-making and enhances the efficiency of the activities of state authorities.

Thus, the Economic and Social Council of France (Conseil économique et social), which is a consultative board for the discussion of economic and social issues, was established in accordance with book IX of the Constitution of France in 1958 (Articles 69-71). The Council has 231 members appointed for five years by the most representative socio-professional organisations (about 70% of the total number) or by the Prime Minister`s decree (the rest of the members). The Board ensures representation of the major economic and social activities, in particular the following: workers, businesses, liberal professions, mutual aid societies, social work, non-commercial organisations (associations). It includes 69 representatives from workers, 72 representatives from businesses and 40 representatives competent in economic, social, scientific or cultural spheres.

Section 11 of the Constitution of the Fifth Republic focuses on the Council`s work and sets out in detail the Council`s powers to pass a decision on draft laws. The

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[8] Goncharov V. V. Problems in the organisation and performance of the Public Chamber of the Russian Federation/ V. V. Goncharov // Modern Law. -2010. – No. 4. - p. 50.

[9] Goncharov V.V. The role and function of political parties in establishing and developing the executive authority system in the Russian Federation // The history of state and law. 2008. N 24. p. 7.

Section highlights the mandatory requirement to submit all economic draft laws to the Council.

The Act regulating the Council`s work sets out its duty to conduct the examination of draft laws. The Council shall conduct the expertise of all acts and decisions relating to the economic sphere. Also, the government shall send draft laws concerning other spheres to the Council for expertise. Besides, the Council can consider and pass a decision on a particular bill at its own initiative.

The Council is supposed to consult the Government and engage in economic and social policy-making, involve NGOs and professional associations in state policy-making, establish a dialogue between different social and professional groups.

Foremost, the government itself has the right to ask the expert advice of the Council. The advice of the Council can be either mandatory or optional. It is supposed to consult the government on the proposed programme of the law (i.e. the draft laws involving the budget planned for the implementation of its stated goals) or economic and social draft laws, except for budget laws and laws on social security financing. The Economic and Social Council has the right to consider an issue at its own initiative to propose reform.

The government is supposed to submit a report to the Council on the annual performance plan. Every year the Prime Minister reports on the process of informing the Council.

The analysis of the working mechanism of the Economic and Social Council of France serves to reveal the following positive aspects: establishment of the Council is formulated in the Constitution of France; every programme of an economic or social act is submitted to the Council for expertise. Thus, the Council acts as a mandatory platform for discussions.

The Public Chambers of France and Greece do not have an officially stated right for veto but governmental structures are obliged to submit certain documents for approval. In France, public authorities seek the opinion of the Council when making certain decisions. The Public Chamber of Greece has the right of legislative initiative in contrast to the Russian Public Chamber.

The Council of National Minorities of the Czech Republic Government is a body which consults, coordinates and drafts laws regulating national minorities` issues.

Thus, the practice of public advisory boards in foreign countries proves that public chambers are a powerful institution of civil society. Effective public chambers mostly consist of members selected by the public. Theoretically, a public council should represent various social interests to the maximum extent and include representatives of different interests including contradictory ones. The government should engage in discussion and consider the opinions of all parties.

Analysis of foreign practice and its comparison with the functioning of the Russian Federation Public Chamber has clearly revealed the existing problems in the structure and composition of the national Public Chamber. To date, the legislative branch of the Russian Federation has adopted amendments to the Federal Act " The Public Chamber of the Russian Federation" to change the procedure of forming the

Public Chamber. According to the new legislation, the Public Chamber of the Russian Federation shall consist of forty citizens of the Russian Federation approved by the Russian President, eighty-three representatives of the public chambers of the federal subjects of Russia and forty-three representatives of all-Russia public organisations.

These changes will result in the involvement of all the subjects of the Russian Federation in policy-making. However, the author argues that the quality of representation of civil institutions is satisfactory if various social and professional groups are presented by their competent representatives in the Public Chamber. The body of the Public Chamber should be dynamic enough to respond to all political and social changes in the state.

National and foreign practice has proven that there is a political and legal dependence of public advisory councils on the government; the recommendations of the Chamber are non-regulatory, the expertise results are not binding. The Public Chamber as a public coordinator should have the right to legislative initiative, the right to conduct overall voluntary public polls concerning the public approval of the Chamber`s decisions on regulatory acts developed by legislative and executive bodies, as well as the Chamber`s proposals to make amendments to legislation.

A public poll can be conducted through online voting or in specially equipped premises and voting booths. Positive response of a significant part of the population should justify further compulsory study of the expert decisions of the Public Chamber by competent government authorities. Such an expansion of authorities of the Public Chamber would serve to establish reciprocal feedback between the state and society.

Thus, the Federal act “The Public Chamber of the Russian Federation” requires being amended in order to establish an effective negotiation space between the state and society.

THE DEVELOPMENT OF CONSTITUTIONAL NORMS ON INDIGENOUS PEOPLE'S RIGHTS FOR THE TRADITIONAL USE OF LANDS AND NATURAL RESOURCES

Elena Gladun

SUMMARY: The article touches upon the issues of indigenous rights and interests established in the Constitution of Russia in 1993. The author pays particular attention to the right of indigenous peoples to lands and natural resources. The federal and regional legislation is analysed in order to show the lack of legal mechanisms in the implication of constitutional provisions.
KEY WORDS: constitutional rights of indigenous peoples, traditional territories, land use

There is a growing public interest in the world towards indigenous people, their rights and interests. Nowadays indigenous people's lives are affected by different factors including environmental changes, industrial development, chemical contaminants, and social integration. Indigenous populations take much effort to promote their way of life and to use the environment and natural resources for living sustainably. They are a source of traditional knowledge as they have responded to major climatic and environmental changes by altering group sizes, relocating, and being flexible with seasonal cycles in hunting or employment. However, the indigenous people have very limited opportunity to effectively voice their opinions in international dialogue on the environment and resources.[1]

The United Nations supports aboriginal people in the world: two International Decades of the World's Indigenous People were proclaimed by the General Assembly consecutively in 1993 and 2004, adopted international documents including the Declaration on the Rights of Indigenous Peoples was adopted on 13 September 2007.[2] International documents set subjective and objective criteria, which are jointly applied to guide the identification of indigenous peoples in a given country. According to these criteria, indigenous peoples have social, cultural, and economic conditions that distinguish them from other sections of the national community; have their status regulated wholly or partially by their own customs or traditions or by special laws or regulations; have a special relationship with the land and natural resources. These characteristics immediately underline the importance of land, territories, and resources for indigenous peoples.[3]

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[1] Eunjung Park. Feature: Searching for a Voice: the Indigenous People in Polar Regions.8 Sustainable Dev. L. & Pol'y 30. P. 30.

[2] Resolution adopted by the General Assembly 61/295 Available at
// http://www.un.org/ru/documents/decl_conv/declarations/indigenous_rights.shtml.

[3] Birgitte Feiring. Indigenous Peoples' Rights to Lands, Territories, and Resources. Available at

Russia is one of those countries that incorporates international rules concerning indigenous peoples into constitutional provisions. The first norms regulating indigenous peoples appeared in the Constitution of the Russian Federation in 1993 and since that time legislation for indigenous peoples has been extensively developed both on a federal and regional level. The laws establish standards for the state support of indigenous peoples, measures for the preservation of their unique culture, language, traditions, as well as guarantees for their traditional occupations and lifestyles. The constitutional provisions have become the frameworks for national and regional policies towards the indigenous peoples of Russia.

The Russian Constitution provides for the protection of indigenous peoples establishing equal conditions for the development of all peoples and ethnic groups in the state. It guarantees the equality and self-determination of peoples in the Russian Federation (part 3 of Art. 5); the equality of rights and freedoms of citizens, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances (part 2 of Art. 19); the right of everyone to freely determine and indicate his or her nationality, to use his or her native language, the right to a free choice of the language of communication, upbringing, education and creative work (article 26); the right for all people to preserve their native language and to create conditions for its study and development (part 3 of Art. 68).[4]

There are special provisions in the Constitution guaranteeing "the rights of indigenous small peoples according to the universally recognised principles and norms of international law and international treaties and agreements of the Russian Federation" (article 69), the basic one is the right to the protection of their "traditional living habitat and of traditional way of life" (article 72). These provisions are included in Chapter 3 "The Federal Structure" and in this context they become the framework of national and regional policy.[5]

The Russian Federation is implementing international rules on the legal status of indigenous peoples and their rights. The main international documents which are the guidance for national and regional legislation are the Indigenous and Tribal Populations Convention, 1957 (No. 107); the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169); the UN Declaration on the Rights of Indigenous Peoples, 2007. The documents cover a wide range of issues of indigenous peoples such as land; recruitment and conditions of employment; vocational training, handicrafts and rural industries; social security and health; and education and means of communication. The Indigenous and Tribal Peoples Convention, developed by the International Labour Organisation (ILO) on 26 June, 1989, says in article 2: "Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and

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http://www.landcoalition.org/publications/ilc-publishes-study-indigenous-peoples%E2%80%99-rights-lands-territories-and-resources

[4] SZ RF. 2009. No. 4. P. 445.

[5] Kryazhkov V.A. Korennye Malochislennye Narody Severa v Rossiiskom Prave // NORMA, 2010. P. 75.

systematic action to protect the rights of these peoples and to guarantee respect for their integrity".[6]

Some international acts underline special conditions for a traditional way of life of indigenous peoples. For example, the Convention on Biological Diversity entered into force on 29 December 1993 and ratified by Russia on 29 February 1995 in article 8 states that each party shall "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity". [7]

International rules and constitutional norms concerning indigenous peoples are implemented, first of all, in the federal legislation. V.A. Kryazhkov characterises the federal laws related to indigenous peoples as "comprehensive and developed".[8]

The Federal Law "On Guarantees of Rights of Indigenous Peoples in the Russian Federation" is a basic document that determines the status of indigenous peoples in Russia, protects their rights and interests.[9] For its realisation the Government adopted the Concept of Sustainable Development of Indigenous Peoples of the North, Siberia and the Far East in 2012-2015" (4 February 2009).[10] On 12 October 2013, the Prime Minister of the Russian Federation Dmitry Medvedev signed an order approving the plan of activities to implement this concept. The plan aims to improve the quality of life of indigenous peoples and to protect their rights, as well as to develop traditional ways of life and traditional occupations, and to preserve their cultural heritage.

The federal legislation establishes some specific rights of the indigenous peoples of the North, Siberia and Far East guaranteeing their traditional habitat and lifestyle: territories of traditional natural resource use; land use regime; legal regime of water and forest use; consent on the acquisition of lands for non-traditional forms of occupation; priority access to hunting and fishing resources; tax benefits; limits on the use of wildlife and quotas of aquatic biological resources; gratuitous use of land, etc. However, the Federal Government and the Ministry of Regional Development have not adopted the sub-laws regulating the issues mentioned above and this fact has become an obstacle for indigenous peoples to enjoy their rights established by the Constitution and federal laws.[11]

The most important right declared by international acts and national legislation is the right to possess and use lands and natural resources for traditional occupations and ways of life.

Traditional occupations and the lifestyle of indigenous peoples is the main condition for their social-economic development in any country. In the North and the

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[6] Konvencii i Recomendacii, Prinjatye Mezhdunarodnoy Konferenciey Truda 1957 – 1990. T. II Geneva: Mezgdunarodnoe buro truda, 1991. P. 2193 – 2207.

[7] Convention on Biological Diversity. Available at: http://www.cbd.int/convention/articles/default.shtml?a=cbd-08

[8] Kryazhkov V.A. Korennye Malochislennye Narody Severa v Rossiiskom Prave // NORMA, 2010. C. 77

[9] SZ RF.1999. No. 18. P. 2208.

[10] SZ RF. 2009. No. 7. Ст. 876.

[11] *See* Tranin Ą.Ą. Ecologo-pravovye Aspekty Nacionalnoy Strategii Rossii Po Voprosam Razvitia Korennyh Malochislennyh Narodov // Ecologicheskoe pravo, M.: YURIST, 2009, No. 4. P. 7-12.

Arctic with its intensive economic and industrial development, the protection of the indigenous way of life is a factor in their survival. Using lands for traditional occupations such as reindeer breeding means the exploitation of huge territories which can also be used for industrial development. In Russia there is a system of "land categories" which means that every land plot is referred to one of seven landscape types such as agricultural lands, urban territories (settlements), lands for industry and some special objects; protected natural landscapes, forest lands, lands under water objects; reserved lands. The lands used by indigenous peoples may at the same time be used by the oil and gas industry, agriculture industry, landowners. The oil and gas industry and indigenous peoples have been increasingly coming into contact with each other over the past few decades as the search for new oil and gas resources has engendered more exploration and development in lands that indigenous peoples traditionally occupy or customarily use.[12]

Therefore article 9 of the Constitution is very important in protecting the right of indigenous peoples to lands. In part 1 the article reads: "lands and other natural resources in Russia are used and protected as the basis of traditional life and occupations of the people inhabiting the territory". The Constitutional Court of the Russian Federation expounded this norm in its ruling on 9 January 1998 No. 1-P "The Case on the Constitutionality of the Forest Code of the Russian Federation". The Constitutional Court sets: "land and other natural resources (subsoil, forest, wildlife) are the natural wealth, the commons, i.e. it is public property of multinational people of Russia, and a specific type of federal property, which has a special legal regime".[13] Some authors suggest another interpretation of this constitutional provision. Thus, E.V. Zhukova believes that, being public property of the multinational people of Russia, the land is, first of all, the property of the people who live on this territory and who have a close relationship with the land. And it is fair for the indigenous peoples to have certain advantages over the non-indigenous people because the traditional use of land is the main condition for the aboriginal way of life, economy and culture. It is even more important if we understand the fact that the traditional use of lands means their sustainable development, which preserves the lands and resources for the next generations of Russia.[14]

To protect indigenous rights to land and natural resources means to set rules and standards regulating land issues in legislation. Russian federal legislation fails to recognise the need for indigenous people to use lands freely to maintain their traditional way of life. Legal rules concerning indigenous rights to lands, territories and resources are characterised as non-compliable with constitutional provisions, incomplete, declarative and they do not imply mechanisms for their realisation.[15]

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[12] Indigenous Peoples and the Oil and Gas Industry Context, issues and emerging good practice. IPIECA 2011 P. 3.

[13] Postanovlenie Konstitucionnogo Suda ot 9 janvarja 1998 No. 1-P «Po delu o proverke konstitucionnosti Lesnogo Kodeksa Rossiiskoy Federacii // SZ RF. 1998. No. 3. P. 429.

[14] Zhukova E.V. Pravo na Tradicionnoe Prirodopolzovanie: Ego Mesto v Systeme Prav Korennyh Malochislennyh Narodov i Problemy Realizacii// Vestnik AltGTU im. I.I. Polzunova, No. 1-2 2010. P. 135.

[15] Galinovskaya E.A. Osobennosti Pravovogo Regulirovania Poryadka Ispolzovania Zemel Obschinami

Federal laws establish general provisions for the realisation of the rights of indigenous peoples to land and other natural resources. In particular, it is mentioned that in Russia a special legal regime is established for the territories of traditional natural resource use.[16]

For example, the Federal Law "On Guarantees of Rights of Indigenous Peoples in the Russian Federation" (30 April 1999 No. 82-FZ) sets out the right of indigenous peoples, associations of indigenous peoples to gratuitous use of lands referred to different categories and common minerals in order to maintain their traditional occupations and way of life, the procedure of land granting is regulated by federal and regional legislation.[17] The Forest Code of the Russian Federation (4 December 2006 No. 200-FZ) provides for the right of indigenous peoples of the North, Siberia and Far East of Russia to harvest timber for their own needs on the territories of their traditional habitat and occupations.[18] The Water Code of the Russian Federation (3 June 2006 No. 74-FZ) regulates the use of water objects by indigenous peoples on their traditional territories.[19] The Federal Law "On Production Sharing Agreements" (30 December 1995 No. 225-FZ) establishes that in the case of developing deposits located on the traditional territories the main condition of the auction should be the compensation for indigenous peoples whose traditional land is used.[20]

The main federal law regulating aboriginal land rights is "On Territories of Traditional Natural Resource Use". According to article 10 of this act land plots and waters are granted for indigenous peoples within the special territories to be used for traditional occupations. Article 11 of the same act sets out the legal regime of traditional territories and refers to other federal laws that regulate the land rights and resource-related rights. However the law doesn't set the conditions under which land rights are provided and protected because this is the scope of the land legislation. Thus, in spite of the importance of lands and resources for traditional occupations and lifestyle of indigenous peoples, in Russian legislation there are no norms granting them specific rights to land and resources.

Article 97 of the Land Code of Russia provides that in the areas of native settlements and traditional occupations of indigenous peoples special territories of traditional resource use can be organised. The procedure of organisation of such a territory, establishing its borders and legal regime is regulated by the Government of the Russian Federation.

Korennyh Malochislennyh Narodov v Regionah Sibiri i Dalnego Vostoka RF I Ih Uchastia v Ohrane Prirodnyh Resursov // Sbornik vystupleniy, dokladov i I materialov Vserossiiskogo nauchno-prakticheskogo seminara «Zemlepolzovanie v mestah prozhivania korennyh malochislennyh narodov Rossii: zakonodatelstvo i praktika». M.: PROSPEKT, 2010. P. 22.

[16] *Ibid*

[17] SZ RF. 1999. No. 18. P. 2208.

[18] SZ RF. 2006. No. 50. P. 5278.

[19] SZ RF. 2006. No. 23. P. 2381.

[20] SZ RF.1996. No. 1. P. 18.

Realising this norm the Government approved a list of traditional territories and traditional occupations of indigenous peoples of the Russian Federation by the Government Order (8 May 2009 No. 631-p).[21] Nevertheless the Government hasn't established a legal regime and conditions of use of these territories.

Commenting on the present situation V.A. Kryazhkov wrote: "The Government does not fulfil its obligation to adopt the necessary regulations; for a long time it rejects requests on organising traditional territories, focusing on law amendments it does not take particular measures and doesn't involve practical mechanisms for traditional territories' organisation. De facto: the policy of the Federal Government violates the rights of indigenous peoples to traditional resource use and a traditional lifestyle".[22] This opinion is shared by S.N. Kharjuchi, the President of Indigenous Peoples of the North, Siberia and Far East Association. He says: "Up to now there haven't been any federal traditional territories organised and the number of regional traditional territories is too small. Moreover, there is only one federal law with a few instruments protecting indigenous rights to traditional lands and lifestyle and this law is not enforced properly because of the inaction of federal authorities"[23]. The result is a situation in which indigenous peoples cannot enjoy their rights to traditional land and resource use.[24]

The rights of indigenous peoples to lands and natural resources are also in the scope of land and forest legislation. General and special rules on land rights are set out in articles 15, 20-24, 29, 34 of the Land Code adopted on 25 October 2001 (No. 136-FZ); articles 38, 71-74 of the Forest Code adopted on 4 December 2006 (No. 200-FZ); article 10 of the Federal Law "On Turnover of Agricultural Lands" adopted on 24 July 2002 (No. 101-FZ). The analysis of these norms proves that in Russia there are no legal provisions for the gratuitous use of lands by indigenous peoples even in the areas of their traditional habitat and way of life. Indigenous peoples can only use lands under general conditions: on land lease agreement or property rights. These conditions considerably narrow the opportunities of indigenous peoples to use lands and resources in the traditional form.

Part 3 of article 7 of the Land Code reads that the regions of the Russian Federation and municipalities can regulate the use of lands and set a special legal regime for territories of traditional occupation and lifestyle if these laws do not contradict federal legislation. Interpretation of this norm together with the norms of the Federal Laws "On Guarantees of Rights of Indigenous Peoples in the Russian Federation", "On Territories of Traditional Natural Resource Use" lets the author

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[21] SZ RF. 2009. No. 20. P. 2493.

[22] Kryazhkov V. A. Territorii Tradicionnogo Prirodopolzovania kak Realizacii Prava Korennyh Malochislennyh Narodov na Zemli // Gosudarstvo i pravo. 2008. No. 1. P. 14

[23] Otchetny Doklad Presidenta Associacii Korennyh Malochislennyh Narodov Severa, Sibiri I Dalnego Vostoka S.N. Kharjuchi // Mir korennyh narodov. Zhivaja Arktika. Almanah Associacii korennyh malochislennyh narodov Severa, Sibiri I Dalnego Vostoka, No. 22, 2009. P. 7.

[24] Zhukova E.V. Pravo na Tradicionnoe Prirodopolzovanie: Ego Mesto v Systeme Prav Korennyh Malochislennyh Narodov i Problemy Realizacii// Vestnik AltGTU im. I.I. Polzunova, No. 1-2 2010. P. 135.

assume that the regional authorities are vested with the powers to regulate land issues and therefore they can fill the gaps of federal regulations. But the problem is that the Land Code itself restricts the authority of regional legislature in land issues.

It happens because the federal land laws (Land Code and others) regulate the whole set of issues concerning land rights, procedure of land granting, land transactions, disposal of land, preservation of lands, etc. The Land Code set the legal regime of all land categories, including agriculture lands (on which traditional settlements are mostly located). According to part 1 of article 76 of the Russian Constitution "on the issues under the jurisdiction of the Russian Federation federal constitutional laws and federal laws shall be adopted and have direct action in the whole territory of the Russian Federation". Thus, the issues of land use, traditional territories' organisation, indigenous rights to lands and resources are under the jurisdiction of the federal laws and regional laws cannot comprise special rules in the same issues.

This legal interpretation is approved by the high judicial authorities of the Russian Federation (for example, Determination of the Supreme Court of Russia on 16 May 2012 No. 92-APG12-5, Determination of the Supreme Court of Russia on 26 June 2003 No. 57-G-2).

The author makes the conclusion that there is no legal instruments for the realisation of constitutional norms providing indigenous rights to lands and natural resources either in federal or in regional laws and regulations.

Summing up it should be noted that the Constitution of 1993 provides rights of indigenous peoples and these rights are concretised and guaranteed in federal and regional legislation, still there are some gaps in the realisation of indigenous rights, namely, the right to use lands for traditional occupation and lifestyle. The analysis of legal provisions and practice makes it possible to suggest some proposals.

1. Many problems of indigenous rights to lands and natural resources can be resolved if Russia ratifies the Convention concerning Indigenous and Tribal Peoples in Independent Countries and incorporates its rules to the national legislation. Indigenous Peoples hold specific rights under international law and in many national legislative contexts. It is the responsibility of Russian Government to uphold and protect indigenous peoples' rights.

2. The federal laws and sub-laws providing indigenous rights to lands and natural resources are not systematised, not coordinated and have many references to other laws. Also they do not include legal instruments for the realisation of indigenous rights. It is necessary to amend the Land Code and the Federal Law "On Territories of Traditional Natural Resource Use" with the traditional right of indigenous peoples to the gratuitous use of land on the territories of their traditional habitat and occupations.

3. In order to protect the areas of traditional habitat and to provide conditions for traditional occupations there should be a special legal regime for the traditional territories, especially when they are used for non-traditional purposes.

The regional authorities should be empowered with the right to establish and guarantee the rights of indigenous peoples to lands and natural resources and to

regulate legal regimes of traditional territories. The suggested amendments can guarantee a comprehensive realisation of constitutional norms concerning indigenous rights and interests and the effect of it will be the sustainable development of indigenous peoples of Russia who have traditional knowledge and attitudes to the land and natural resources.

VOTERS AS NONTRIVIAL MACHINES: VALUATION OF POLITICAL ACTORS BY THE PRESS AND ESTONIAN VOTERS' PREFERENCES FROM 1999 TO 2007

Raivo Palmaru, K. Jaak Roosaare

AUTHOR NOTE

Raivo Palmaru, Ph.D., Institute of Communication, Tallinn University, Estonia.
K. Jaak Roosaare, J.D., The American University Washington College of Law (1979); member of the faculty of Tallinn University School of Law, Estonia.

ABSTRACT

By employing a constructivist approach and conceptualising media effects as contingent change, this article examines the impact of the valuation of different political parties by the media on forming people's election preferences in Estonia over an eight year period. Research indicates that valuations serve the structural coupling of the mass media with consciousness systems and with other social domains and perform an important role in the formation of public opinion and election preferences. More frequent valuations of an actor or event in media messages trigger the valuation of that same actor or event among the public, which, in turn, is the basis for people's preferences and decisions. The valuation of political actors by the press is an essential means of orientation that enables people to organise their experiences and interact. For political actors, their valuation is the basis of their legitimacy.

Keywords: media effects, structural coupling, voting, Estonia

The Paradoxes of Media Effects

Although scholars have spent nearly 70 years studying the effect of mass communication on voters, and in spite of the fact that the legitimisation of communication science as an academic discipline has largely been derived from the fact that it set the question concerning the influence of mass media in the centre of its interest (Schmidt and Zurstiege, 2007: 100), the "media effects" in contemporary information age discussions are by far its central topic. This is in spite of the fact that numerous theories and hypotheses have been presented on the effect of media as a central problem of communication science. In figurative speech, the field of media effects research is similar to a rag rug with each piece made of a different material and huge gaps between the various parts.

For over half a century, the prevailing approach in conducting media effect research has been the minimal effect model which emphasises the importance of individual and structural factors and reduces the role of the mass media to that of a

reinforcer (Lazarsfeld, Berelson and Gaudet, 1944; Blumler and McQuail, 1968; Miller, 1991: 1–4; McQuail, 2003: 374–379, 401–423). At the same time, there have been numerous findings that show that the media's impact on public opinion and election results may be significant (Kepplinger, 1988; Fan and Tims, 1989; Roberts, 1992; Holbrook, 1996; Shaw, 1999; Iyengar and Simon, 2000; Lawson and McCann, 2005).

Using the terms of one of the architects of constructivism, Heinz von Foerster (2008: 62–66), people and communities are complex and analytically indeterminable nontrivial systems. However, traditional media and communication research has used the trivial machine model that treats people and social systems as if they are the same as common coffee machines where pushing a button always yields the same desired result. This is also reflected in language: in media research, the input is called the independent variable and the output is called the dependent variable. It should seem surprising that such studies are generally successful in the sense that they show that there is a connection or correlation between media output and audience preferences. Here we touch upon an inconsistency between cognitive autonomy and social orientation to which German communication scientist Siegfried J. Schmidt steered attention in 1994 (Schmidt, 1994).

Why does the mass media appear to have an impact in some cases and not in others? Why do social and psychic systems function sometimes as trivial and other times as non-trivial machines? What is the process whereby media influence is generated and how can the relationship between people and the mass media be theoretically modelled?

Up to now, traditional media effect research has not answered these questions, primarily because it supposes media effects in the media users. However, it often appears from the studies that there are more people affected than simply the recipients of media messages, especially at the macro level. Of course, the picture changes when one also considers impersonal communication with friends, family members, acquaintances, colleagues and others. But here another paradox is encountered. Namely, upon closer inspection, it soon appears that the direct user of media could be less affected than a person that does not use the observed media outlet, and that the same medium might have a different impact on different groups. In dealing with the interaction of many individuals, the phenomena appearing as a result are emergent properties of that interaction.

For these reasons, the authors do not rely on the traditional media effect research in this article, but instead attempt to explain media effects in a constructivist manner, based on an assumption that the recipients of media messages are cognitively autonomous individuals who are selective and actively construct meanings both individually and socially. Communication and media are handled as fundamental means of socialisation that link and connect different operationally closed consciousness and social systems. This connection, however, does not evolve randomly, but is orientated upon the creation of common meanings and the valuations that arise therefrom. These valuations are the essential means of orientation.

The goals for this article are twofold: first, to show that valuations serve the structural coupling of the mass media with consciousness systems and with other social domains and perform an indispensable role in the formation of public opinion and election preferences; and second, to present empirical evidence to support the elements of that assumption. For this purpose, the connection between valuations of political parties by the Estonian media and corresponding election and poll results are analysed in an attempt to show that the perception of the voters follows these valuations in the media. The constructivist approach affords new and additional understanding about the process by which media influence is generated.

Theoretical Framework

First, the theoretical framework in which our subject is observed must be explained. The authors' approach relies upon the work of biologists Humberto Maturana and Francisco Varela (1980, 1998), who theorise that the nervous system of a living organism operates as a closed network of neuronal interactions and cognition does not mean the reception of a representation of an objectively existing world but is the constant and continuous creation of that world by the observer in the course of living. The acquiring of knowledge through the senses or communication is not a passive process but an active one. People constantly construe something that they accept as reality (Maturana & Varela 1980, 127).

An operationally closed consciousness system lacks direct access to other operationally closed consciousness systems – these belong to its environment. A person cannot transfer the results of his observation and thoughts to the consciousness of another person. In order to share one's experience, constructions in one's consciousness with others and the coordination of one's activities, people must use communication, which is a surmounter and corrector of the autopoietic closeness of consciousness systems (see Maturana 1980, 30–35). In other words, communication and media are fundamental means of socialisation that link and connect different operationally closed consciousness.

The authors also follow the concept of autopoiesis originally developed by Maturana and Varela (1980; 1998). Niklas Luhmann (1986; 1995; 2000) modified the original biological concept and applied it to a large number of non-biological systems. A central element within the theory of autopoiesis is the concept of structural coupling which refers to the relationship between systems and their environments (Maturana and Varela 1980, xx–xxi; 1998, 95–96).

The role of communication in society and in the creation of common meanings is treated by Luhmann's theory of social systems. Let it be noted that Luhmann's theory could be seen as a successful attempt of implementing the Maturana's and Varela's autopoietic systems theory in the social field. It is also important to understand that Luhmann's social systems theory is a sociological theory and only a small part of Luhmann's rich legacy is of immediate interest for communication science. From the point of view of the topic of this article, first of all, the extension of social systems theory to mass media and to the role of media in the construction of social reality,

presented in Luhmann's "The Reality of the Mass Media", is important. According to Luhmann (2000, 97), the function of mass media is the "directing of self-observation of the social system." The distinctions made by the media system are their own product. Media communication is not the transfer of information, but the construing of reality that corresponds to the media as a system. The results of this circular and long-term activity are "the description of the world and of society to which modern society orientates itself within and outside the system of the mass media" (id., 98). From day-to-day, the media presents its descriptions to us, generating with that common knowledge and expectations arising there from. Thus "the mass media guarantees all function systems a present, which is accepted throughout society and is familiar to individuals, and which they can take as a given when it is a matter of selecting a system specific past establishing decisions about future expectations important to the system" (id., 99). People base their actions on those descriptions; that "present" created by the media, and from that their expectations ensue, as well as their expectations of others' expectations. Social reflexivity — the perceiving of others perceiving — is added to the relationship between the media and cognitive systems. Collective knowledge, beliefs and a common construction of meanings which orientate people in their activities (including communication) are formed from that. This collective knowledge enables people to act together and to constantly recreate the society.

It should be added that today critical self-observation of the political system has been largely replaced by the observation of the system by the media and that takes place not in accordance with the conditions established by the political system but by the media. The political system has merely adapted to these conditions. The media are the main connection channel between political actors and the general public. Political events occur mostly outside people's field of perception and they have little or no opportunity to verify the validity and accuracy of the media messages. The recipient of the message can but choose between similar messages and accept the media coverage that seems most sensible. Thus, politics for most people turns into politics as received through the media and policy-making is more and more the presentation of already existing policies to the general public.

Valuations and Elections

Cognitive systems observe their environment and give system specific meanings to the distinctions that have been made. However, the reflexive reference of agents to events and other actors does not end with giving meanings (and explanations). It is accompanied, consciously or unconsciously, by the valuation of the observed phenomenon as positive or negative, which regulates its acceptance or rejection by the participants in a communication. Depending upon the valuation given, one can either rejoice or grieve over an event or phenomenon; one may wish to participate in the event and support it or avoid it.

This kind of valuation is the result of the process and depends upon the meaning given to the observed phenomenon or event. Different meanings can be given to the

same phenomenon and different valuations may arise as a result. At the same time, valuations may change over time. The valuations that arise from assumptions and beliefs are the means of orientation and at the same time the means of reduction of the complexity of the environment that enables people (whose consciousness is operationally closed) to organise their experiences and act together with other people. Valuations may be weak, inaccurate, contradictory or temporary, but that does not change their purpose.

Although explanations are important in this mechanism of orientation and reduction of the complexity of the environment, individuals significantly rely on valuations. People may not know or remember the exact explanation: they orientate on the basis of valuations. Our thesis is that more frequent valuations of an actor, event or problem in the media messages trigger the valuation of that same actor, event or problem among the public. For political actors, their valuation is the basis of their legitimacy. In order to test the relationship of valuations presented in media messages with election returns, the results of the of the 1999, 2003 and 2007 general elections and the 2002 local election in Estonia, as well as the results of concurrent public opinion surveys were compared to the valuations given to the campaigning parties in the largest Estonian newspapers.

Speaking of media influence, it is important to keep in mind that communication cannot be conceptualised as a transmission of information nor people as directly influenced entities. Communication is a reflexive sign-using process, an action game, in which operationally closed cognitive systems participate. Through this game one does not (as the traditional dualist semiotic concept suggests) reach out 'into reality', but always falls back on socially approved uses of signs in communication. Media influence in this process should not be conceived as a causal relationship between mass media and their audiences, but as a result of structural coupling, where cognitive systems and mass media mutually perturb one another and affect each other's structure. It may be defined as contingent change that is dependent on the actors' cognitive and emotional state, experiences, expectations, the specific situation and many other factors. The individual interprets the message and gives it meaning that is consistent with his own understandings and culture.

Structural coupling assigns an equal role to interacting entities such that neither is seen to determine the other completely. Each entity can only trigger changes in the other, but the actual changes are not predetermined. At the same time, it must be taken into consideration that the irritations coming from the media side are repetitive, massive and touch phenomena and events that occur outside the cognitive system's field of comprehension. For the most part, an individual lacks the opportunity to compare the media messages with his own personal experiences and also lacks comparable interaction with some other part of the environment. The result is that the media valuations set the tone that the public adopts as its opinion or valuation at some later point in time. It should be possible to prove this by comparing the valuations presented by the media with the voters' preferences.

The authors hypothesise (H_1) that the frequency of valuations of political parties by the media to a considerable degree describes the election results and that the relationship between them is proportional.

By "description" and "relationship" it is meant that the certain and measurable change of an attribute characterising the valuation of a political party in media messages corresponds to a change in election results. The word "proportional" characterises the structure of the relationship of variables and means that a change in the value of an independent variable corresponds to a change in the same direction in a dependent variable. This relationship is always probable but never determined because, as has already been stated, one is dealing with structural coupling between cognitive systems and the media system. The cognitive systems can only determine themselves through their self-generated structures and states.

The authors also hypothesise (H_2) that the relationship between the valuation of political parties by the media and the political preferences of the voters accumulates diachronically as a cumulus in which valuations that emerge in the process of structural coupling are joined and congregate in the mind of the perturbed cognitive systems. It is necessary to keep in mind that this process is possible only upon the condition that both the media (whose coverage is dependent on human beings) as well as the human observers operate in a space that is deeply marked "culturally" and socio-structurally (Schmidt 1994, 47).

Method, Data and Reliability

For some reason, many communication scholars and sociologists are of the opinion that constructivism and empirical studies, especially ones dealing with media effects, are incompatible. Such an opinion is misleading. As many authors have pointed out, for the practical use of empirical methods, it is not important whether the researcher follows a constructivist or a realist approach (see Hennig 2009; Scholl 2011a; Scholl 2011b). Empirical research is as natural a part of constructivist or systems theoretical investigation of observed processes as is research within the framework of a realistic epistemology. However, there is a significant difference in understanding the role that empirical research plays in observation. In order to avoid hidden ontology, constructivism and as well as social systems theory are strictly process- orientated (see Schmidt, 2011: 4). Accordingly, by studying the impact of the valuation of different political parties by the media one is observing a process. Such a process can only be observed (as a process) with the help of empirical research if the observer manages to adhere to a static aspect, which Schmidt calls the process result (see *id.*:4). This outcome in the case of the article is on the one hand a valuation of the political actors that is not to be understood as an entity but as a process-result and on the other hand people's election preferences. According to Armin Scholl (2011a: 30), empirical research operates as a stopper of the process in order to observe it. Only the intervening (empirical) stoppage of the processes under observation makes them observable. Based on this logic, the valuation of different political parties by the

observed media outlets as static aspect (or outcome) of the process constitutes the authors' predicting variable.

It must be considered that media influence is difficult to observe empirically because cognitive processes in principle are not capable of being observed directly. In addition, there are too many physical and social factors that are simultaneously exerting influence on the observable process (each of which is difficult to isolate and all of whose influence is difficult to determine), which complicates accurate interpretation. This compels the researcher to prefer models that contain fewer components and use standard measuring instruments although their variables, correlations, and regression coefficients characterise the properties of whole aggregates at the expense of their constituent members (see Krippendorff, 1996: 316).

In the following analysis, two events are observed and compared: valuations of political parties in the print media and voting behaviour. The data about the former are compiled from content analysis. Voting behaviour is characterised by election results and alongside them the ongoing public opinion research data that is observed as the dependent variable. The observable data of the content analysis consists of the valuations given to the political parties that participated in the 1999, 2003, and 2007 Estonian parliamentary elections as well as the 2002 local elections in the major newspapers with a national circulation in Estonia.[1] In 1999, there were seven media outlets that were included in the analysis: *Postimees* and *Eesti Päevaleht* (two that consider themselves quality daily newspapers); *Õhtuleht* and *Sõnumileht* (the two largest nationally circulated tabloids in Estonia); *Äripäev* (the business newspaper); and *Eesti Ekspress* and *Maaleht* (the two largest nationally circulated weekly newspapers).

Prior to the elections held in 2002, 2003 and 2007, the newspapers analysed for content numbered six: *Postimees*, *Eesti Päevaleht*, *SL Õhtuleht* (in 2000 *Õhtuleht* and *Sõnumileht* merged under the banner of *SL Õhtuleht*), *Äripäev* as well as *Eesti Ekspress* and *Maaleht*. The data that characterises the influence potential of those publications is presented in Table 1. In the table, the 1999 data for *Sõnumileht* and *Õhtuleht* are combined and are presented as the data for *Õhtuleht*.

[1] During the period from 1999-2007 there were also two presidential elections in Estonia (21 September, 2001 and 23 September, 2006) as well as elections for the European Union parliament on 13 June, 2004. Even though there is data for those elections, it was not considered in the current framework of observations because in both the cases of the presidential elections and the European Union parliamentary elections the election systems vary too greatly from those employed in the other elections and the data is not comparable.

Table 1. Characteristic Indicators of the Influence Potential of Observed Publications

Newspaper	Publication Frequency	Circulation (in thousands)	Number of readers (in thousands)					
			1999	2003	2007	1999	2003	2007
Postimees	6 times per week		58.2	61.5	67.1	237.0	246.0	230.0
Eesti Päevaleht	6 times per week		48.6	33.5	37.0	229.0	136.0	145.0
Õhtuleht	6 times per week		75.8	65.6	64.6	279.0	279.0	237.0
Äripäev	5 times per week		17.0	20.7	23.0	78.0	74.0	77.0
Eesti Ekspress	once a week		47.1	44.7	47.7	194.0	140.0	140.0
Maaleht	once a week		42.0	49.0	51.4	180.0	156.0	129.0

Source: Eesti Ajalehtede Liit [Newspaper Association of Estonia]; BMF Gallup Media (Balti Meediateabe AS)

Here it is essential to note that the number of readers of the observed publications is fewer than the number of voters. The observant reader will have noticed that in some instances (for example, in the case of the newspaper *Postimees* in 2003 and 2007) circulation increased as the number of readers decreased. This is explained by the fact that together with the development of the economy and the rising standard of living, the means of obtaining publications has changed. In earlier times, people read publications at their workplace and the library, and often also borrowed them from friends and acquaintances. As time went on, more and more people began to subscribe to publications individually that were delivered to their homes. Thus, the readership of each individual copy of a publication has decreased.

This study included only the print media. Although a widely held belief exists that television is more influential than the print media, many authors allude to the fact that newspapers have greater influence in mobilising voters than does television (Norris et al. 1999, 101). Newspapers are also considered to be more effective in agenda setting (McCombs and Gilbert 1986, 9–10).

Usually journalists pay careful attention to media opinion leaders and that to a great extent determines the selection of issues and the manner in which these issues are treated (Donsbach, 1996: 86). In Estonia, those leading publications are the newspapers *Postimees*, *Eesti Eskpress* and *Eesti Päevaleht*, from which the television stations pick up the most essential issues.

The political actors whose presentation in the aforementioned publications were studied and compared are all of the political parties that participated with their own electoral lists of candidates in all of the observed elections. There were 12 such parties in the 1999 Estonian parliamentary (*Riigikogu*) elections, seven in the 2002 local elections and 11 in the 2003 and 2007 parliamentary elections.

The time frame for the analysis in the 1999 and 2007 elections was the nine-week period prior to the elections. All of the most essential pre-election events as well as

the most intensive election battles occurred during this period. In the 2002 and 2003 elections, the content analysis covered the pre-election period from June 2002 to March 2003. Both the 20 October, 2002, local elections and the 2 March, 2003, parliamentary elections fit into this time period. During these periods, all of the media valuations of every political party that participated in the elections were considered and analysed.

The code words for the content analysis were the names of the political parties participating in the elections. The coders counted each mention of a political party that appeared in news items, editorials and opinion articles (op-ed pieces). Upon discovering the name of the political party mentioned anywhere in the article, the coder had to ascertain the context – positive, neutral or negative – in which it appeared. The coders were given precise rules of interpretation based on how the party name relates to neighbouring words or phrases. For example, in the phrase "the Reform Party has proven to be a trustworthy partner", the name of the party appears in a positive context because "Reform Party" and the adjective "trustworthy" are positioned sufficiently close to one another. In the phrase "the Social Democrats have not been successful in steering the economy", the party is mentioned in a negative context. In the statement, "the Centre Party as well as the Reform Party, who have traditionally made strong showings in party-based elections, are planning to remain in power for a long time and will undoubtedly leave nothing to chance", the references to both parties are neutral. The favourable and unfavourable mentions attributed to the political parties were interpreted as indices of the writers' and the media's attitudes toward the named political party. In all instances the content was analysed by two or more content coders.[2] The coders' decisions were assessed and discussed during a pilot test and during coding of the full sample. Any discrepancies were resolved by this process. Since percentage agreement is often too liberal a measure of intercoder reliability, we calculated Krippendorff's alpha index for every observed publication and for each examined year separately. In all cases, the reliability sample was the same as the full sample. A sufficient level of intercoder agreement ($\alpha \geq 0.90$) suggested that the decisions of the coders can reasonably be included in the final data.

In conducting this study, six sets of data were used: election results, results of public opinion polls (surveys), the positive, negative, and neutral valuations of political parties. The first two we analysed as dependent and the last three as predicting variables. For the purposes of comparison, the figures are placed on the same base, expressing the share in percentages in all cases: in the case of election results, each political party's share of votes in percentages; in the case of media coverage, the party's positive and negative assessments and its share of neutral

[2] The content analysis was conducted by the media research firms Observer Eesti OÜ, AS Corpore and Nord University students Maria-Helena Loik, Kairi Luhaäär and Harry Kanistik.

references in the total.[3] Hereafter, for the purpose of making calculations, the author designates the symbol y for election results, y_{os} signifies the results of public opinion surveys, x_p the positive valuations of political parties, x_e the neutral valuation of political parties, and x_n the negative valuation of political parties. In some cases, the frequency of notation of political parties (x_z), which is the sum of the positive, neutral and negative valuations ($x_z = x_p + x_e + x_n$) has also been used as a predicting variable. The notations of political parties that participated in the elections were counted in the observed publications, amounting to a total of 7,830 times in 1999, 14,504 times in 2002 and 2003 and 9,152 times in 2007.

Regression Models

How are the election results tied to the input variables? It should be possible to evaluate that with the aid of the multiple linear regression model. In the interests of acquiring a complete picture, it is necessary to merge all four input variables into the model. However, there is a noticeable multicollinearity effect. In addition, multicollinearities involving three or more variables are relatively difficult to detect and it may become apparent that the results are statistically insignificant and the model is unstable. Let it be noted here that the lack of independence among predictors is inherent in this type of data: it is not generated by design. This means that the collection of additional data does not eliminate the problem of multicollinearity. This relationship is often so strong that one is left with the impression that the same data is being observed under different names. In a certain sense this is true, because the media do not transfer information from the transmitter to the recipient, but present interpretations and connotations from which the autonomous reader constructs a message that is acceptable to him in an attempt to decrease his own uncertainty. The different parameters of media content are basically one piece of related information for the active subject. Clumps of these variables measure the same thing. This explains why the input variables in the relationship between media messages and election results are also correlated among themselves. In that case, the lack of independence between predictors is inherent in all data characterising media influence and researchers must deal with the multicollinearity problem.

Multicollinearity does not affect the ability of a regression equation to predict the response, but serious correlations among predicting variables will lead to inflated magnitudes of the estimates and inflation in the variances of these estimates (Hocking, 2003: 166). In order to preclude this possibility, it is necessary to eliminate explanatory variables that are more closely tied to other input variables than to the output variable. Due to the effect of multicollinearity, it is not always possible to use all of the input variables in regression models. Thus, the predicting variable in the

[3] In order to calculate the parameters of regression models, percentages are widely used alongside the nominal values. Zhao proved that "[g]enerally, the accuracy of linear models for modelling bounded variables (e.g., percentage data) is not as good as for other unbounded variables obtained in the same experiment." (Zhao et al. 2001, 2129). In the data presented in this article, this difference is extremely small. The coefficient of correlation is, of course, not affected by the form in which the data are presented, so either raw numbers or percentages are equally useful.

1999 model is positive media coverage of political parties (*xp*);[4] in 2002, 2003 and 2007 the positive (x_p), neutral (x_e) and negative (x_n) media coverage.

In all four instances the predicting variables are not weighted by the number of readers because of the absence of significant variance within the positive, neutral and negative valuations of political parties in the different media sources.[5] The data for the three multiple linear regression models are presented in Table 2: the adjusted coefficient of determination (adjusted R^2)[6], the significance of the model, the least squares estimates of β_j (called "coefficients" in table 2) and their significance. The election results in those models are assumed to be a function of the input variables.

Table 2. Linear Regression Models: Dependence of Election Results Upon the Valuationof Political Parties in the Print Media

	1999	2002	2003		2007			
Adjusted R^2	0.971	0.966	0.990		0.853			
Significance F	0.000	0.004	0.000		0.000			
Arguments	*Coeffi-cients*	*P-value*	*Coeffi-cients*	*P-value*	*Coeffi-cients*	*P-value*	*Coeffi-cients*	*P-value*
x_p	0.987	0.000	1.545	0.004	1.462	0.004	1.667	0.000
x_e	-	-	-1.909	0.029	-0.845	0.043	-1.148	0.005
x_n	-	-	1.421	0.029	1.225	0.009	0.215	0.002

From Table 2 it can be seen that in all four instances one may speak of a strong relationship between the election results and how the different political parties were presented in the print media. The positive valuation of the political parties (x_p) is shown in all of the models to be the most prominent part of the influence of the print media on the election results. A fairly definite relationship also exists between negative valuations of political parties and the election results, but this correlation is positive: the negative media coverage of political parties influenced the election results in a beneficial way to that party. The same is confirmed in all four cases by the coefficients of correlation of the negative valuations of political parties and the election results: 0.84 in 1999, 0.73 in 2002, 0.82 in 2003 and 0.80 in 2007. The correlation coefficient for 2002 is statistically significant at the significance level 0.05; the remaining correlation coefficients are

[4] Due to collinearity, it is not possible to use other explanatory variables in the 1999 model.

[5] Unfortunately, the question about the diversity of the output of different media outlets must be left aside here because it strays too far from the main topic.

[6] Because the number of political parties being observed was relatively small and because there are several explanatory variables, the coefficient of determination may show a deceptively significant relationship among the variables. For that reason, an adjusted coefficient of determination is used. The adjusted R^2 is computed using the formula
$1- n/(n-1) \times R^2$

statistically significant at the significance level 0.01. It must be realised that reading the newspaper is not just the reception of the text, but the active subject plays the central role of the constructor. His action is not determined by what the media outlet said, but by the meaning that the reader gave to the words that reached him. Thus the authors' first hypothesis (H_1) which presumed that the frequency of valuations of political parties in the media describes election results and that the relationship between them is proportional is confirmed. Even in the case of negative valuations, the relationship between the independent and dependent variables is proportional: as the constituent part of the negative valuations increases the value of the dependent variable also increases.

Since influence was defined as change, the dynamics of the relationship coefficients prior to the election must also be observed. In order to accomplish this, the correlative relationship between election results and media coverage of political parties was studied week by week. Due to the fact that for several of the observed weeks it was not possible to calculate and obtain statistically significant results for the multiple correlation coefficients between the three predicting variables – positive, neutral and negative coverage – and the election results, the election results were compared with the frequency of media notations of political parties (x_z). As stated above, the frequency of notations is the sum of positive, neutral and negative valuations ($x_z = x_p + x_e + x_n$). Thus, x_p, x_e, as well as x_n are strongly correlated with the dependent variable. However, when plotting linear relationships that appear in more than two dimensions onto a single multiple regression plane, the strength of the partial association between x_e and x_n, on the one hand, and y, on the other, becomes weaker. A noteworthy effect deriving from the relationship among the explanatory variables themselves is also added. For this reason, the numerical value of the multiple coefficient of determination is greater than the coefficient of determination between the output variable and frequency of notation . Second, the relationship between the frequency of notation and the dependent variable is considerably weaker than the relationship between positive coverage and the response, because in the first instance, the influence of other variables is also reflected. As a result, it may be concluded that In all instances where x_z is an independent variable, the relationship between the frequency of notation and the dependent variable is relatively modest (see Tables 5 and 6, Figure 1).

Figure 1 depicts the data relating to the dynamics of the coefficients of determination between the 2 March, 2003, election returns and the notation frequency of the political parties by month from June 2002 until March 2003. The statistically significant value of the coefficients of determination shown in Figure 1 is 0.44 (the critical value for coefficients of correlation is 0.67) at the significance level 0.05.

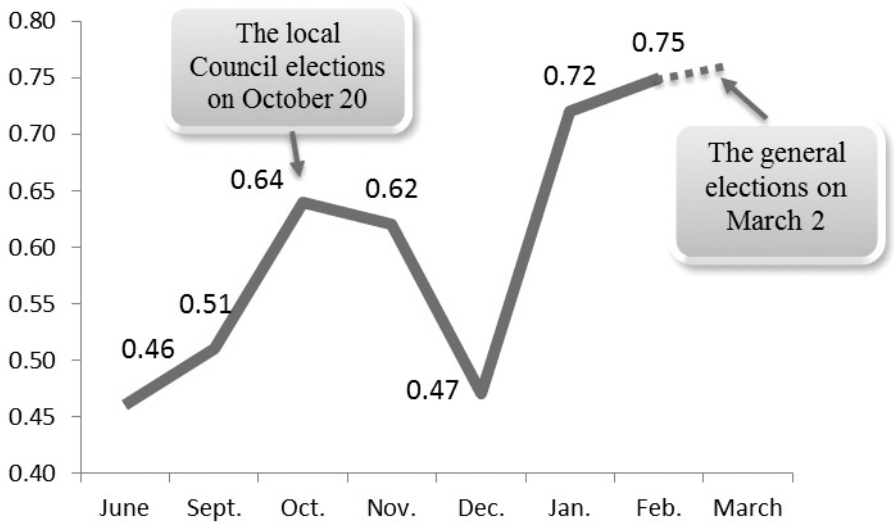

Figure 1. The Coefficients of Determination Between the 2 March, 2003, Election Results and the Notation Frequency of the Political Parties During June 2002 – February 2003.

Figure 1 shows that the relationship between media content and the 2 March, 2003 election results is noticeable. The value for the coefficient of determination clearly changed prior to the election. It rose as the local municipal elections approached from September to October from 0.51 to 0.64 (it was noted above that the adjusted multiple coefficient of determination for the 20 October, 2002, local election returns and media coverage was 0.97, clearly significantly greater). Thereafter, in December, it declined to 0.47 and rose again in January to 0.72. In the last month prior to the elections, it rose to 0.75. It may be concluded that the coefficient of determination changed.

The Cake Model

First, it can be seen that the closer the date of elections approaches, the more closely the content of the media expressed the outcome of the upcoming election. Second, the political parties that received a relatively greater number of votes in the election received more coverage in the media than did other political parties. But the critical question remains: which came first, the chicken or the egg? It is possible to argue that the media content merely reflected the changes in public opinion and that the popularity of the political parties and candidates influenced their positive, negative or neutral presentation by the media. However, the question still remains as to whether the people's preferences for political parties influenced the media or did the media influence the people's preferences for political parties? Also, did the popularity of political parties influence their portrayal by the media? The answer to the last

question is: yes and no. Comparing the coverage of the political parties that participated in the parliamentary elections of 1999, 2003 and 2007 by the leading daily and weekly newspapers immediately prior to the elections (see Table 3), the preference for some and the rejection of others became apparent.

Table 3. The Valuation of the five largest political parties in Estonia by the leading daily and weekly newspapers in their news and opinion articles during the final nine weeks prior to the 1999, 2003, and 2007 Estonian Parliamentary (*Riigikogu*) elections (the positive and negative valuations given to political parties as a percentage of the total number of corresponding notations).

	Number of valuations	Share, %					
		Reform Party	Centre Party	Pro Patria/ Res Publica Union	Moderates/ Social Democratic Party	People's Party	Five largest political parties combined
1999	pos n = 544	21.3	23.7	7.0	15.1	18.4	85.5
	neg n = 1063	15.1	37.8	7.1	7.6	9.5	77.1
2003	pos n = 727	25.7	21.6	12.2	9.5	9.5	78.5
	neg n = 1159	22.1	40.9	6.7	4.7	9.4	83.8
2007	pos n = 977	24.3	21.9	16.4	8.1	12.6	83.3
	neg n = 1424	22	44.8	8.6	5.2	13.5	94.1

The largest political parties were mentioned in the media significantly more than lesser known parties. This is natural because the political parties that are represented in the parliament (and even more so if they belong to the ruling coalition) are usually more extensively covered by the media than those that have been left out. The former are associated with far more events that are covered by the press and in general they are also far more proficient in their public relations efforts. Table 3 also shows the political preferences of Estonian newspapers. In major newspapers, the negative valuations were primarily associated with the Centre Party. The Reform Party, the Social Democratic Party and the Pro Patria/Res Publica Union were favoured with mostly positive valuations. Thus, in both positive and negative valuations, the picture was out of balance. In general, the world view of Estonian journalists is somewhat left of centre politically and this is reflected in their relatively positive valuation of the Social Democratic Party. At the same time, the aggregated data blurred the picture somewhat because the two largest newspapers have different political preferences: *Postimees* favours the Reform Party and *Eesti Päevaleht* the Pro Patria/Res Publica

Union. Consequently, each of those newspapers tended to treat its competitor's favourite political party critically and this was apparent in the negative valuations of the Reform Party or the Pro Patria/Res Publica Union, respectively. Both of those newspapers, however, have a common enemy — the Centre Party, as evidenced by that party's strong negative valuations. The aggregation of 44 percent of the negative valuations to one political party during the nine pre-election weeks in 2007 cannot be explained only by that party's unfortunate or inappropriate behaviour or actions. Data from the 1999 and 2003 elections produced similar results. Primarily negative valuations were given to the Centre Party; the Reform Party, Pro Patria/Res Publica Union and the Moderates/Social Democratic Party were favoured with positive valuations. It must be added that in two out of the last three elections observed, the Centre Party received the most votes.

Thus, the valuation of the political parties by the media was not necessarily influenced only by their popularity. This circumstance still does not answer the question of which change came first — the media tone or public preferences? In searching for an answer to that question, one may compare the results from pre-election public opinion polls with the media content analysis data.

Prior to the 2003 parliamentary elections, numerous public opinion polls explaining voters' support for political parties were conducted between December 2002 and March 2003. Four of them were carried out by the research firm Emor. The results of those opinion surveys have been published by Emor's analyst Aivar Voog (2003). The Emor polls were conducted during the following periods: 27 November – 18 December, 2002; 8 – 15 January, 2003; 5 – 12 February, 2003; and 18 – 24 February, 2003. In each case, 500 people were polled. In addition to that, the firm Turu-uuringute AS [Market Research, Inc.] carried out a survey from 31 January to 7 February, 2003, in which 1,000 persons were polled (PM 2003). The results of those polls are presented in Table 4.

Table 4. Results of Public Opinion Polls Conducted Prior to the 2003 Parliamentary Elections (support for political parties – percentage of legal age citizens who had the firm intention of voting).

Survey organisation	Emor	Emor	Turu-uuringute AS	Emor	Emor
Political Party	27 Nov. – 18 Dec., 2002	8-15 Jan., 2003	31 Jan. – 7 Feb., 2003	5-12 Feb., 2003	18-24 Feb., 2003
RefP	13	13	13	20	15
CP	27	26	30	31	27
M	3	6	5	4	7
PPU	6	8	4	6	7
PPE	5	6	6	3	11
ResP	23	21	24	14	16
	n=500	n=500	n=1000	n=500	n=500

Sources: Voog 2003; PM 2003.

The results of the surveys were compared with the media content data prior to conducting the survey and during the period of the survey, using equal time spans. If the poll was conducted during a seven-day period, for example, the period observed prior to the election was also seven days in duration. The survey results were observed as the dependent variable and the frequency of notation of political parties in the print media (x_z) as the predicting variable. The values for coefficients of determination between the survey results and the notation frequency of political parties are presented in Table 5. The critical value of the coefficients of determination shown in Table 5 is 0.50 at the significance level 0.05. N is as previously stated, the number of notation of political parties (x_z).

Table 5. Coefficients of Determination Between the Survey Findings and Frequency of Notion of Political Parties for the Periods Preceding the Surveys and During the Polling Periods in December 2002 and January 2003.

	Before	Polling Period	Before	Polling period	Before	Polling Period
	5–26 Nov., 2002	27 Nov. – 18 Dec., 2002	3–7 Jan., 2003	8-15 Jan., 2003	23-30 Jan., 2003	31 Jan. – 2 Feb.,2003
	0.62	0.38*	0.63	0.56	0.78	0.56
n	409	389	532	660	629	768

* statistically non-significant

In all three instances, the value of the coefficient of determination prior to the polling period was markedly greater than during the polling period. This finding is important: the typical lagged correlation is obvious. One can observe here the classical pattern of media influence: the media first sets the public opinion tenor which the public adopts as its opinion at some later point in time. From this it can be concluded that the coverage by the media influenced public opinion.

At first glance, this conclusion is not supported by the data collected in the survey conducted by Emor in the beginning of February. Immediately prior to the poll conducted from 5 – 12 February, the coefficient of determination for the notation frequency of political parties and the results of the public opinion poll was 0.86 and during the polling period it was 0.96 (see Table 6).

Table 6. Coefficients of Determination for the Results of Public Opinion Polls and the Notation Frequency of Political Parties Prior To and During the Polling Periods in February 2003.

	Before	Polling period	Before	Polling Period
	28 Jan. – 4 Feb., 2003	5–12 Feb., 2003	11–17 Feb., 2003	18–24 Feb., 2003
	0.86	0.96	0.85	0.73
n	691	745	692	857

From this it can be seen that media apparently followed the public opinion that prevailed at the moment more closely. However, in drawing this conclusion it must be presumed that the observed publications had not previously written anything about political parties, or that the readers had completely forgotten the prior messages they had received. This, however, is obviously not the case. It is easy to be convinced that this is so by extending the time period prior to the polling period and taking into account the earlier coverage given to political parties in the media.

Unfortunately the length of the ideal time lag between the appearance of media coverage and the change in public opinion that takes place is not known. Probably it is possible to experimentally verify this ideal interval by searching for the time lag during which the correlation between the media coverage and the results of the public opinion surveys is the greatest. It is also not known how quickly people forget the messages presented by the media. The problem has been resolved in the current study by extending the time prior to the polling period to the beginning of January (taking into consideration the content of the media from 3 January, 2003, until the February polling periods). By increasing the time period prior to conducting the poll from seven days to four and a half weeks (3 January to 4 February), the coefficient of determination between the results of the public opinion polls and the notation frequency of political parties increases from 0.86 to 0.98.

Hence it is indicated that the media content changed first and changes in public opinion followed. Moreover, the relationship between the content observed over a longer period of time and the results of the polls shows that public preferences accumulated diachronically under the influence of the available media messages. By its nature, the mental picture construed by the reader's mind is a composite that is shaped not only by the media coverage of the moment, but also by the time lag between the exposure presented in the media and the changes that take place in the perception of the audience. This may range from a few days to many months in duration. Figuratively speaking, one may compare public opinion with a Napoleon cake – it has several layers as a result of previous and more recent structural couplings. New coverage or valuations are given to the political parties on a daily basis and each event of new media coverage triggers a new layer influencing the layer that came before and that comes after. Something is forgotten and something is

remembered, one issue forces another into the background or is itself influenced by an earlier message. Thus, the public's preferences are not echoed only by the media's latest segment of valuation but also by prior coverage. This becomes apparent in the relationship between the results of the lengthier period of content analysis and public preferences.

These empirical results confirm the second hypothesis (H_2) that the relationship between the valuation of political parties by the media and the political preferences of the voters accumulate diachronically as a cumulus in which concepts and valuations that emerge in media communication are joined and congregate. The voters' preferences were formed layer upon layer in compliance with the constant supply of valuations by the mass media and were processed into information within the cognitive systems. The aforementioned applies not only with regard to mass media content and opinion polls but also in the case of election results. Figure 2 shows the coefficients of determination between the notation frequency of political parties and the election results during the nine weeks prior to the 2007 elections.

At the same time, the relationships between the concurrent week's media coverage and the election results have been compared. In the last instance, the data from prior weeks beginning with the first week in January were added to the concurrent week's notation frequency of political parties (x_z). In other words: the period of observation was extended to the beginning of January. The coefficients of determination that are presented in the Figure 2 are statistically significant at the significance level 0.05.

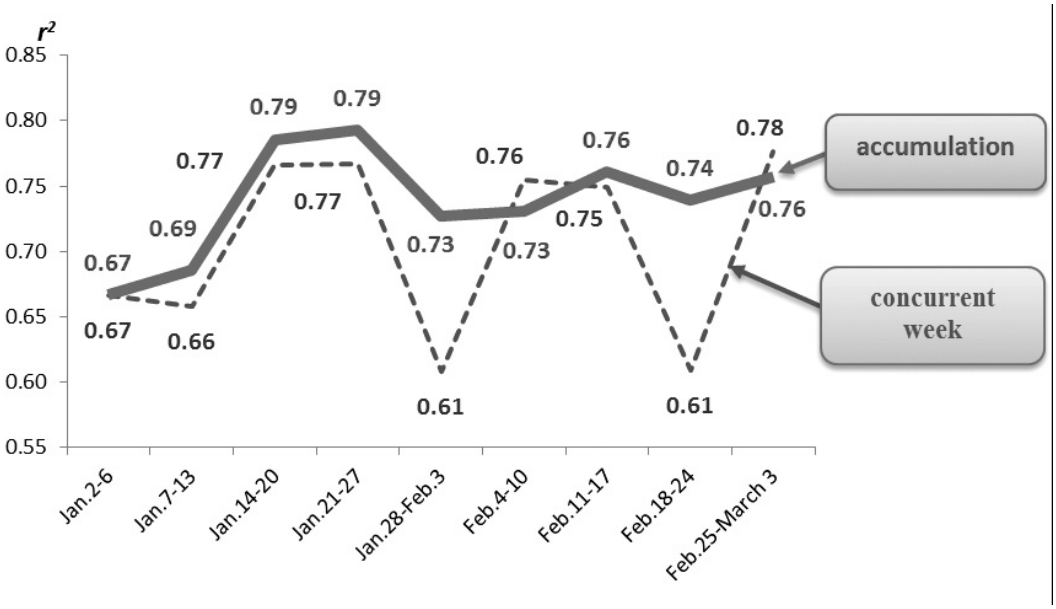

Figure 2. Coefficients of Determination Between Election Results and Notation Frequency in 2007.

In Figure 2, the dotted line depicts the concurrent weeks' coefficients of determination

and the bold line depicts the accumulation dynamics. It can be seen that the coefficients of determination between one-week notation frequency data and election results fluctuate in rather large amplitudes. However, the coefficient of determination of the combined results moves in another rhythm and reacts in an altogether different and more subdued amplitude in comparison to the boisterous movements of the current week's coefficient of determination. The basic flow of the process of forming peoples' preferences for political parties is depicted by the combined results.

Conclusions

The results of the authors' analysis show that the constructivist and systems theoretical approach has proven itself and empirical research fixed some interesting aspects of the process under observation within a certain period of time. In our study, both hypotheses were confirmed. It is indicated that the frequency of valuations given to political parties in the observed print media described the election results to a considerable degree. In the case of all of the observed elections, a quantitatively measurable relationship exists between the valuation of political parties and the election results or results of the public opinion surveys. This relationship was responsive: when one was changed the other changed as well. A clear chronological order appeared in comparing media content and the results of public opinion polls: the predicting variable preceded the dependent variable. First the media distributed its valuations, and after some time elapsed, public opinion followed. Hence, public opinion accumulated diachronically and layer-upon-layer based on the available exposure. Public opinion was shaped not only by current coverage, but also to a large extent by media messages from previous weeks.

However, the correlation coefficients do not explain everything. It should be noted that in proving the relationship between the valuation of political parties and election results, the "influence" of the media was measured for only those people who actually voted. Of the eligible voters, 57.4% voted in the 1999 parliamentary elections; 52.5% in the 2002 local council elections, 58.2% in the 2003 and 61.9% in the 2007 parliamentary elections (Estonian National Electoral Committee). Furthermore, in all four instances the readership of the observed publications did not coincide with the entire electorate – there were always more people "influenced" than there were media message receivers. This shows that the relationship between the media and individuals is considerably more complicated than is allowed for by the conventional theories that deals with how the media influences people.

It is also evident that the intent of the "sender" of the message is not always relevant: the relationship between media content and voters' preferences appears even when the communicator does not want it. In confirmation of that fact is the effect of the influence of the negative valuation of political parties. Here it can again be seen that a person's consciousness is a non-trivial system whose output cannot be predicted on the basis of the input. Changes can only be triggered by media but they cannot be determined in advance.

Thus, the activity of the reader is not determined by what the media wrote or said but by what meaning the observer gives to the words that were read or heard. The interpretation and valuation of media messages depends upon the recipient's basic implicit assumptions, beliefs, and preferences. Following that comes interpersonal communication – people discuss the events of the day and media messages among themselves. Both proceed reflexively: people as observed observers in forming their opinions keep in mind the views of others that they experience either directly or via the media. They are inclined to think what others around them think and believe what others believe. That intricate process cannot be observed empirically because cognition is recursive, complex and closed to outside observers. One can only interpret linguistic and other activity or data brought forth using some method and make decisions that better or worse fit the ascertainable facts.

The fact that the constructions and valuations presented by different media outlets were generally similar does not tell one very much about the observed events and actors, but primarily about culture as a pattern of structurally related meanings that directs the making of choices, provision of meanings and the making of valuations by media professionals. The mass media's depiction of "reality" emanates only from the observed actor or event to which it gives a system specific meaning. Compatible connotations and valuations are derived from that. For the reader of media messages, the phenomena and events exist only by virtue of such descriptions and they may be specified only as system specific realities (see Schmidt, 2007: 88).

Although the authors' database is limited – it refers to Estonia at a certain time only – it can be reasonably concluded that valuations serve the structural coupling of the mass media with consciousness systems and with other social domains and perform an indispensable role in the formation of public opinion and election preferences. In structural coupling, when the media system and the cognitive systems perturb one another, a system of common understandings, shared beliefs and accepted orientations emerges that coordinates the behaviour of the individuals. The analysis showed that although the reader was active and gave meaning to the media texts in keeping with his own beliefs and that while in the reception of media messages opinions were formed reflexively, in all observed instances the perception of the voters follows the valuations of political parties in the media to a considerable degree. People, in making their choices, relied on these valuations, on that "present" created by the mass media. The collective knowledge that is created in a complex, ongoing process of communication, and the expectations that arise from this ensured that in all of the instances observed here the cultural signifier of those who were elected corresponded to the "social mandate".

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AUTHORS

Rein Müllerson - Research Professor Tallinn University, President Institut de Droit International (Estonia)

Gennady Cebotarev – President Tyumen State University, Professor of the Department on Constitutional and Municipal Law, Institute of State and Law, Tyumen State University, Honorary Lawyer of the Russian Federation (Russia)

Mikhail Kleandrov, Professor, Judge of the Constitutional Court of the Russian Federation, Corresponding Member of the Russian Academy of Sciences (Russia)

Peeter Järvelaid – Professor of comparative law and history of law, Law School, Tallinn University (Estonia)

Irina Bakulina - Assistant professor of the Administrative and Finance Law Department, Tyumen State University (Russia)

Mikhail Borodach – Professor of the Department on Constitutional and Municipal Law, Institute of State and Law, Tyumen State University (Russia)

Elena Gladun – Associate professor of the Department of Public and Financial Law, Institute of State and Law, Tyumen State University (Russia)

Kalle Liiv - Lecturer, Law School, Tallinn University (Estonia)

Taavi Minnik – Lecturer, Law School, Tallinn University (Estonia)

Mariya Riekkinen - Professor of the Department on Constitutional and Municipal Law, Institute of State and Law, Tyumen State University Tyumen) and post-doctoral researcher Law Department Abo Akademi University (Finland)

Ilmar Selge – Associate Professor Public Law. Tallinn University Law School (Estonia)

Mart Susi - Associate Professor Public Law. Tallinn University Law School (Estonia)

Ivan Tarasevits - Associate professor of the Department on Constitutional and Municipal Law, Institute of State and Law, Tyumen State University (Russia)

Tatiana Anbrecht - Associate Professor, Labour Law and Entrepreneurship Department, Tyumen State University (Russia)

Larisa Zaitceva - Associate Professor, Head of the Labour Law and Entrepreneurship Department, Tyumen State University (Russia)