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Understandings of the Rule of Law in various Legal Orders of the World
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Understanding of the Rule of Law in Russia

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I. Pravovoe gosudarstvo: the Russian understanding of the "law-based state"

The concept of a "law-based state" (*pravovoe gosudarstvo*[1]) was initially discussed between Russian legal scholars in the beginning of the 20th century and remained in the centre of constitutional legal theory until the Revolution. The influence of the German school was formative. For a good reason the notion *pravovoe gosudarstvo* is a litteral translation of the German *Rechtsstaat*. Russian scholars attributed to that concept not only formal content but also a material one: e.g. Kotliarevski (1915) saw the main purpose of *pravovoe gosudarstvo* to be a state of justice; for Kistiakovski (1913) it was a state that defends the liberties of persons and where the state power is limited by the interests of individuals. Novgorodtsev (1907) emphasised the need for a renaissance of natural law. Under the soviet regime that concept was rejected as a "bourgeois ideology". But it revived in the course of perestroika.

The Constitution of the Russian Federation, which came into force in 1993, begins with the following Article 1, para.1:

> "The Russian Federation – Russia is a democratic federal law-based State with a republican form of government."

The Constitution contains formal components of the rule of law concept: primacy of the law and hierarchy of norms, direct applicability of

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[1] The term „*pravovoe gosudarstvo*" is also translated as "law-governed" or „law-bound" state.

the Constitution, separation of powers, equality in law, judicial review and judicial independence etc. In the material sense, it contains the supreme value and direct applicability of human rights that are regarded as natural laws.

Today, the concept of "law-based state" is seen as one of the basis of the Russian constitutional order. But unlike e.g. in Germany, there is no common elaborated doctrine of *pravovoe gosudarstvo*. Some important commentaries to the Russian Constitution dedicate only few paragraphs to that term. Still, *pravovoe gosudarstvo* is a legal concept that is central to legal but also to political debate in Russia. But often it is used as a generic term for "justice", "primacy of law", "limitation of power", not as a term on its own. The Russian Constitutional Court, as well, uses this legal term, but did not elaborate it.

Remarkably, the majority of constitutional commentators state that Russia is not yet a law-based state. By Russian scholars the *pravovoe gosudarstvo* is seen as a goal to be achieved (like a welfare state) but not as a reality.

II. The main elements of pravovoe gosudarstvo

In the following, some particularities and problems discussed by Russian scholars in the context of the *pravovoe gosudarstvo* should be described on the basis of its main elements.

1. Verhovenstvo sakona: *Primacy of the law*

In the contemporary legal doctrine scholars extract the main elements of *pravovoe gosudarstvo* from the provisions of the Constitution, whereas the protection of human rights, the limitation of the state power by law, the primacy of the Constitution and the primacy of the law ("*verhovenstvo sakona*") are seen as its central aspects.

The Russian language distinguishes between *pravo* (Recht, jus) and *sakon* (Gesetz, lex). The *pravovoe gosudarstvo* means primarily the primacy of *sakon* (lex). The *sakon* is adopted by the legislator and is therefore the highest form of expression of the people's will as a sovereign. All other

norms have to comply with the *lex* to guarantee that they comply with the will of the people. On the other hand, Art. 55, para. 2 provides that no "laws shall be adopted cancelling or derogating human rights and freedoms". In that respect, the primacy of law means here the primacy of *jus*.

In Russia, the president has the inherent power to issue *ukasy* (decrees, see below) in the "areas" that are not yet regulated by the legislator or when it does not contradict the existing law. Therefore, *verhovenstvo sakona* means the "comprehensiveness" of law (lex). The *sakon* shall regulate all areas that are essential for the life of the society for other legal acts (including presidential decrees) do not "break through" and "squeeze out" the legislator (Koslova/Kutafin 2009: 123). Only law can be the basis for state acts and decisions, especially for repressive measures (Baglai 2008, 141).

In the context of primacy of the law one particularity of the hierarchy of norms should be emphasised: The Russian Constitutional Court stated the priority of the "Code of Criminal Procedure" even over later laws. It perceives a *code* as "an own, structured system" with the consequence that new norms have to comply with that code (decision from 29.06.2004, N 3-P). Though, modifying "lex posterior"-principle, the Court recognised a priority of "codified" normative acts over "simple" norms in other federal laws. Interestingly, that decision was based inter alia on the principle of the rule of law. But in later decisions, the Constitutional Court modified its ruling and made clear, that this priority principle does not apply in cases where (later) federal laws establish additional guarantees of rights and interests of citizens (e.g. decision from 15.05.2007).

The idea of "dictatorship of law" proclaimed as a reaction to the widespread legal nihilism in Russia is even contradictory with regard to its description of the liberal foundation of the concept of the rule of law. The implicated "blind" application of laws and the oppressive sound do not correspond with the (material) concept of *pravovoe gosudarstvo*.

2. Limitation of the state power by law

The idea of limitation of the state power by law is embodied in Article 15, para. 1, 2. It declares that the Constitution has the supreme judicial force and that "the bodies of state authority and of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws".
The legality of administration is one variation of that principle (Koslova/Kutafin 2009: 122).

3. Human Rights

Article 2 states that "the human being, his rights and freedoms are the supreme value". The state has the obligation to protect the rights and freedoms "of men and citizens". These rights are not granted but exist ipso jure, they are natural rights. The placement of that provision at the very beginning shows the importance that the Constitution attaches to the protection of human rights (part 2 of the Constitution is devoted to the "rights and freedoms"). In that respect, the Russian concept of *pravovoe gosudarstvo* embodies the substantive concept of *Rechtsstaatlichkeit*.

4. Democracy

One further element of *pravovoe gosudarstvo* is the rule by the people (Article 3). The multinational people of Russia is the bearer of the sovereignty.

In 2006, a debate on a "Russian" type of democracy was launched by the high representative of the Kremlin Administration Surkov – the "sovereign democracy". An intensive debate took place also among the legal scholars (see Kutafin, 267-286). Its obscure definition is the following: "a society's political life where the political powers, their authorities and decisions are decided and controlled by a diverse Russian nation for the purpose of reaching material welfare, freedom and fairness by all citizens, social groups and nationalities, by the people that formed it". The idea of "sovereign democracy" can be seen as an attempt to put the interests of state above the interests of citizens and above the law

and was rejected by Medvedev (being vice-president) – "democracy without any adjectives".

Due to the experience in the Soviet period, the Constitution explicitly stipulates in Article 13, para. 1-3, that in the Russian Federation ideological and political diversity (multi-party system) are recognised. There shall be no state ideology. This prohibits state officials from basing their actions not on the Constitution or law but on any ideology.

The continuing consolidation of the "vertical of power" that most prominently led to the abolition of direct elections for regional leaders increases the misbalance of power in favour of the president and his administration. However, some scholars consider the authoritarianism as an element of the transitional period (so e.g. the President of the Constitutional Court Sorkin).

5. Separation of powers

According to Article 10 of the Constitution the state power is divided into legislative, executive and judicial power. But there is a significant misbalance between three branches of powers in favour of the executive power.

One particularity of competences of the Russian president is, as mentioned above, his original power to issue decrees ("*ukas*", Article 90). The *ukas* is a normative legal act and has binding force and is directly applicable (there are *ukasy* without any normative force, too, e.g. appointments). It shall not contradict the Constitution and federal laws. The legislative power of the president is not confined to any specific subject matter. The only constraint could be the general idea of separation of powers (the Constitutional Court has stated that for the cases, where the Constitution does not elaborate on the execution of acts by the president). An *ukas* can be modified or withdrawn only by the president. And only the Constitutional Court can challenge its legal force.
An *ukas* can be the basis for the edicts ("*postanovlenie*") of the government that has also a binding force (Article 115, para. 1 and 2). The

president is empowered to revoke an edict in the case that it is against the Constitution, federal laws or a presidential decree.

In its decisions Nr. 11-P from 30.4.1996 and Nr. 7-P from 30.4.2007 the Constitutional Court decided that the president can even issue *ukas* to fill a regulatory gap on the area where the parliament is obliged to act, provided the *ukas* is temporarily limited and does not contradict the Constitution or federal laws. The president derives this power from his position as the guardian of the Constitution and his competence to "ensure coordinated functioning and interaction of all the bodies with state power" (Art. 80, para. 2).

The decrees were an important instrument and were used by president Yeltsin extensively in the beginning of the 1990s, when relevant federal laws were absent and the legislative process was insufficient for several reasons. Since the end of the 1990s, the percentage of *ukasy* among the legislation has declined considerably.

Interestingly, the Constitutional Court, the Supreme Court and the Higher Arbitrazh Court have the power to initiate legislation "on issues in their field of competence" (Art. 104, para. 1).

One further particularity are the "explanations" in form of judicial decrees issued by the Plenum of the Supreme Court or by the Higher Arbitrazh Court. They are binding for lower courts and have therefore "quasi"-normative effect. The "explanations" concretise the norms, explain the meaning of legal norms and determine how to resolve outlined cases. The basis for the "explanations" is the "generalisation of judicial practice". In that context it is problematic, firstly, that no legal action is provided against these "explanations". Secondly, the "explanations" constitute a constraint upon the independence of judges. Thirdly, they deny the possibility of change or improvement of judicial practice by lower courts. And lastly, the judges of lower courts – anyway shaped by strong positivism – as a consequence unlearn independent interpretation of laws.

Recently, the concept of precedents became the main topic in legal debate. The bone of contention was the position of the Higher Arbitrazh

Court, that its interpretation of laws and "legal positions" given not only in "explanations" but also in concrete cases is binding on lower courts. That position was approved by the Constitutional Court (decision from 21.01.2010, N 1-P). That is seen as the establishment of case law as a source of law.

6. General principles of international law and international treaties

The *pravovoe gosudarstvo* is based also on general principles and rules of international law and international treaties (Article 15, para. 4). They are an integral part of the Russian legal system. If any international treaty contains a rule which is against Russian law, the international law prevails. That is a remarkable openness towards the international community. In November 2009 the Constitutional Court based the prolongation of the moratorium on death penalty on Article 18 of the Vienna Convention on the Law of Treaties (decision Nr. 1344-O-R from 19.11.2009). It also based its decision from 26 January 2010 on Article 15, para. 4 and stated that judgements of the ECHR could be a ground for retrial in civil procedure (in criminal and administrative procedures explicit norm for that exist already).

7. Independent judiciary/court

The independence of the judiciary is crucial for a law-based state and is embodied in Art. 120 et seq. of the Russian Constitution. But in reality the independence of judges remains one of the main problems in Russia. This is even recognised by president Medvedev too, who considers the achievement of a *real* independence of the judicial power as a "main objective" and a "fundamental task" (speech from 20 May 2008). In that respect, Medvedev himself speaks of "pressure of various kinds, such as surreptitious phone calls and money" that undermines the independence of judges.

One further problem concerns the organisation of the courts. The court presidents have a considerable influence in Russian courts which is generally conceived as a huge problem.

Emblematic for the pressures on the judges is the case of Kudeshkina v. Russia, decided by the ECHR on 26.02.2009 (Application no. 29492/05). In that case, the judge Kudeshkina was put under pressure by the president of the court who was not "satisfied" with her dealing with the case. As a consequence of the conflict, judge Kudeshkina was relieved of her duties.

The courts presidents are appointed by the Federation Council on proposal of the President or by President on proposition of the President of the Supreme Court. They are appointed for a period of 6 years, whereas the prolongation of the mandate for the next possible period is a source of pressure on "compliance". The court presidents are seen as "translators" of different administrative interests.

They can initiate disciplinary measures; they propose the candidates for different positions in the court. Their opinion has an important impact on the career of a judge. This leads directly or indirectly to an "adjustment" of the judges. More important is the power of court presidents to adopt the schedule of responsibilities. In the end, they decide which judge deals with which case. The impartiality is therefore not guaranteed. In a considerable number of cases the presidents of courts substitute the judges in ongoing cases. That leads to violations of the right to the lawful judge.

Since 2006, in some Arbitrazh courts, automated system of allocation of cases were introduced in order to reduce the described human factor. But that are particular cases and the system is not appropriate for smaller courts.

A judge can become "easily" subject to disciplinary measures or to relief of duties in a case of infringement of the "Codex of judicial ethics". Its rules are very general. In first instance a "qualification council" decides about the dismissal of judge upon the request of President of a court. The judges in that council are delivered to the same extend to the sword of Damocles of disciplinary measures as any judges – so, they are not protected from pressure and can be even the judges at the same court and "under" the President of the court who initiated the dismissal procedure. Furthermore, the majority decides and there is no procedure guaranteeing secret voting.

In the end of 2009, a special Judicial Disciplinary Tribunal was created. It will review the decisions of the disciplinary councils and is supposed

to approach this in a more impartial way. The new competence to review the decisions that rejected the motions of dismissal of judges is also criticised.

8. Judicial Review

One particularity of the system of judicial review in Russia is that there are two systems of court which deal with civil and commercial disputes: the ordinary court system and the commercial court system (so called arbitrazh courts). Since they both decide on the basis of the same laws and no common higher court or other mechanisms exist, informal consultations shall help to avoid a contradictory jurisprudence.
There is no separate administrative jurisdiction yet – it is realised by civil or Arbitrazh courts. The protection of the citizens against administrative acts is limited. A crucial problem is the lack of any administrative procedural law. Consequently, each public authority has its own procedure. In the administrative procedure the principle of judicial investigation does not apply.

Uncommon is the general competence of the public prosecution (so called "general supervision power", *prokurorskii nadsor*, a heritage form soviet system) to prove the compliance e.g. of state executive organs or commercial or non-commercial organisations with human rights and freedoms "in order to assure the rule of law". Furthermore a prosecutor may institute or enter in civil proceedings on behalf of another. Having instituted or entered a proceeding, the prosecutor is not bound by the interests of the person whose rights or freedoms have been violated. That provision is seen as a constraint upon the liberal state.

The Constitutional Court has jurisdiction over the compatibility of federal laws, normative acts of the president, both houses of the parliament and the government, as well as constitutions, laws and other normative acts of the subjects of the Russian Federation with the Constitution of the Russian Federation.
In the case of individual complaints the competence of the Constitutional Court is restricted to the review of the constitutionality of the

laws (lex). This limits considerably the scope of constitutional review of administrative actions.

One of the problems is the implementation of the decisions and the application of interpretation given by the Constitutional Court to legal norms by the other constitutional institutions. According to an interpellation of the State Duma in 2005, for the period 1997-2005 ten decisions and one ruling of the Constitutional Court were not executed by the Executive branch. The latter is obliged to propose law amendments according to the judgments of the former within tree months.
As another problem can be stressed the lack of strong authority of the Constitutional Court. Its authority is seen as compromised after the 1993 events when it "interfered" in the conflict between the president and the Soviet and was finally dissolved by Yeltsin. The Constitutional Court adopts itself self-restriction. It interprets the Constitution largely in favour of the "state power" (e.g. its decisions on Chechnya where it accorded to the president competences not provided by the Constitution or the decision on the abolition of direct elections of regional leaders).

There is a kind of controversy between the Constitutional Court on one side and the Supreme Court and the Higher Arbitrazh Court on the other: the Constitutional Court gives an interpretation to a certain legal norm – the other courts shall follow that interpretation. But they have an argument against that: the interpretation cannot be mandatory since it is not a law and the principle of supremacy of law does not apply.
The decision of 11.11.2008 (N 556 O-R) illustrates this issue: in an earlier ruling the Constitutional Court had given in the light of the Constitution the only possible interpretation to a provision of a law. But in the following retrial in that case the Supreme Court stated, that the interpretation of the Constitutional Court does address only the Legislator and refused to review the case in the light of the decision of the Constitutional Court. In the new decision the Constitutional Court reiterates the binding nature of its decisions.

To strengthen the authority of the Constitutional Court, 2009, President Medvedev imposed on his administration the task of drafting a law

concerning the liability of officials and private persons for the execution of decisions of the Constitutional Court.

Not only for the decisions of the Constitutional Court but in general the execution of judgments is deficient. It is said, that only 50 % of judgements are implemented.

III. Conclusion

The Russian Constitution contains the basic principles of the Russian constitutional order and is due to its supreme legal force the centre and the heart of *pravovoe gosudarstvo*. The principle of *pravovoe gosudarstvo* is central to the Russian constitutionalism but it is a "weak" principle not a "hard" one since it describes not the current state which does not tolerate any derogations but an objective that has still to be achieved. In the current state there are inter alia considerable deficiencies in the application of the laws, contradictory norms and other normative acts, big discretionary power of the executive, misbalance between the powers, dangers to the independence of judges… The legal system is still in transition. Some Russian academics observe that Russian legal scholars tend to discuss the principle of *pravovoe gosudarstvo* theoretically but do not apply it in reality – the current state building and legislation are not measured with *pravovoe gosudarstvo*. Furthermore, the Russian constitutionalism lacks wide social support by the population – there is no identification yet with the Constitution and its values. This makes the very long way to go not easier.

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