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ANDERS FOGELKLOU

East European  
legal thinking

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### **About the author:**

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In 1994 Fogelklou was appointed Professor of East European Law and Society at the Department of East European Studies, Uppsala University, Sweden. He is partly on leave from that position.

He is especially interested in constitutional development in Eastern and Central Europe and the emergence of constitutionalism in these states. In particular the Russian development is a topic for his research. Presently, he is engaged in a research project on Russian constitutionalism and federalism. He has numerous publications.

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## Introduction

While the process of legal transition in Eastern and Central Europe has to a large extent been finished at the legislative level, it is not yet fully completed. Entry into the European Union has already paved the way for new legislative challenges and in non - candidate states, such as Russia and the Ukraine, there are still important gaps in the legislation, especially in the Ukraine.

But legislation is only one element in legal transition. A change of legal culture and a more advanced approach to implementation of new and old legislation are also needed. Only with such a change could a real Europeanisation of the law take place. All European states, except Belarus and Yugoslavia, are now members of the Council of Europe, having ratified the European Convention of Human Rights and its Additional Protocols.

The European Union is to be enlarged. Most of the countries of Central and Eastern Europe, including the three Baltic States, stand more or less eagerly in line to become new members of the Union. The legislative framework for entering into the European Union will soon be there, says the optimist.

But, *alas*, this process is meeting difficulties. The European Union has mentioned corruption and a weak judiciary as a common problem for the candidate members. A further dilemma will also be the creation of an efficient administration to handle and apply the *acquis communautaire*, the body of EU legislation which is to be adopted.

These points might also be connected with one, not seldom, heard remark concerning the transition process of law in Eastern Europe: the alleged lack of developed or "sophisticated" legal thinking. The process of application of the law in, for example the Baltic States is sometimes seen as "formalistic" or lacking in

argumentative strength.<sup>1</sup> Russian legal reasoning has also been accused of the same kind of formalism.<sup>2</sup>

But this idea presupposes that there exists a pattern of legal argumentation or thinking which should serve as an ideal.

Is there such a pattern of thinking common to EU member states and states like Canada, Argentina, Australia or the United States? It seems artificial only to include Europe in a discussion revolving around legal reasoning and thinking an activity which is truly international.

Consequently, we are confronted with three questions:

1. Is it true that there is a common pattern of Western legal thinking? Does membership of the European Union or ratification and integration in the internal legal system of the European Convention of Human Rights imply a change in legal thinking in Europe?
2. Is it also true that there is a common deficit in Central and Eastern European legal thinking?
3. Has a change in legal thinking in transitional legal systems in post-Communist Europe already occurred - for example, as the result of the new constitutional order and the ratification of the European Convention of Human Rights and future membership of the European Union? And what changes could be expected to come?

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<sup>1</sup> Egils Levits, *Interpretation of Legal Norms and the Notion of "Democracy" in Article 1 of Satversme (The Latvian Constitution)*, Latvian Human Rights Quarterly, No. 1, 1997, pp. 55-75 (here p. 57).

<sup>2</sup> *Uyazvimaya neprikosnovennost*, interview with the Russian Constitutional Judge Tamara Morshchakova, Expert, No. 10, 2001, p. 65; also another Russian Constitutional Court Judge, Gadis Gadzhiev, expressed similar thoughts in the official internet publication <http://strana.ru/state/law/2000/11/01/973095782.html>

## Dimensions of legal thinking

Legal thinking is of course a rather broad concept. It might include reasoning in legal doctrine, reasoning in court decisions and more generally, the legal discussion which lawyers take part in.

Legal thinking and reasoning may either be oriented to *the process of discovery* of the solution of a legal problem, covering the substantive reasons why the solution to a legal problem has been taken in this or that direction either by a legislator or a judge - or for that matter also by an academic writer - or to *the process of justification* of a given answer. In this essay we shall concentrate our attention on the courts and their way of reasoning, including the style of their decisions, i.e. on the process of justification.

This differentiation has to be made because it is plausible that a judge, favouring a certain solution, must relate this solution to existing authoritative sources. However, in difficult cases some authoritative sources may point in one direction while others may point in the opposite direction. The use of justificatory materials will then be used to fit the substantive reasons making the real grounds for a decision and not the other way around. In a general moral, academic or political discussion we do not always mention the real grounds for a standpoint, although we may try do so. Or we may not even know why we intuitively came to a certain conclusion or standpoint. The process of discovery may reflect a deeper level or the deep structure of the law, which may be hard to touch or analyse. In principle, the process of taking a decision or standpoint is different from that of its justification.

Both dimensions will concern substantial questions of law but may also be related to the constitutional structure, the legal process and the actual value system or political culture within or outside the law of a given country. In the discursive utopia of Jürgen Habermas they should be similar, but such an ideal may be hard to achieve. However the courts *are bound* to give reasons for their decisions. This is one of the prerequisites of the rule of law and one of the grounds

why law-application could be seen as a rational process.<sup>3</sup> Why Kafka's novel "The Trial" gives rise to a sense of fear and horror, depends on the fact that no reasons for the indictment of Joseph K. were given.

Now we turn to the first question. Is there a common core of Western legal thinking? This is a vast question which cannot be answered without solid research. The question to be discussed is descriptive or empirical and, in principle, not normative.

## Legal thinking: level of justification

In analysing the actual reasoning in court decisions we are primarily only confronted with the level of justification. This level is also important in assessing *changes* in legal reasoning, pointing, for example, to a more open form of justification. Fortunately, substantial empirical research has been done in relation to legal thinking on this level. In the 1990s legal theorists made a solid attempt to compare legal reasoning from different states, dealing primarily with the justifications for court decisions.<sup>4</sup> Nine legal orders were first included in this research project: the Argentine, Germany, Finland, France, Italy, Poland, Sweden, the UK and the US. Later (concerning interpretation of precedents) Norway, Spain and the European Union were also included. The basis for the comparison was the activities of the Supreme Courts covering all areas of the law.

The main conclusion of the project on interpreting status was the *universalist* thesis: i.e. that the main types of justificatory practices were similar in the following aspects: (1) the set of the major type of arguments that figure in the opinions were analogous; (2) the material or sources used in the opinions were similar; (3) the patterns of justification involved in the decision were likewise akin; (4) the method of weighing various types of arguments against one another showed

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<sup>3</sup> Gunnar Bergholtz, *Ratio et Auctoritas: ett komparativrättsligt bidrag till frågan om domsmotiveringens betydelse främst i tvistemål*. Lund: Juridiska fören: Akademibokh., 1987, passim.

<sup>4</sup> *Interpreting Statutes: a Comparative Study*, D.Neil MacCormick and Robert S.Summers, eds., Dartmouth, Aldershot, 1991; *Interpreting Precedents: a Comparative Study*, D.Neil MacCormick and Robert S.Summers, eds., Dartmouth, Aldershot, 1997.

great similarities; (5) precedents play a significant part in legal decision-making and the development of law in all countries that were studied;<sup>5</sup> and the role of precedents in interpreting statutes demonstrated an analogous pattern.<sup>6</sup>

It is clear that linguistic-semantic arguments in various forms comprise a universal part of courts' reasoning, given the syllogistic form of law-application of statutory norms: the major premise being the statute, the minor the facts and the conclusion the decision itself.

(1) Arguments from a standard ordinary meaning of ordinary language used in the specific section of the statutory text being interpreted are often articulated. Also the context assists in determining the linguistically proper, specific meaning of words and concepts.

(2) Arguments from a standard, technical meaning of words or legal or non-legal technical words are also employed.

(3) Contextual arguments are widely used, e.g. taken from other parts of the section or the statute, which may give a special meaning to the norm in the provision.<sup>7</sup>

In interpreting statutes in all legal systems, linguistic-semantic arguments seem to have greater or far greater weight than other types of sources and arguments.<sup>8</sup> That could rather easily be explained by several factors. In contrast to an open debate, the courts act in the name of the law or even in the name of the state; legislation is decided by a democratically elected legislature and courts must for this reason be bound by legislation and other authoritative sources. Legislative sources are easily available and form the points of departure for legal discussion. Also precedents from the supreme courts are normally easily accessible.

The emphasis on linguistic-semantic universality among different jurisdictions may indeed be seen as trivial: legal reasoning more often than not

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<sup>5</sup> D.Neil MacCormick and Robert B.Summers, *Further General Reflection and Conclusions*, In: *Interpreting Precedents* (note 4), pp. 531-532.

<sup>6</sup> Robert Summers and Michele Taruffo, *Interpretation and Comparative Analysis*, In: *Interpreting Statutes: a Comparative Study* (note 4), p. 462.

<sup>7</sup> *Ibid.*

<sup>8</sup> D.Neil MacCormick and Robert B.Summers, *Interpretation and Justification*, In: *Interpreting Statutes: a Comparative Study* (note 4), pp. 512-525.

begins with the ordinary meaning of the words of a given statute.<sup>9</sup> The question is rather when do *other* arguments than the linguistic-semantic play a role and what function do they then have?

The research shows at least eight basic types of argument in addition to the first three types of linguistic arguments already mentioned. But there is also diversity; the differences in justificatory practices are sometimes nearly as important as the similarities. The traditional difference between common law and civil law traditions seems not so decisive for the structure of legal thinking on the level of justification as other factors. The following aspects also play significant roles and lead to diversity in justificatory practices:

(1) different constitutional theories, for example including the separation of powers doctrine, affect justificatory style; (2) the institutional structure, for example, court organisation, procedure in the courts and the number of cases and supreme court judges; (3) variations of legal culture and legal theory, for example, the traditional role of precedents, are also of importance; finally (4) dissimilar conceptual frameworks and (5) differences in education and judicial training.<sup>10</sup>

On the level of justification there appears to be a vast difference in style between France at the one extreme and the United States at the other. French judges tend to be legalistic and magisterial, whereas judges of the American Supreme Court take an openly evaluative and creative position, using a more open dialogue-oriented style. One group of courts is closer to the Americans: the British, the Argentinean and the Swedish judges have a more open approach. In some respects, too, the German judges are closer to the American extreme and in other aspects they are not. Only the German Constitutional Court permits dissenting opinions but not other German courts. Italy, Germany, Finland and Poland then form the basis for a third group.

France is rather alone in Europe in its brevity of judgement and its formalistic attitude, which might go back to the French Revolution. The main task for the constitutional doctrine of the French revolution was to limit the role of the

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<sup>9</sup> Cf. Daniel A. Farber, *Book Review: The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, *Cornell Law Review*, Vol.81, 1996, pp. 513, 516.

<sup>10</sup> Summers and Taruffo (note 6), p. 463.



courts to a judicial function, understood in the manner of Montesquieu's constitutional theory. For him, judicial power was non-existent and the judge was no more than "the mouthpiece of the law". In this mechanical theory of law-application, the only task for the judge is to draw an automatic conclusion. In line with this conception of the role of the courts, Napoleon also forbade the judges to interpret the law in the new Civil Code. The principle of separation of powers has up to now influenced French judicial style.

An important feature of judicial style or reasoning relates to the use of *precedents* in interpreting statutory provisions. All countries with the exception of France, which does not cite previous cases, refer to case law. Only in France is a formal reference to the text of the law a sufficient justification. Some courts may use statutory analogies. Another type of judicial argumentation is of a *logical-conceptual* type, which may have been elaborated by legal doctrine. Courts may also refer to *general legal principles of law*, existing in the area of law in which the interpretational problem arises. This seems especially important in the United States and Germany. In relation to a German case it was argued along the following lines:

*In case of insufficient legislative provisions the courts are to derive substantive law by the acknowledged method of finding the law from general foundations of law relevant to the legal relationship concerned. This is also true where a legal provision, for instance because of its constitutional guarantee of protection is necessary... Only in this way are the courts able to fulfil their duty imposed by the Basic Law to decide every legal dispute brought before them appropriately.*<sup>11</sup>

Another type of argument focuses on the specificity of the *reception and evolution* of a legal statute. Such type of argument presupposes that the statute has become something different than what it was originally designed for. An

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<sup>11</sup> Entscheidungen des Bundesverfassungsgerichts, Vol. 84, pp. 212 (226); Cf. Robert Alexy and Rolf Dreier, *Precedent in Federal Republic of Germany*, In: *Interpreting Precedents: a Comparative Study* (note 4), p. 33.

interpretation along these lines has been criticised by legal formalists in the United States, such as Justice Scalia and others.

They stress that the proper forum for policy making in a society is the legislature. The task of judges is to apply statutes as they are written, without considering statutory purpose or legislative intent, and without attempting to adapt statutes to changing times. "Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new.... Law does not change in meaning as the political culture changes."<sup>12</sup>

In the courts, reasons for giving a statutory provision a meaning related to a given, objective *purpose* have also been used. This could be exemplified by a German decision relating to government searches, which construed the word "dwelling" to include a professional office. That interpretation is coherent with the principles the Federal Constitutional Court has developed for the interpretation of the basic right of the freedom of profession.

In addition, arguments consisting of *substantive reasons*, which are essentially dependent on some authority, have been used. Here again the United States is an important example. Arguments pointing to the effect that the legislature intended that the word should have a given meaning are, for example, used to a large extent in Swedish courts which means that *travaux préparatoires* play an important role.

The weighing of arguments could be exemplified by the Swedish Supreme Court, which discussed the various reasons for and against the principle that security transfer according to foreign law should have effect against the transferor's creditors in Sweden.<sup>13</sup>

As a conclusion to these very general remarks on systematic and far-reaching studies, it could be noted that on the level of justification the universalist thesis is severely weakened by the French exception and by a number of particular differences between the other participating jurisdictions included in the study. The

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<sup>12</sup> See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, Harvard Journal of Law & Public Policy, Vol. 17, 1994, p. 69, quoted by Farber (note 9), p. 522.

<sup>13</sup> Nytt Juridiskt Arkiv I, 1984, p. 693 (Cf. Gunnar Bergholtz and Aleksander Peczenik, *Precedent in Sweden*, In: Interpreting Precedents: a Comparative Study (note 4), p. 296.

other part of the universalist thesis is a general tendency to more openness on the level of justification.<sup>14</sup>

The European Court of Justice has an exceedingly important role in interpreting Community law. The Court has sometimes been seen as too activist but it interprets the law in a teleological way, making extensive use of case law, which does not mean that its practice is without textual constraints.<sup>15</sup> The European Court of Human Rights in Strasbourg has, of course, a similar role. Both these courts have developed principles and forms of argumentation on a transnational level, which also include forms of absorbing comparative law arguments or references to national legal systems within or outside of Europe.<sup>16</sup>

Most of the states in the studies mentioned are members of the EU: Germany, Italy, France, Spain, Sweden and the U.K. Membership of the Union seems to have little impact itself on the way courts will justify their decisions in the member countries.

But it is sometimes difficult to draw a clear line between the justificatory style and the actual substantial *content* of judicial decisions. It is clear that Community law will affect the content of decisions in several areas of the law. Community law *principles* have gained ground in the domestic law of member countries, particularly in constitutional and administrative law. Such impact will also derive from the European Convention of Human rights and its interpretation by the European Court of Human Rights. General principles of European law, developed by the European Court of Justice and the European Court of Human Rights, such as proportionality, legal certainty and protection of legitimate expectations and prohibition of discrimination, may influence judicial decision-making. If courts are to follow the principles of European law in some areas it may not be surprising that this kind of reasoning will spread into other areas. Legal principles may on the one hand put constraints on administrative discretion and, on the other, mitigate the

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<sup>14</sup> Summers and Taruffo (note 6), p. 494.

<sup>15</sup> Ola Wiklund, *EG-domstolens tolkningsutrymme om förhållandet mellan normstruktur kompetensfördelning och tolkningsutrymme i EG-rätten*, Stockholm: Juristförl /Norstedts juridik, 1997. Diss. Stockholm: Univ., passim.

<sup>16</sup> Markku Kiikeri, *Comparative Legal Reasoning and European Law*, Dordrecht/Boston/London: Kluwer Academic Publishers, 2001, especially pp. 269 et seq.

formality of statutory law leading to changes of justificatory practices.

For instance, the principle of proportionality has also made an impact on English administrative law. Lord Diplock, for example, said in connection with the discussion of incorporating the proportionality principle into English law:

"My Lords, I see no reason why simply because a decision making power is derived from common law and not from statutory sources it should for that reason be immune from judicial review...The first ground I would like to name "illegality", the second "irrationality" and the third "procedural impropriety" That is not to say that further developments on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality", which is recognised in the administrative law of several fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."<sup>17</sup>

Moreover, in Sweden, which became a member in 1995, a subtle change in the doctrine of the sources of law seems to have taken place. The weight of the *travaux préparatoires* seems to have lost some ground compared with interpretation, putting more emphasis on the statute itself. This could be a reflection of the impact of EU law but other factors may also have been decisive.<sup>18</sup>

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<sup>17</sup> Quoted by Jürgen Schwarze, *European Administrative Law*, London: Sweet and Maxwell/Brussels: Office for Official Publications of the European Community, 1992, p. 865. (Unfortunately, no reference to the given case was given.)

<sup>18</sup> Bergholtz and Peczenik (note 13), p. 312.

## Western legal thinking: level of discovery

So far we have dealt with Western or European legal thinking on the level of justification and here, above all, French legal thinking has for several reasons been seen as the exception. However that does not mean that French judges do not raise other arguments than those of a linguistic-semantic nature. Difficult questions, to which the legislative texts do not give answers, have certainly not escaped the French legal system. And the courts were prohibited from not delivering judgements. Art. 4 of the French Civil Code for this reason provides that those judges who refuse to adopt a decision should be punished for denial of justice, *deni de justice*. Leading decisions are commented on by academics explaining the meaning of the judgement and the report of *l'avocat general*, discussing controversial points, might sometimes be published.<sup>19</sup> The Civil Code was written before the industrial revolution. In particular, in relation to the law of torts and to other areas of private law such as unjust enrichment and several aspects of the law, French judges have been very constructive.<sup>20</sup> Likewise the *Conseil d'Etat*, acting as a supreme administrative court, has shown less scruple in developing the law than the ordinary courts because there was no code which constrained the activities of the officials of the *Conseil d'Etat*.<sup>21</sup> The question then is whether the French courts will not merely *appear* but in fact also *are* passive<sup>22</sup>; however, that question itself leads us to the area of the process of discovery, to the reasoning behind or leading up to concrete judicial decisions. Through recent empirical studies it has been shown that the French judges are *not* passive; they use case law and doctrine although they want to appear to follow only the text of the written law.<sup>23</sup>

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<sup>19</sup> Geoffrey Samuel, *The Foundations of Legal Reasoning*, Maklu, 1994, p. 140.

<sup>20</sup> Michael Bogdan, *Comparative Law*, Deventer: Kluwer/Norstedts Juridik, 1994, p. 172.

<sup>21</sup> L.Neville Brown and John Bell, *French Administrative Law*, Oxford: Clarendon Press, 1998, pp. 292-293.

<sup>22</sup> Summers and Taruffo (note 6), p. 496.

<sup>23</sup> Mitchel de S.-O-l'.Lasser, *Judicial Discourse in the French Legal System*, Yale Law Journal, Vol. 104, 1995, pp. 1325 et seq.

On a deeper level a scathing criticism has however been directed towards the idea of convergence between common law and civil law tradition.<sup>24</sup> The main tenor of this attack on convergence between the two traditions is related more precisely to the level of discovery, of legal solutions, than to the process of justification; it is directed towards the way lawyers *think* before coming to a solution. The author does not include American law but only compares English legal thinking, or rather a part of English law, the common law, with civil law tradition.

The author's main arguments are based on a dichotomy between the way common law lawyers and continental lawyers arrive at a solution to a legal problem. Common law is inductive, advancing step by step, whereas continental law is deductive; common law is without systematisation and has no academic roots but has been developed through tradition.

Concrete facts play an important role in each case of common law, whereas the continental law tradition uses concepts as the main starting point; facts have to be covered by a concept. Rules do not play the same role in common law as in the continental system. The former is preoccupied "with the apprehension of regularities rather than the knowledge of rules"<sup>25</sup>.

This is in line with the claim that "the isomorphic relationship used in reasoning by analogy is different from the prepositional relationship used in reasoning via the syllogism."<sup>26</sup> Reasoning from the particular to the particular is different from the question whether facts fit into a given abstract rule. Even if a rule in a precedent is expressed in abstract terms it must never be divorced from the actual facts of the case in which it was proposed.<sup>27</sup>

In the common law tradition, it is not rights that are points of departure, but wrongs. Likewise, in common law there is no clear difference between past and present time: "The common law has no beginning: it dates from time immemorial."<sup>28</sup>

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<sup>24</sup> Pierre Legrand, *European Legal Systems are not converging*, International and Comparative Law Quarterly, Vol. 45, 1996, pp. 53-72.

<sup>25</sup> W.T.Murphy, *The Oldest Social Science? The Epistemic Properties of the Common Law Tradition*, Modern Law Review, Vol. 54, 1991, pp. 182, 205, quoted by Legrand (note 23) p. 68.

<sup>26</sup> Samuel (note 19), p. 145.

<sup>27</sup> Ibid, with further references.

<sup>28</sup> Geoffrey Samuel, *The Foundations of Legal Reasoning*, Maklu, 1994, p. 140.

The main idea is that this reflects different legal *mentalities*. The approach of the author is close to an anthropological perspective. One should, however, bear in mind that the author does not discuss statutory law, which of course is very important in England, but only common law, which has been developed by the courts. For this and perhaps other reasons one may doubt the author's conclusion that the legal systems are not converging in Europe. Today, for example, the European Convention of Human Rights is part of the domestic legal system of the U.K. Some form of mixture between continental tradition and common law tradition is really taking place, albeit with difficulty.<sup>29</sup>

There is a common core of European legal thinking. One could argue from a comparative, functional perspective that the solutions to legal problems articulated by the courts are often similar, but the justifications - and partly more so the deep structure of legal thinking behind those solutions - are different and show a great deal of diversity.

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<sup>29</sup> Cf. Kiikeri (note 16) who from another perspective stresses the possible incoherence of European law, but also the "common legal cultural tradition" assumption, pp. 272, 281.

## Legal thinking in states in transition: level of justification

The two last questions concern the alleged shortcomings of legal thinking in transitional legal systems and any change in legal thinking that may have taken place in these systems. It has been argued that in Central European states a change from "socialist methodology" has taken place, whereas in the European states of the former Soviet Union a deficient way of legal thinking still prevails<sup>30</sup>. We will not discuss what can have been meant by the expression "socialist methodology" other than that this would point to a non-creative and formalistic way of legal reasoning.

It is, on the other hand, hard to imagine that the massive change of legislation, the completely different constitutional structure and the entry into a common European legal area in the field of human rights would not have had some consequences for the emergence of new legal thinking, not only in Central Europe in a narrow sense but also, say, the Baltic States or even Russia. Above it was pointed out that the basic constitutional structure is decisive for the way in which judges reason, and in particular how the doctrine of separation of powers and the independence of the judiciary is perceived. If this observation is correct, then it would mean that the massive constitutional changes that have taken place in Central and Eastern Europe should affect judicial reasoning. Integration in European institutions such as the Council of Europe and the European Union would then in the long run affect the reasoning of courts in, say, Latvia or Poland. Questions of European law have to be referred by the courts to the European Court of Justice.

European integration will affect legal reasoning but this is only a part of a process of constitutionalisation which is now taking place in Europe and in particular in Central and Eastern Europe.<sup>31</sup> This process of constitutionalisation could also have effects on judicial and legal reasoning.

One source of intellectual influence would be the newly founded constitutional courts in Eastern Europe, the reasoning of which in most cases is less formalistic

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<sup>30</sup> Levits (note 1), p. 62.

<sup>31</sup> Anders Fogelklou, *Konstitutionalisering*, In: Makt utan motvikt, N.Bergren, N.Karlsson, J. Nergelius, eds., Stockholm: City University Press, 1999, pp. 79-108.



and more open, to a different degree expressing a combination of pragmatism and closeness to legal principles. The Russian Constitutional Court, for example, has a different style than the Russian Supreme Court. The Court has expounded so-called *pravovye positsii*, clarifying the content of the Constitution, in reality creating precedents.<sup>32</sup> The possibility of dissent, which the Law on the Constitutional Court explicitly establishes, makes a break with a tradition of authoritarian unity. It makes clear that the Court is not only an instrument of power but also a living instrument for professional constitutional discussion and argumentation. The Court's methodology in its decisions could be called systemic. It also engages in consequential, policy oriented reasoning, and is in this sense not formalistic.

A second source of influence would imply that constitutional norms or principles themselves will influence not only the courts' decisions but also the structure of their reasoning.

The formality of statutory law will be restricted by general principles. Some of these principles may derive from the constitution or might have been developed by the practice of constitutional courts. Other principles such as proportionality may also derive from European law. Thus general principles of law will then play a stronger role in the decisions of the courts.

From this perspective the *domestic* constitutional transformation is more important than integration into Europe but the latter will also not be without significance. The courts in Eastern and Central Europe also have to follow the rulings and decisions by the European Court of Human Rights in Strasbourg.

The practice of the constitutional courts could be models for the ordinary courts but it is an open question whether they really serve as such. Since their decisions are final and binding upon the legal system, it seems probable they will influence the substantial reasoning of the courts. But here, too, a great diversity might be expected.

Moreover, a vacuum could still be left for the part of civil or private law which is not affected by constitutional principles. In difficult cases in such areas it will take time before the courts more actively discover constructive solutions.

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<sup>32</sup> For example, V.A.Kriazhkov and L.V.Lazarev, *Konstitutsionnaya yustitsiya v Rossiiskoi Federatsii*, Moscow: Bek, 1998, pp. 246-248.

In the following section three countries will be discussed: Poland, Hungary and the Russian Federation.

## Poland

The studies on legal reasoning mentioned above included Poland, whose legal order was not seen as having specific characteristics. The situation in Poland seems presently to be rather close to other civil law countries.

The late Jerzy Wroblewski, as early as 1991 gave a substantial and simultaneously subtle picture of Polish legal thinking on the level of justification in the highest Polish courts: the Supreme Court, the Constitutional Tribunal, and the Supreme Administrative Court. (There is also a Tribunal of the State but this special court is not included in the investigation.) The findings from 1991 seem to be confirmed by the 1996 study of precedents. Most of the cases refer to the 1980s and 1990s, although earlier cases could be found. The principle that the courts cannot change the content of legal norms and provide new rules goes back to the 1960s.<sup>33</sup>

One important point was the creation of the Constitutional Tribunal in 1985. Already by 1980 a Supreme Administrative Court had been established. Both these courts changed the traditional Communist notion of judicial power by accepting the idea of judicial review of legislative and administrative acts. Another factor was the abolition in 1989 of the practice of giving binding guidelines for the lower courts. Now abstract resolutions and legal principles of the Polish Supreme Court have lost their binding force and they are not a formal source of law. As in other states which have established constitutional courts, only the resolutions of the Polish Constitutional Tribunal concerning the interpretation of statutes could be regarded as formally binding for everyone and are published in the official *gazette*.

Polish doctrine distinguishes between autonomous sources and non-autonomous sources of law, judicial precedents being non autonomous.<sup>34</sup> The Constitutional Court does not include precedents as a binding source of law in some

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<sup>33</sup> Lech Marawski and Marek Zirk-Sadowski, *Precedent in Poland*, In: *Interpreting Precedents: a Comparative Study* (note 4), p. 233, referring to decision of Supreme Court of 19 March 1962 and similar decisions.

<sup>34</sup> *Ibid*, pp. 231-233.

of its decisions concerning legal sources. Only the weight of arguments in the precedents from the Supreme Court should be a guide for the lower courts and not their hierarchical position, according to the view of the Polish Constitutional Tribunal.<sup>35</sup> The rule of law doctrine in Poland assumes that there is only one legally correct answer to a given situation.<sup>36</sup>

Simultaneously, a move towards increased use of non-autonomous sources of law can now be discerned in Poland. Judicial decisions and opinions from academic writers are now referred to more than before. Even foreign judicial decisions and views of foreign jurisprudence have found their way into Polish judicial judgements and decisions, resulting not only from the integrating tendencies in Europe but also from the growth of a more subtle, independent and autonomous legal culture.<sup>37</sup>

## Hungary

So far, we have discussed Poland and its way of legal reasoning in the highest courts. Much less research has been devoted to other Central and Eastern European countries. A recent article has, however, explored changes in Hungarian justificatory practices.<sup>38</sup> A transition to a more open form of statutory interpretation can be discerned without, however, abandoning the close link to the linguistic-semantic constraints of statutory texts. Although there has been no reference in Hungarian Supreme Court decisions to legal literature, to basic principles of a branch of law or to general principles of law, earlier judicial decisions play a more important role and the same applies to legal dogma or doctrines.<sup>39</sup> Moreover, the increasing length of sentences and judgements by the Hungarian Supreme Courts in criminal and civil matters suggests that a more open argumentation has gained ground in the Court. Of special importance is the new weight of precedents in Supreme Court decisions, in particular the increasing use of

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<sup>35</sup> Resolution of the Constitutional Tribunal of 5 May 1992.

<sup>36</sup> Lech Marawski and Marek Zirk-Sadowski (note 31), p. 226.

<sup>37</sup> Lech Marawski and Marek Zirk-Sadowski (note 31), pp. 234-235.

<sup>38</sup> Bela Pokol, *Statutory Interpretation and Precedent in Hungary*, East European Quarterly, Vol. XXXIV, 2001, No. 4, pp. 365-489, here p. 478.

<sup>39</sup> *Ibid*, pp. 477-478.

precedents in civil law matters.<sup>40</sup> But the writer also cautions that judicial law has so far "harmoniously fitted in the text of the law".<sup>41</sup>

## The Russian Federation

On the level of justification and with the mentioned study as a background, one could perhaps put most East Central European countries closer to France than to the United States. The style is as in Poland: deductive, legalistic and magisterial.<sup>42</sup> This statement certainly applies to the Russian Federation, where the Supreme Court keeps up its magisterial style, pointing out false interpretations of legislative acts in lower instances but seldom giving reasons why the norm should have the meaning, attributed to it by the Supreme Court. Precedents are not sources of law in a formal sense in the Russian Federation but their significance has been more openly acknowledged. Notwithstanding that the main purpose for *publishing* decisions is pedagogical, their legal impact has grown<sup>43</sup>. The issue is not very clear and has several dimensions which we will not discuss now. The Court and its leadership through its Presidium have an extensive control function through its power of *nadzor* or supervision over lower courts. A specific function of the Plenum of the Court is to give Explanations (*raz'iasneniia*) to lower courts on correct interpretation and application of the law. The main function of these Explanations is to achieve a uniform application of the law. The Explanations are no longer considered to be binding, although some still would assert the contrary.<sup>44</sup> Furthermore, the Supreme Court in overviews gives its analysis and opinions on court practice in different areas of the law.

There are no references to legal scholarship or to previous cases but references to previous Explanations. The reasoning of higher courts in Russia is still

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<sup>40</sup> Bela Pokol (note 38), pp. 479-48.

<sup>41</sup> Ibid, p. 487.

<sup>42</sup> Lech Marawski and Marek Zirk-Sadowski (note 31), p. 225.

<sup>43</sup> P.Z.Livshits, *Sudebnya praktika kak istochnik prava*, Zhurnal rossiiskogo pravo, 1997, No. 6, pp. 49-56.

<sup>44</sup> A.I.Papor, *Pravovoe znachenie raz'iasnenii plenuma Verkhovnogo Suda RF*, Gosudarstvo i Pravo, 2001, No. 2, pp. 51-57. The author criticizes some Explanations as not being in accordance with the law and suggests that the value of the independence of judges of the lower courts is greater than that of the uniformity of the application of the law (p. 57).

to a large extent directed to linguistic arguments, to the semantic content of legislative acts. As in Poland, the Russian Supreme Court assumes that there seems to be only one correct legal answer to a legal problem.

Constitutional cases now play a not unimportant role for the Russian Supreme Court, especially after its landmark decision on 31 October 1995, grounded on Article 15 Part 1 of the Russian Constitution, which stipulates that the Constitution has direct effect on the whole territory of the Russian Federation.<sup>45</sup> The Court asserted then that the Constitution could be applied directly if no additional legislation is necessary to use as a standard and/or there is no explicit mention in the Constitution of the necessity for a special law implementing the constitutional provision. The Court also asserted that the Russian courts should apply the Constitution directly if a corresponding federal legislative norm violates the Constitution. Instead of the contested norm, the constitutional provision should be applied.

Thus an immediate effect of the constitutionalisation of the Russian Federation is a widening of the legislative sources of law, which the courts could and should use, leading to the application of constitutional principles. This decision of the Supreme Court led to jurisdictional disputes with the Russian Constitutional Court, which, in its decision on 30 June 1998<sup>46</sup>, assessed its own exclusive competence, asserting that ordinary courts may set aside norms in a legislative act in the actual case, using the constitutional norms instead but that they should not have the power to make the contested provisions formally invalid. Normative acts of the President, the Government and the Federal Assembly could not be invalidated by ordinary courts, in the opinion of the Constitutional Court. After this the judicial activism of the Supreme Court has been somewhat diminished.<sup>47</sup> It seems, though, that the magisterial and terse style of the Russian Supreme Court has not been fundamentally transformed through the impact of constitutionalism in

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<sup>45</sup> B'ulleten' Verkhnovnoga Suda Rossiiskoi Federatsii (further BVS), 1996, No.2, Postonovlenie No.8.

<sup>46</sup> Vestnik Konstitutsionnoga Suda, 1998, No. 5.

<sup>47</sup> Peter Krug, *The Russian Federation Supreme Court and Constitutional Practice in the Court of General Jurisdiction: Recent Developments*, Review of Central and East European Law, Vol. 26, 2000, No. 2, pp. 135 et seq.

the Court's decisions. Its reasoning has become somewhat more open but it is too early to say that a change has occurred.<sup>48</sup>

A comparison was made by the author between decisions from 1993 and 2000 respectively on constitutional law issues. A clear change was noticeable in that references to constitutional norms and principles were much more frequent in 2000 than 1993, thus confirming that a constitutionalisation has taken place.

The basis for this study was the Court's monthly publication - *Bjulleten' Verkhnovnoga Suda Rossiiskoi Federatsii* - which reports some but not all decisions of the Russian Supreme Court and some decisions by the Supreme Courts of the Russian Republics and the Regional Courts of the Russian Federation. Here, only Russian Supreme Court decisions have been analysed. These decisions are normally published in an abridged form.

In the year 1993 - the year that the new Constitution was adopted on December 12 - there were a few references to the then amended Constitution of the RSFSR.

In an Explanation from 18 November 1993, it was held that the Constitution guarantees every person the right to defend his liberties and freedoms.<sup>49</sup> In a concrete case the Supreme Court gave the Procurator the right to protest against decisions of the local soviet, referring to general constitutional principles of supervision of the procurator.<sup>50</sup> In another case the Constitutional right to strike was mentioned as well as its limitations.<sup>51</sup>

Another picture emerges from the reading of cases from the year 2000, where the Constitution was referred to in a large number of cases. The decision of the Constitutional Court of the Russian Federation not to allow judges on their own initiative to order additional investigation was the object of an Explanation from 8 December 1999, which laid out the correct interpretation of the law.<sup>52</sup> In an overview of questions on the constitutional basis for local government, the

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<sup>48</sup> Cf. Krug *ibid*, pp. 140-141 who sees little change. The late John Hazard, in my mind was too early to find changes in the style of the Russian Supreme Court decision. See John Hazard, *Is Russian Case Law Becoming Significant as a Source of Law*, Parker School Journal of East European Law, Vol. 1, 1994, pp. 23-46.

<sup>49</sup> BVS, 1993, No, 1, p. 1.

<sup>50</sup> BVS, 1993, pp. 2-3.

<sup>51</sup> *Ibid*, No. 8, p. 3.

normative nature of the Russian Constitution was stressed and various legislative violations of the regions were mentioned.<sup>53</sup> There was no reference to the Constitutional Court decision on this issue, in particular to the so called Udmurtian case from 24 January 1997.<sup>54</sup>

In another case the Constitution was mentioned as prohibiting confiscation of property by organs other than the courts.<sup>55</sup> A Convention on establishing legal assistance among members of the CIS formed the ground for another decision.<sup>56</sup> Another case concerned a passenger whose passport had lost its validity because the time limit had expired. Aeroflot officials refused him the right to embark on the plane from the US to Moscow. The Supreme Court found that this refusal was a violation of his constitutional right to free movement.<sup>57</sup> A violation was also found when an instruction or regulation from the Ministry of Internal Affairs of 15 September 1997 demanded that in order to get a passport, the person must be registered at his permanent or temporary address. Here, too, decisions of the Russian Constitutional Court, prohibiting refusal of registration, were mentioned.<sup>58</sup> In a similar case, ministerial regulations on drivers' licences were found not only to be legally unfounded but also constitutionally prohibited.<sup>59</sup> In several procedural cases there were references to constitutional norms and to decisions of the Constitutional Court.<sup>60</sup> Concrete regional constitutional questions were also discussed and decided by the Court in several cases.<sup>61</sup> Another decision of the Russian Constitutional Court on the unconstitutionality of some norms in the Law on the *Prokuratura* gave rise to an Explanation changing previous Explanations.<sup>62</sup>

One clear - and from a *methodological* point of view interesting - constitutional case concerned the leader of the Liberal-Democratic Party of Russia,

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<sup>52</sup> BVS, 2000, No. 2, p. 2.

<sup>53</sup> Ibid, 2000, No. 1, pp. 17 et seq.

<sup>54</sup> Cf. Sobranie Zakonodatel' stva, (further SZ), 1997, No. 5, item 708.

<sup>55</sup> BVS, 2000, No. 2, p. 8.

<sup>56</sup> Ibid, p. 17. Cf. also No.5, pp. 18-19.

<sup>57</sup> Ibid, No.5, pp. 16-17.

<sup>58</sup> Ibid, No. 6, pp. 7-8.

<sup>59</sup> BVS, 2000, No. 6, pp. 6-7.

<sup>60</sup> Ibid, No. 11, pp. 19-20. Ibid, pp. 20-21.

<sup>61</sup> Ibid, No.3, p. 10-11. Ibid, pp. 11-12.

<sup>62</sup> Ibid, No. 7, pp. 1-2.

Vladimir Zhirinovskii, (in the report of the case he was only referred as Zh).<sup>63</sup> Zhirinovskii was refused registration as Presidential candidate by the Central Electoral Commission because he had not informed the Commission of his ownership of a flat in Moscow, formally belonging to his son. The decision was appealed to the Civil College (Chamber) of the Russian Supreme Court, which upheld the decision of the Commission. An appeal was made by Zhirinovskii to the Appeal (Cassational) College of the Supreme Court (*Kassationnaia Kollegia*)<sup>64</sup> which gave Zhirinovskii the right to register as a candidate, thus reversing the previous decisions.

The ground for this new decision, granting Zhirinovskii the right to register, was another interpretation or application of the expression *sushchestvennyi* (substantial) lack of information. According to the Federal Law of 31 December 1999 "On Elections of the President of the Russian Federation" and its Annex (*Prilozhenie*)<sup>65</sup>, every candidate must give a full account of their financial resources, including real property of the candidate and their family. Not giving full information, or giving misleading information, on the financial situation of the candidate, might lead to a refusal of registration if the lack of information was substantial. As an example of substantial information the lack of which would lead to a refusal of registration, the law also mentioned the existence of flats belonging to the candidate.

In Article 39 d of the Law, fairly detailed circumstances were seen as examples of substantial disinformation on the part of presidential candidates.<sup>66</sup> A lack of information concerning real property (houses, flats or land) was grouped together with examples of other types of substantial disinformation, such as lack of information concerning income or financial resources over a certain level, where the disinformation amounted to more than 10% of the declared income or wealth information. A contextual *linguistic* interpretation of the word flat (*kvartira*) in connection with the expression "including" (*v tom chisle*) and the other examples in the statutory provision would then be sufficient ground for rejection of a

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<sup>63</sup> BVS, 2000, No 7, pp. 2-5.

<sup>64</sup> As a result of the entry of the Russian Federation to the Council of Europe and its ratification of the European Convention of Human Rights, this appeal instance was founded on 4 January 1999. SZ, 1999, No.1, item 5.

<sup>65</sup> SZ, 2000, No 1, item 11.



candidate. The Commission and the court of first instance consequently chose a strict and literal interpretation. Also the Cassational College asserted that its interpretation was in line with the language of legislative provision; but that is more problematic.

The College interpreted the expression "if this lack of information has substantial character" as a general condition for all examples<sup>67</sup> which, given the detailed description of what was disinformation in the other examples, is not very convincing linguistically. The only possibility for an exception to those demands was recourse to the expression "may" in the relevant legislation. It did not say "must". But in Russian administrative practice a discretionary power of an authority is expressed through the expression that an authority "*may*" do this; and that regularly means in relation to citizens that they are subordinated to the strict demands of the authority. "May" in most cases is a "must".

Actually, the Cassational College used a principled (systematic) and teleological interpretation and came to a much more convincing conclusion and decision than those of the Central Electoral Commission and the Civil College of the Supreme Court.

The Cassational College referred to the Russian Constitution (Arts. 2 and 18) and to the 1966 UN Convention On Civil and Political Rights, pointing to the importance of fundamental human rights in this area of passive electoral rights. The College also said that nothing had shown that this lack of information could be attributed to the applicant's fault; it also pointed out that the Commission had the right, but not the obligation, to refuse registration if some information was not given. Zhirinovskiy had not intentionally or even by negligence caused this lack of information. Even in an objective sense a lack of information concerning a flat of 38 square meters could not be called substantial in relation to the collective overall area of real property of more than 4.000 square meters belonging to the applicant, his wife and son.

This does not mean that general principles would easily enter into the reasoning of the Supreme Court.

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<sup>66</sup> The translation of provision 39 d is an annex to this article.

<sup>67</sup> BVS, 2000, No. 7, p. 5.

The Presidium of the Supreme Court allowed a regional deputy to be under criminal investigation notwithstanding that a chamber of the Supreme Court referred to specific Constitutional norms regarding the Federal Assembly and general principles of immunity for candidates as ground for immunity, but analogy of law in this area of federal jurisdiction was prohibited by the Presidium.<sup>68</sup>

## Legal thinking in states at transition: level of discovery

The criticism mentioned of legal thinking in Eastern and Central Europe is more concerned with the level of discovery, with the way judges and lawyers arrive at their decisions. The style may be magisterial but the main question should be: do the courts find appropriate solutions in difficult cases, as assumed is the case in France?

In pathological cases there is abuse of power, hidden behind the syllogisms of legal application, in which the judgement emerges as a result of a deductive process. The real, brutal reasons behind the solutions (political influence, corruption) are however a far cry from the legal reasons articulated by the courts or the public authorities.<sup>69</sup> The problem lies more in normal cases in which judgements enunciated in good faith are hard to criticise without solid research in a given area of law. This question is hard to answer generally and must be related to different concrete areas of law.

One part of the criticism directed at judges or courts in the Baltic States is that they simply do not have the knowledge and experience to apply parts of the new legislation. In such a situation they would not be able to find constructive solutions to legal problems. But such problems might also appear elsewhere.

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<sup>68</sup> BVS, 2000, No. 2, p. 14. Cf. also *ibid*, p.15.

<sup>69</sup> The deputy head of the Presidential Administration in Moscow, Dmitrii Kozak who is behind the reform of the judicial system in Russia said in a recent interview that even of most judges are honest, each fact of corruption affects the legal and the judicial system very negatively and undermines its already weak legitimacy,  
<http://strana.ru/state/lkremlin/2001/03/02/983552355.html>

A more articulated critique is directed to the perception and use of law in general in states in transition. The political, social and economic context in which the law is adopted and applied has been discussed. The law has been used as a legitimating instrument but is, in reality, often powerless; and respect for the law from administrative and political actors is low.<sup>70</sup>

Andras Sajó stated in 1993 that "if there is not enough time left for the consolidation of formal structures, the inevitable result will be the maintenance of the present imperfect legalism where the law has mainly symbolic and legitimating functions"<sup>71</sup>. Such risk is even more evident when taking the activities of the constitutional courts into account. There is always the possibility that constitutionally doubtful legislative acts will gain legitimacy if a constitutional court approves them.<sup>72</sup>

At the same time, it would be difficult to agree with Sajó today. First, the law as a social construct in all states could have or already has a legitimating function. Second, the legal systems in Central and Eastern Europe have to a large extent been so changed to the present date that they certainly do have not only symbolic or legitimating functions but are clearly also able to influence and change actual behaviour. Time has given space for the consolidation of the legislative base. Implementation problems, though, exist and for the observer it is sometimes impossible to suppress a feeling of a lack of congruence between the new legislation - say in Russia or in Bulgaria - and the legal, social and moral environment in which this new legislation is going to be applied. The future is open.

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<sup>70</sup> Adam, Czarnota, *Meaning of Rule of Law in Post-Communist Society*, *Rechtstheorie*, Beihaft 17, 1995, pp. 179-196.

<sup>71</sup> A.Sajó and V.Lasonci, *Rule of Law in East Central Europe: Is the Emperors new Suit a Straightjacket?* In: D.Greenberg, S.N.Katz, M.Oliviero, S.C.Wheatley eds., *Constitutionalism and Democracy. Transitions in the Contemporary World*, New York/Oxford: Oxford University Press, 1993, p. 321.

<sup>72</sup> Anders Fogelklou, *Constitutional Order in Russia: A New Territory for Constitutionalism?* *Review of Central and East European Law*, Vol. 26, 2000, No.3, p. 243.

## Annex

Federal Law of the Russian Federation from 31 December 1999  
"ON ELECTIONS OF THE PRESIDENT OF THE RUSSIAN FEDERATION"  
(SZ, 2000, No 1, item 11)

### Art. 39 Part 3<sup>73</sup>

....

Grounds for refusal [of registration] may be:

a) ....

b) ....

c) ....

d) the incorrectness of the information, presented by the candidate in accordance with the present Federal Law if this incorrectness is of substantial character, including lack of declaration on incomes exceeding 200 times the minimum income ... provided that this income exceeds more than 10 % of the declaration of the income delivered according to the present law; no declaration of ownership of flat, house, ground ... enterprise or its parts; no declaration of the sum of [bank] account(s), exceeding 200 times the minimum income ... provided that the sum of this(these) account(s) exceeds by more than 10 % of the declaration of the sum of account(s) delivered according to the present law; ...

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<sup>73</sup> Abridged and in parts simplified by the author.