

Sabine Fischer, Heiko Pleines, Hans-Henning Schröder (Eds.)

Movements, Migrants, Marginalisation

Challenges of societal and political participation
in Eastern Europe and the enlarged EU

CHANGING EUROPE

Edited by Dr. Sabine Fischer, Dr. Heiko Pleines and
Prof. Dr. Hans-Henning Schröder

ISSN 1863-8716

Sabine Fischer, Heiko Pleines, Hans-Henning Schröder

(Eds.)

MOVEMENTS, MIGRANTS, MARGINALISATION

Challenges of societal and political participation
in Eastern Europe and the enlarged EU

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Bibliographic information published by the Deutsche Nationalbibliothek

Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at <http://dnb.d-nb.de>.

Dieser Titel ist als Printversion im Buchhandel
oder direkt bei *ibidem* (www.ibidem-verlag.de) zu beziehen unter der

ISBN 978-3-89821-733-7.

∞

ISSN: 1863-8716

ISBN-13: 978-3-8382-5733-4

© *ibidem*-Verlag
Stuttgart 2012

Alle Rechte vorbehalten

Das Werk einschließlich aller seiner Teile ist urheberrechtlich geschützt. Jede Verwertung außerhalb der engen Grenzen des Urheberrechtsgesetzes ist ohne Zustimmung des Verlages unzulässig und strafbar. Dies gilt insbesondere für Vervielfältigungen, Übersetzungen, Mikroverfilmungen und elektronische Speicherformen sowie die Einspeicherung und Verarbeitung in elektronischen Systemen.

All rights reserved. No part of this publication may be reproduced, stored in or introduced into a retrieval system, or transmitted, in any form, or by any means (electronical, mechanical, photocopying, recording or otherwise) without the prior written permission of the publisher. Any person who does any unauthorized act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

Contents

Foreword	9
<i>Sabine Fischer, Heiko Pleines, Hans-Henning Schröder</i>	
Introduction	11
1. DEFINING THE RIGHT TO POLITICAL PARTICIPATION. THE CASE OF THE RUSSIAN PARTY SYSTEM	
<i>Elke Fein</i>	
Re-Defining Justice and Legitimacy in the Post-Soviet Space. The Case of the First Russian Constitutional Court	15
<i>Alla M. Samoletova</i>	
Different Paths of Party System Consolidation: Which Factors Matter for Political Justice?	27
2. DEFENDING SOCIETAL INTERESTS. NGOs' ATTEMPTS TO FRAME PUBLIC DEBATES	
<i>Susanne Schatral</i>	
Stop Violence. Framing Strategies of Russian Women's NGOs	43
<i>Noémi Kakucs and Róbert Sata</i>	
Violence against Women in European Societies: East and West	57
<i>Diana Schmidt</i>	
Anti-Corruption Advocacy in Contemporary Russia? Local Civil Society Actors between International and Domestic Contexts	83
3. INTEGRATING MIGRANTS INTO WESTERN SOCIETIES. THE EU BETWEEN CULTURAL CHALLENGES, MULTICULTURALISM AND NEW IDEAS OF CITIZENSHIP	
<i>Oksana Morgunova and Dmitry Morgunov</i>	
Making Cakes in Scotland. Sweet Memories and Bitter Experiences	101
<i>David Duncan</i>	
Multiculturalism as a Tool for Migrant Integration	113
<i>Aleksandra Wyrozumska</i>	
Enhancing Inclusion in the European Union. The Model of a European Stakeholder Citizenship	125

**4. RESTITUTING EXPROPRIATED PROPERTY IN POST-SOCIALIST COUNTRIES.
THE LIMITS OF LEGAL JUSTICE**

Csongor Kuti

Justice and Reparation 143

Katerina Koleva

Restitution of Expropriated Property in Eastern Europe.
The Restrictive Approach and Available Remedies with a Special Emphasis
on the Case Law of the European Court of Human Rights Related to Restitution 159

Damiana Gabriela Otoiu

Restitution Policies and National Identity in (Post)Communist Romania.
The Case of the Jewish Community 173

5. REACTING TO SOCIAL MARGINALISATION

Aisalkyn Botoeva

The Institutionalisation of Novel Shopping Places in a Post-Soviet Country.
The Case of Supermarkets in Bishkek, Kyrgyzstan 191

E. Carina H. Keskitalo

Vulnerability in Forestry, Fishing and Reindeer Herding Systems
in Northern Europe and Russia 203

Anastasiya Ryabchuk

Nostalgia and Solidarity. Social Suffering in Post-Communist Societies 213

About the authors 223

Foreword

This book presents the results of the Changing Europe Summer School on 'Justice as a societal and political matter. Equality, social and legal security as conditions for democracy and the market' that took place in Berlin in July 2006. The Summer School, organised by the Research Centre for East European Studies at the University of Bremen, brought together more than 30 young scientists from all over the world who work on issues related to Central and Eastern European nations and the enlarged EU. Summer School participants were selected with the help of international referees.

The participants in the Summer School, mostly doctoral students from the disciplines of political science, sociology, economics and law, all presented their current research work. Some of the best Summer School contributions were selected for publication in this edited volume.

The 2006 Summer School held in Berlin represents the first in a series. In the years to come, the Changing Europe Summer School will become a regular event, taking place in a different European capital every year. The best contributions will be published in an annual edited volume. This first collection ushers in the Changing Europe book series.

This book would not have been possible without ample support. First of all, our thanks go to the participants in the Summer School, who, with their enthusiasm and knowledge, made it an unforgettable event. We would also like to thank all the referees who supported us in the selection of appropriate participants. We are additionally grateful to all those who helped to organise the Summer School and the book production, namely Hilary Abuhove (language editing), Christopher Gilley (language editing), Julia Kusznir (organisational support), Matthias Neumann (technical editing), Susanne Schaller (Summer School organisation) and Tobias Schulz (final editing).

Last but not least, we want to express our gratitude to the Volkswagen Foundation, which generously supports the Changing Europe Summer Schools.

Bremen and Berlin, January 2007

The editors

Introduction

The end of socialism posed a historical challenge to European societies. The former socialist Central and East European countries were faced with what has been called a 'triple transformation': mutually dependent changes in the political, economic and social spheres. At the same time, the old EU member states had to develop strategies to react to these developments and integrate former socialist societies. This post-socialist transformation of Europe coincided with a number of broader trends in the political, economic and social spheres, which are often collectively referred to as globalisation. Success or failure to adapt to these changes creates winners and losers. The focus of this edited volume is on various groups of 'losers' and the challenges they face as a result of their marginalisation.

By looking through the prisms of political and social movements, migrants, property restitution and social marginalisation, the contributions in this book analyse societal and political participation in various European contexts. The first part deals with political participation. The chapters by Elke Fein and Alla Samoletova revolve around the Russian party system. Together they describe the constraints that limit political participation in the post-Soviet regime.

The second part presents a comparative perspective on strategies for representing societal interests in different countries. The contribution by Susanne Schatral and the chapter by Noémi Kakucs and Róbert Sata look at efforts to combat violence against women in Russia, Hungary and Great Britain. The following chapter by Diana Schmidt examines civic initiatives against corruption in Russia with regard to overlapping international, national and local contexts.

The third part turns the readers' attention to the old EU member states. The integration of migrants in a climate of globalisation and post-socialist transformation is one of the main challenges confronting the EU today. Oksana Morgunova interviewed Latvian migrant workers in Scotland to analyse the cultural conflicts occurring between immigrants and their new social environment. David Duncan goes on to assess the concept of multiculturalism based upon the Dutch example. These two researchers present migrants' forays into societal participation from a bottom-up and a top-down perspective. Aleksandra Wyrozumska broadens the spectrum to include the issue of citizenship within the EU. She presents the stakeholder model of citizenship, which aims to reconcile different loyalties in a multi-national and multi-ethnic context.

The fourth part of the volume returns to a familiar challenge for post-socialist societies. The issue of restitution of property expropriated under communist rule provokes serious debate about societal justice and equal rights for those seeking

redress. The three contributions by Csongor Kuti, Katerina Koleva and Damiana Otoiú provide an overview of the different approaches adopted by the post-socialist countries that joined the EU in the first and second waves of Eastern enlargement. They also investigate the role of different actors, politicians, interest groups and national as well as international courts in shaping specific regulations and addressing the balance between individual and societal interests.

The final part of the book presents three very different cases of classic social marginalisation. The chapters by Aisalkyn Botoeva, Carina Keskitalo and Anastasiya Ryabchuk unfold in disparate geographies: Kyrgyzstan, northern Scandinavia and Ukraine. The contributions also investigate different societal groups from rural and urban populations as well as various traditional communities. The authors find that all of these groups exhibit feelings of powerlessness and despair. They are perceived – and, for the most part, also perceive themselves – to be in a state of social marginalisation.

Taken together, the contributions in this volume reflect the wide variety of challenges and conflicts linked to political and societal participation in European societies. Although nearly every country is confronted with these problems, the broad spectrum of cases investigated in the book serves to illustrate the significant differences in degree, nature and political reactions shown by societal and governmental actors all over Europe.

***1. Defining the Right to Political Participation.
The Case of the Russian Party System***

Re-Defining Justice and Legitimacy in the Post-Soviet Space. The Case of the First Russian Constitutional Court

Introduction

The functioning of a legal system is decided outside of this system. (...) How laws are being applied is determined by external forces. We can thus speak about a strategic situation which marks the frame of how courts are being used and how laws are *de facto* being applied (Volkov, 2005, 76).

The idea of law and the quest for political legitimacy have been among the central motivating forces of Eastern Europe's transition processes. However, differentiating, let alone separating the spheres of law and politics still poses a considerable challenge for countries which have known their almost complete fusion for decades. In post-Soviet Russia where no social memory of impartial, politically unbiased justice was available after the collapse of the Soviet Union, the question of how 'law', 'justice' and 'legitimacy' are perceived and/or constructed by social actors is of crucial interest with regard to the functioning and development not only of the judicial system but, thereby, of the political system altogether.

While today's Russia is witnessing a new rapprochement of law and politics, the two spheres, formally separated during the Yeltsin era, have never been fully independent. Although serious efforts have been made to establish an independent judiciary based on the rule of law, it is obvious that notions such as 'justice' and 'legitimacy', which had been defined in a partial, Marxist-Leninist way for the past decades, were not likely to and probably could not easily be re-defined through a simple adoption of their western liberal connotations in the process of transition. How then, were they re-defined and which consequences did this entail?

By focusing on the first Russian Constitutional Court (RCC or CC, 1991–1993), this article highlights the double dilemma typically faced by Courts and judges in changing and instable transitional contexts: the necessity to obtain judicial and political legitimacy at the same time, as well as the strategies put forward by them to deal with these challenges. It is argued that the shaping of new institutions and the actual functioning of legal systems is not only decided by institutional arrangements themselves, but to a large extent by and through discursive struggles over the definition of basic rules. This is true especially in transitional societies. Thus, by adopting a constructivist perspective, i.e. by looking at the way basic rules and principles are

¹ The author is grateful to the editors for helpful comments, as well as to Andrew Larrew for linguistic advice.

(re-) constructed in the transitional context of post-Soviet Russia², two theoretical aims are pursued: first, problematising some of the typical challenges faced by newly established or transitional Courts in need of self-definition and legitimacy, and second, discussing the competing powers of institutional and discursive resources in the process of building and shaping new institutions on a more general level.

In order to do this I will first outline the genesis and institutional design of the first Russian Constitutional Court. In a second step, the discursive 'coming into being' of the Court, i.e. the shaping of its 'corporate identity' is discerned as a central 'variable' of its operation in the period preceding the adoption of a new constitution: how did the judges themselves perceive their task(s) and how did they try to accomplish them? The Court's 'politics of justice' is then, thirdly, illustrated at the example of several cases, above all the so-called CPSU trial. The Russian evidence used here is largely taken from a study on the CPSU trial based on an intensive document analysis and interviews with participants (Fein, forthcoming).

The Making of a New Institution

With regard to the relation of law and politics in transitional Russia and the question of the RCC's political independence, two aspects need to be addressed: first the legal-institutional setting and second the Court's personnel, i.e. the human resource factor.

New Court and Old Constitution

The first Russian Constitutional Court operated from 1991 to 1993 and was an element as well as a symptom of Russia's ambivalent transition process. It was created by the Russian Congress of People's Deputies (CPD) in May 1991 after long and painful debates about the design of the institution itself, as well as about the principles it should be based on.³ While the establishment of constitutional courts in transitional societies usually is a consequence of the adoption of new democratic constitutions, based on the rule of law and the separation of powers (Bos, 2004), this was not the case in Russia. Even though the ideas of judicial review and constitutionalism had become more and more popular here already during perestroika, when Russia experienced a dynamic, yet steady and peaceful evolution towards the rule of law⁴, political

2 While the Soviet Union was about to dissolve when the RCC was created, Russia's political system still continued to be 'Soviet' insofar as the Soviet parliament and constitution were still in power until October/December 1993.

3 Vedomosti Verkhovnogo Soveta RSFSR, Nr. 13-28a/1991, Pos. 1017.

4 Robert Sharlet primarily credits Gorbachev for this development: 'In the last years of the Soviet Union and the first year of newly independent Russia change moved at lightning speed and was often expressed in legal forms. This represented a sharp break from even the near-

elites were not able to agree on a new constitution even after the attempted coup of August 1991. As a result, the Russian Constitutional Court was established almost two years before a new constitution had been adopted. So by 1991/92, paradoxically, independent Russia had a Constitutional Court based on modern and liberal constitutional principles but still lacked as of yet a democratic constitution based on these same principles. The constitution which was still valid then dated back to the times of Brezhnev (1978) and had been amended many times during perestroika. As a result, it was highly contradictory even with respect to central principles defining the structure and functioning of the state. However, the parallel existence of old Soviet-type rules and newly introduced liberal and democratic principles⁵ which was to become a stumbling stone to the Court later on, was not the only major difficulty determining the work of the first RCC.

As indicated above, the Court itself was constructed according to the ideas of the rule of law and the separation and balance of powers even before the underlying principles themselves had legally come into being. It was declared to be the highest organ of judicial control of the constitution and awarded wide ranging powers and competences, including the right to impeach the president.⁶ Also, it had the right to produce expert opinions on any problem of norm control on its own initiative, as well as the right to propose new laws. This gave it the possibility to actively intervene in the political process, which it did extensively during its first term, the Zor'kin era.

The law on the CC (LCC) declared the RCC to be the 'most impassionate and independent' of the three powers. A further guarantee of its independence and impar-

term Soviet past, when change was rare, moved glacially at best, and was invariably defined politically by the ruling Communist Party. Gorbachev, whatever his shortcomings, must be given credit for this "change to change" and the tendency to institutionalize that change in law and constitutional writ. Despite his ultimate inability to manage the social forces he had unleashed, Gorbachev's legacy to Russia has been an emphasis on constitutionalism' (Sharlet 1993, 1). The growing importance of constitutionalism manifested itself even during the attempted coup of August 1991, since the plotters themselves made reference to the Soviet constitution (see 'Zayavlenie sovetskogo rukovodstva' (18.8.1991), published in: Pravda 20.8.1991). Richard Sakwa therefore notes: 'However paradoxical it might appear, this was in a sense a "constitutional coup". The plotters tried to present their actions as being in conformity with the constitution and thus sought to draw legitimacy from their formal legality' (Sakwa 1996, 15).

5 The most difficult contradiction was probably the introduction of a new article 3 declaring the 'separation of legislative, executive and judicial powers' to be the basis of the state order, while the old article 104.2.1 entitling the Congress of People's Deputies to decide any given issue, still remained in force. Also, the introduction of liberal pluralism contradicted the values of socialism which continued to possess constitutional status.

6 The most important of them were the right to verify the constitutionality of laws adopted by the CPD and parliament, as well as of acts of the president and all executive organs, of international treaties signed by the RF, and to examine the constitutionality of political parties and legal practice in general (article 1.1 LCC; article 165 of the constitution; amendment of April 21st 1992. Frenzke 1975, 220).

ality was the fact that it had its own budget and that all public and private institutions were obliged to institutional support, as well as, above all, the irremovability and life term office of the judges and its incompatibility with party or other state offices or economic activity.⁷ Their material equipment and privileges were defined by law.⁸ Articles 4–6 of the LCC declared the RCC's judges to be independent of instructions and obliged exclusively to the constitution. How was this institutionally guaranteed independence realised in practice?

This article argues that the shaping of (new) institutions and thus, the actual functioning of transitional legal systems is not only decided by institutional arrangements but to a large extent by and through discursive struggles over the definition of basic rules. This is why, in order to analyse the actual operation of the Court, we have to look at other, non-institutional factors as well. The following sections therefore inquire into the question who the judges were, how they defined their task and what this meant in the circumstances described.

New Personnel with (High Ideals and Some) Old habits

The Court started work after the CPD had elected candidates to 13 of the 15 positions on October 30th 1991. The judges who, according to the Law on the CC, had to be 'independent and impartial' and dispose of 'particular moral qualities', mostly had either top-level academic backgrounds (10), and/or held government (3) or (unimportant) political posts (1) in the past (Spravochnik Konstitutsionnogo Suda 1997 and Fein, forthcoming, chapter I.3.2). With one exception, all of them had been members of the Communist Party which, given the fact that CPSU membership was common in the Soviet Union for all holders of higher positions, must not be overestimated as a factor compromising the judges' independence in advance. Instead, it seems more interesting to look at their subjective relationship towards the former regime and the CPSU, which can either be detected through respective utterances of the judges themselves, and/or by the point in time at which they left the party.

While some of the judges quit the CPSU as early as 1986, most of them left the party after the August Coup, whereas a few others, among them chief justice Valerii Zor'kin, officially did not make such a move at all, but rather left the party 'automatically' at the moment of their being appointed judges of the CC.⁹ So while all of them had been socialised inside the Soviet system and its totalitarian idea of law, their

7 This was only true for the first composition of the Court. The new LCC adopted in 1995 introduced a limited period of office instead.

8 See article 25 LCC and the President's decree of 14.12.1991, VVS RSFSR 1991, Nr. 51, Pos. 1841. Luchterhand 1993, 258.

9 Interviews with seven of the judges of the RCC in June/July 2001 (Ebzeev, Gadzhiev, Kononov, Luchin, Morshchakova, Vedernikov, Zor'kin). Morshchakova was the only one who was not a member of the CPSU.

attitudes towards the regime differed according to their age and personal experiences.¹⁰ However, given the judges' collective experience of a judicial system completely subservient to the Communist Party, all of them strongly supported democratisation, marketisation and, most of all, the development of a fully fledged state of law. So even if the Court presented itself as a politically heterogeneous body, all of its members undoubtedly were among the critically engaged progressive elite of the country.

Between Law and Politics – the Discursive 'Coming into Being' of the CC and its First Trials

The fact that for Russia, an independent CC was a completely new type of institution lead to both high expectations of the public and ambitious goals of the judges themselves, accompanied by a considerable ambition of the latter to meet the expectations of the former. So how did the judges frame their 'mission' and how did they put it into practice?

Besides the ambivalent and partly contradictory constitution, the work of the first RCC was largely determined by the experience of Soviet totalitarianism and the lessons the judges drew from them. The experience of lawlessness was a central motivating force with respect to their professional self-definition and the construction of the new Court's *corporate identity*. Therefore, one of the central aims articulated by the judges was their willingness to strengthen the principle of legality. This endeavour was, of course, based on their wish – as well as public expectations towards them – to distance themselves from and to break with the totalitarian judicial legacies in order to foster the establishment of an independent and impartial judiciary based on the rule of law. This is why the judges demonstrated high interest not only in contributing to Russia's transition to democracy based on a full-scale separation of powers, but also in establishing a reputation as an independent, impartial and just judicial body. This self-declared mission was both articulated discursively and demonstrated practically in the course of various important proceedings during its first term (1991–1993).

The Discursive Self-Construction of the Russian CC

The basic principles articulated by the judges on multiple occasions in and outside the broad media as being fundamental to their work can be summarised by three somewhat contradictory ideas which therefore demonstrated a partly productive, partly conflicting relationship during the Court's first term.

10 The families of Ebzeev and Vedernikov, for example, were repressed for various reasons during the Stalin period and after (Fein, forthcoming, chapter I.3.2).

Fostering Constitutionalism – the Legal Mission

We have had a punitive state for a long time. (...) It is the duty of the CC of the RF to introduce legal methods and legal thinking into the consciousness of society.¹¹

The first element of the *corporate identity* as articulated by the judges was the Court's legal mission as a supplier of justice and an outpost of constitutionalism and the rule of law in transitional Russia. When chief justice Zor'kin declared:

We must and we will live according to the law. (...) My twelve colleagues and I are like watchdogs. And the executive and legislative branches of power are the herd which I as chairman of the CC will safeguard. I will not allow that the president or parliament leave the path of law and to fall into an abyss. Therefore, the Court has all powers including that of impeachment¹²,

he claimed a certain moral 'surplus' for the Court as a guardian of law, justice and civil peace which gave the Court's task an almost missionary character. Even though in the context of the contradictory and transitional legal system of the time, this was a political mission as well, insofar as it implied a progressive, liberal and democratic interpretation of the existing, ambivalent constitution, the Court's quest for law and constitutionalism, ironically, largely resulted in its legalist submission to the contradictory but valid constitution.

'Bad, but Valid' – Submission to an Imperfect but Valid Constitution

The contradictory nature of the late (post-) Soviet constitution was not ignored, but actively acknowledged by the judges. Zor'kin himself said the country needed a new constitution as soon as possible¹³ and called the existing one a 'strange hybrid with one sleeve cut from a medieval caftan, the other from a modern business suit', inviting lawyers to 'article-shopping' whereby they could pick what they wanted. However, he and his colleagues also stressed over and over again that it was better to apply a bad constitution than none.¹⁴ So even if the judges themselves called the constitution an obstacle to democratisation, they presented their emphasis on formal legalism as a demonstration of judicial professionalism in an incomplete and fragmented legal environment. The Court therefore faced the dilemma that, in order to foster an independent judicial review and, thereby, the rule of law, it had to make reference to a constitution that did not consistently promote these principles.

11 'U nas, kazhetsya, poyavlyatsya tret'ya vlast'', Interview with E. Ametistov, in: Literaturnaya Gazeta, 22.1.1992.

12 'Valerij Zor'kin talking to Vladimir Orlov', in: Moskovskie Novosti, 26.1.1992.

13 Moskovskie Novosti, 26.1.1992.

14 Komsomol'skaya Pravda, 15.1.1992.

Political Independence, Mediation and Neutrality

The third element of the Court's legal discourse was connected to the first one and can also be explained by the Soviet experience, or more precisely the judges' wish to break with the ideas and practices underlying Soviet legal reality. Therefore, they put particular emphasis on a clear demarcation of their field of competence against that of the government in order to demonstrate their political independence of the latter. This aspect of their *corporate identity* was often verbalised by the formula that the Court did not want to 'become a servant of the powerful'. This, however, turned out to be the source of a second dilemma, as it made the Court privilege a position of political-legal neutrality which, in the context of the as yet unsolved constitutional conflict, resulted in its self-imposed obligation to mediate between the conflicting political groups and their political and legal claims. Mediation, however, seemed to be understood in the sense of 'finding the vector in the centre', as Zor'kin put it, i.e. of taking equal distances to both sides instead of taking sides for a progressive interpretation of the constitution. Indeed, Valerii Zor'kin called the law a means of harmonising interests¹⁵, thereby constructing the Court's role primarily as that of an allegedly politically neutral moderator and mediator who, in the ambivalent legal environment of late (post-) Soviet Russia, simply *could not* be politically neutral. So by trying to make a political virtue out of the dilemma of the conflictual political and the contradictory legal situation, the RCC in some sense became a political actor itself.

The Court's Political-Legal Mission Put into Practice: the Most Important Cases of the First Term

The extent to which the first RCC was a transitional phenomenon with one leg marching towards a democratic constitution and the other one still remaining in the Soviet past is illustrated by the example of some of its most important cases which demonstrate different aspects of the Court's corporate identity, but also of its identity crisis.

The First Case: Independence and Separation of Powers

The CC's first case was widely appreciated as a huge success which not only fostered democratisation and the establishment of an independent judiciary, but thereby also strengthened the Court's reputation as an independent and professional judicial body. In its first ruling pronounced on January 14th 1992, the Court struck down as unconstitutional Yeltsin's decree which had tried to merge the ministry of the interior with the secret services (Sharlet, 1993, 14). When the president accepted the CC's ruling after a few days of hesitation, this entailed a double message: first, as a clear

15 'Pravo, éto est' opredelennoe soglasovanie interesov', author's Interview with V. Zor'kin.

signal against a return to past Soviet traditions of the concentration of power and a strong influence of secret services on politics, and in favour of a system of 'checks and balances' granting citizens' rights instead, and second, as a powerful practical demonstration of independence of the Court with respect to the government, and thus in favour of the separation of powers. Both elements helped to shape and strengthen the Court's profile and reputation as a politically independent body and a promoter of Russia's democratic transition to a modern state of law.

However, it can be assumed that, given the three major elements of the Court's *CI*, this success was possible only because two of the principles presented above (political independence and promoting the rule of law) were not conflicting here. This was different in the second big case, the CPSU trial.

The CPSU Case: Impartiality as Political Neutrality

The so-called CPSU trial took place between May and November 1992 and was about the constitutionality of Yeltsin's ban of the Communist party decreed in August/November 1991. In this case, which was commonly regarded as a severe test of the Court's independence as well as of the functioning of the separation of powers in transitional Russia¹⁶, the demarcation line between advocates and opponents of democratisation and the rule of law was less clearly cut than in the RCC's first case considered above. Even though Yeltsin's ban of the CPSU seemed somewhat problematic from a legal point of view, it was much more difficult here to rule against the president and thus, in favour of the Communist Party (which, after all, symbolised not only the old political system but also the Soviet legal system which everyone wanted to overcome) without putting into question the Court's mission of fostering Russia's democratic transition. The fact that the CPSU-ruling pronounced on November 30th 1992 nevertheless turned out to be rather pro-communist raises interesting questions with respect to the (re-)definition of procedural as well as substantive legal notions, which shall therefore be examined in some more detail.

Justice as a Trade-Off Between Legal, Political and Institutional Interests

The CPSU trial is probably less interesting for its ambivalent (see below) outcome as such than for the way this was achieved, i.e. the re-definition and shaping of central signifiers such as 'procedural fairness', 'justice', 'legitimacy' and 'democracy' which took place during the process. In order to illustrate the mechanisms and strategies by which this happened, three levels can be distinguished. On each of them, a certain

16 Robert Sharlet even called it the 'most dramatic case to date' (Sharlet 1993, 5).

element of the Court's identity was challenged and, often enough, undermined, and thus reshaped through discursive struggles over the interpretation of the notions in question.

Procedural Justice

The first and most basic level on which the power relations between the participants of the trial were negotiated was that of procedural justice. Given the fact that the CC was a new institution, no rules of court had been passed as yet. This is why a large number of procedural questions, for example how many and which speakers, witnesses and experts were allowed and which documents should be accepted as an exhibit (official evidence), were decided *in actu*. Obviously, this gave the participants wide-ranging possibilities to try and influence this process, i.e. to make their respective definitions of what was to be considered a just procedure, hegemonic. This was especially the case since the Court lacked a corresponding tradition, just like the judges lacked institutional judicial experience of the rule of law. Given also the contextual factor of the Court's wish to gain reputation and to distance itself from the government, it was rather easy for the Communists to at least partially 'impose' their notions (and thereby: demands) onto the Court. This basically happened through a trade-off between certain procedural concessions to the Communists which were exchanged against their cooperation with and acceptance of the Court. As a result, procedural justice was re-defined in a way that obliged the Court to intervene in favour of the (supposedly) weaker party (here: the Communists), i.e. on a substantive basis and outside of procedural legal rules strictly speaking.

Substantive Justice and Legitimacy

Similar discursive mechanisms could be observed on the second level, where the definition of historical truth and democratic legitimacy was negotiated. With regard to the question of how to do justice to the forbidden Communist Party, an interesting, largely implicit struggle took place about the criteria according to which this was to be decided. Here too, formal-legal criteria (the violation of laws and/or the constitution) ended up by proving to be less important than a number of political and moral arguments put forward by the Communists, for example:

- the historical achievements of socialism
- the self-critique of and democratisation brought about by the party during perestroika and
- the absence of a moral right of Russian 'democrats' (the majority of whom were former Communists themselves) to 'judge' the Communists.