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*K. Malfliet***RUSSIA AND EUROPE: CHANGING THE RULES OF THE GAME**

The changing relations between “Europe” and Russia remind us of a Greek drama. In particular the way in which the rules of their bilateral relations developed since the implosion of the Soviet Union (at the end of 1991), leaves us with the sad feeling of an unavoidable tragedy. At the beginning of their new-born relationship, both partners were fulfilled with hope and curiosity. Nobody could foresee how the story would develop. In the middle of the play, several “changings of the plot” drove the story to an unexpected end.

The article provides an analysis of how the enlargement of NATO and the EU has negatively affected the relations between Russia and Europe. The study pays special attention to Russia's role in creation of the Eurasian Economic Union. It also demonstrates how the establishment of this union has brought fresh perspective to the relations between the EU and Russia.

*Keywords:* International Relations, European Studies, Rule of Law, European Enlargement, Eastern Partnership, Russian Constitutional Court, Sanctions.

**Times of hope and belief**

Let us remember those times of hope and belief, belief in a bright post-communist future for the whole Europe. When the Berlin Wall came down in 1989, “Europe” was at the top of its success: the preparations for the introduction of the euro as the EU common currency proved that the formula for economic integration between the European member states was working: European competition rules and deep respect for the Rule of Law in the governance of the national states, were unanimously considered to provide a “common ground” for the countries-members of the European Union.

European integration until then had been a success story. At that time, there were no worries about the lack of political integration of the member states, about the loose content of the concept of democracy, about the absence of a social Europe, about the privileged situation of those who were in, and the problems of those who were left out and remained excluded from the European integrated space. Nobody mentioned the fact that the concept of a geographic Europe, that mounted towards the Urals was, after the Second World War, replaced by a narrowed normative ruling by the “*acquis communautaire*”, which reserved its material application to a selection of privileged member states<sup>1</sup>. Surely, not all European states were involved in the European integration project. But the magnetism of the formula was impressive: to join that paradise on earth, created through economic integration and based on the ideology of guaranteeing peace in post-war Europe, countering the communist world by a concept of liberal democracy and capitalist organization of the economy.

The fact that the Eastern Bloc started its implosion after the fall of the Berlin Wall, was originally interpreted as a victory of the West after the Cold War: a victory of liberal capitalism and transatlanticism over communism. The West however was not realizing in which degree during the period of Cold War its own identity had become defined by the “other”, the Eastern Bloc with its Marxist-Leninist ideology. This “other” disappeared by self-extinction, and created an unexpected identity problem for the European Union: the communist enemy vanished away. This identity problem induced a painful shortage in legitimation, that the West so badly needed for getting countries playing according to its normativity. The original blindness of European governance for this legitimation problem, turned into a slow process of “sleepwalking” after the fall of the Berlin Wall. When “Europe” was awakening, it was already too late. European institutions, such as the Council of Europe, OSCE, the EU, but also NATO, as a transatlantic cooperation and defense organization, lost a great part of their legitimation and entered into a phenomenal identity crisis. The changing rules of the game were crucial in this normativity play. This paper analyses the normativity of these rules of the game, especially by looking at the way the Russian higher courts were developing their relation to European law.

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<sup>1</sup> The *acquis communautaire* refers to the legal rules and court decisions, which constitute the body of European Union law. Together these rules, acquired by the European Union as a supranational institution encompass more than 40.000 pages.

## Europe as a norm

When the EU opened the prospect of enlargement to the Central European countries, it focused on European competition rules and a deep respect for the Rule of Law (Copenhagen Summit 1993), but the normativity of the European Union went much further than those two principles (or values). The candidate member states had to comply with the whole *acquis communautaire* (some 40.000 pages of rulings) before becoming a member of the European Union. This meant that their parliaments had to introduce sophisticated supranational rules in countries that just came out of the communist bloc. This normativity of “Europe” was not questioned in the beginning of the nineties, it was taken for granted. Such was the case not only for the European Union, but also for other European institutions. The Council of Europe represented the lowest threshold for “entering Europe”, but also the OSCE and NATO defined their own conditionality for candidate member states. Compliance was the only answer to the conditionality of these European and Transatlantic institutions [34. P. 806-825].

While Eurocentrism was at its top, the collapse of the Eastern bloc (the CMEA (COMECON) dissolved itself, the Warsaw Pact suddenly disappeared, the Czechoslovak, Yugoslavian and finally the Soviet Federation imploded and Marxism-Leninism lost its role as the sole state ideology) went almost unnoticed. These events were seen as a normal consequence and implication of the fact that Moscow had lost the Cold War and that because of this, communism itself had lost its credibility. The claim that liberal democracy (and capitalism) would remain “the only game in town” and that in this sense the end of history was near, was not only made by Francis Fukuyama [15].

“Europe” did not realize that this “grand enlargement”, that it started in the beginning of the nineties, was critical for its own development as well. The subsequent institutional reform process of all European institutions, but especially of the EU was deeply influenced by the spill over of European enlargement to the internal agenda of the EU. The continued fragmentation and the ongoing disintegration of the former Eastern Bloc was a development on which the West had no influence at all, and this phenomenon was underestimated as a problem for the European institutions themselves. At the time when the decision to enlarge was taken, deepening and widening were no longer seen as a zero sum game (“it is either widening or deepening”), but as realistically combineable. The Visegrad countries and the Baltic countries were given a prospect of full integration, while Southeastern Europe came under a special regime and Russia and the CIS countries were offered a technical assistance program (TACIS). Under then Russian foreign minister A. Kozyrev, at the beginning of the 1990s, the EU was not seen by Russia as a relevant actor in the orbit of Russia’s vital interests [20. P. 59-71] (while NATO was considered by Russia as a hostile power from the very beginning).

That honeymoon between Russia and “Europe” was very shortlived. In the mid-1990s, under foreign minister Yevgenyi Primakov, Russia redefined its foreign policy priorities [32. P. 1-13]. Primakov launched the concept of a “multipolar world”, with Russia as a new geopolitical centre, and striving towards a strengthened partnership with China, counterbalancing the US influence in the world. In that multipolar world, the EU should become independent from NATO, and a strategic partner for Russia. The so-called Primakov-doctrine was born as a relevant Russian foreign policy concept, deeply influencing EU-Russia relations.

When Russia, as the first CIS country, concluded a Partnership and Cooperation Agreement with the EU in June 1994 (which came into force as late as in 1997) the rules of the game on which this bilateral partnership relied, were still European conditionality, and compliance expected from the partner country [28].

At that period of the early nineties, and until president Putin came to power in 2000, the Russian Higher Courts started to refer to the European legislation, and also to the “precedents” of the Court of Justice in Luxembourg and the European Court in Strasbourg. In 2003 one can still find a ruling by the Plenum of the Supreme Court of the Russian Federation, stating that judges should follow both international law and the jurisprudence of the international courts. This behavior of the Russian supreme courts created hope that Russia would abide by the European rules, and show that it was serious about joining and entering the “European house”<sup>2</sup>.

But critical voices at that time remarked that Russian judges were only referring to European law and European precedents, when this was instrumental for their own reasoning, where they took European law as a supplement for their decisions based on Russian law [2]. If possible, they even avoided European law:

<sup>2</sup> At that time, the jurisprudence of the Russian Federation Supreme Court and the Supreme Arbitrazh Court in a monist vision instructed all lower courts to make direct use of international law in their judgements, including the ECtHR and the International Covenant on Civil and Political Rights: William Burnham, Gennadii Mikhailovich & Peter Maggs, *Law and Legal System of the Russian Federation*, Juris Publishers, 2009, 49-50.

“...even though the district courts cited ECtHR case law in their decisions at a higher rate than the Supreme Court, the judges nevertheless tried to avoid invoking the Convention where they could adjudicate cases based on domestic law” [31. P. 306-307].

In any case, during the nineties, Europe was hopeful to build good relations with Russia, which after all was the largest country, much more important than the Central European countries, as more than 80 % of Russia's energy exports went to the EU markets. Also this was, remarkably, a new perspective even for the so-called Russia watchers. The dependence of the West from Russian oil and gas had never been a political issue in the period of Cold War. However, the revealing of this fact was not felt as really threatening for Western Europe, because Russia rightly stressed that Russia and Europe were in a situation of mutual interdependence. The one could not do without the other. That was true indeed. But several incidents with cutting off the energy providing through Ukraine, which were felt in Southeastern Europe and Germany, sent a clear sign from Russia: within that situation of interdependence, Russia was leading the dance.

The EU became aware that it should join forces and act in a more coordinated way, where it concerned its foreign policy, especially towards Russia. Hoping that a new formula combining national sovereignty with the need for a coordinated EU foreign policy would help, the EU created the so called “Common Strategies”, at that time a new foreign policy instrument. The first Common Strategy of the EU was the one adopted towards Russia in June 1999 [4]. It was never implemented. Russia however responded by presenting its “Medium-Term Strategy for the Development of Relations with the EU” [35]. In this document, Russia for the first time postulated a need to develop an all-Europe Common European Security Identity. By stating this, Russia pointed out that it was no longer accepting the one-sided normativity of “Europe”. At least there should be a dialogue on each other's strategies [24].

Especially in the field of energy, Russia as the EU's main energy supplier asked for a special treatment, including a preferential treatment of its energy companies and their access to the European market. Russia pointed at its special position and interests in the energy sectors of the former Soviet republics. This was the start of Russia's claim for exceptionalism. Ukraine and Belarus, the main transit countries for Russia's energy exports to the EU, were defined by Russia as belonging to its “Near Abroad”. In this way the situation of “overlapping Near Abroads” of the EU and Russia came as a new framing of EU-Russia relations. While discussing a new basic treaty on EU-Russia relations, Russia refused to ratify the EU Energy Charter (although it had signed the charter), considered by the EU as a *condition sine qua non* for further liberalization of the energy market and equal treatment of Russian energy companies on the EU market. That was one of the main reasons for the slow progress of the ongoing talks about the renewal of the bilateral basic treaty. President Medvedev even asked whether such a bilateral treaty should not be replaced by a global security treaty for Europe, that would replace the European energy charter. In these words he addressed the member states of the G-8 and the G-20 [40].

### Norms, Values and interests

Who would have questioned the normative power of Europe in those times of early postcommunism? With undisputable success the EU had profiled itself as a civilian power, a qualitatively different international actor seeking to promote a democratic and rule-based international order, instead of traditional modes of power politics. The legitimacy of the European Union to act as “normative power Europe” was derived from its very experience: economic cooperation between former enemies had proven to lead to sustainable peace. Democratic cooperation between market economies, so much had been proven, induced and guaranteed peace in Europe. This “soft power identity” of the European Union became even more explicit in the process of its enlargement. While European institutions until that period were driven by a silent consensus about their fundamental values, the treaty of Amsterdam explicitly mentions human rights protection, democracy and the Rule of Law as the fundamental pillars of EU cooperation and identity [38].

The pan-European perspective, that opened up after the self-declared defeat of communism, resulted in unexpected developments in the academic debate on norms, interests and values. The image of the Common European Home, launched by Gorbachev in 1985 was a typical example of a constructivist post-Cold War thinking in international relations. The new situation in Europe was “incarnated” in the picture of a home, where East and West could live together under the same roof. In the EU enlargement debate this image of Europe implied a special kind of responsibility of the EU, as an essentially normative actor, towards the post-communist countries. However, the relation between arguing on norms and values and bargaining over concrete interests became a problematic one.

As to values, "Europe" could count on its watchdogs. The Council of Europe, the Venice Commission and especially the European Court for Human Rights became very active in pointing at violations by the post-communist countries of fundamental values, implied in the European Convention of Human Rights [30. P. 65-111]. The OSCE, a pan-European institution created in the aftermath of the Helsinki Conference on Security and Cooperation in Europe (1975), attained a high standard of efficiency in field of electoral monitoring and sustaining civil society. In this way, the democratic content of elections was closely watched by the OSCE.

Problematic was however that the activities and decisions of these European institutions, were not enough taken into account by the European Commission. After the coming into force of the PCA in 1997, Russia was not really making progress in its approximation to EU standards. Although the PCA in its art. 2 stressed the living up to fundamental values such as protection of human rights, democracy and rule of law, and although sanctions were available in case of non-compliance, the European Commission became very cautious in linking its bilateral relations with Russia to norms and values. This was because interests involved became increasingly explicit in the field of energy resources, a subject that was not sufficiently dealt with in the PCA.

The "sleepwalking of Europe" during the nineties is understandable. Throughout the nineties, it appeared that Russia went along with the idea of Europeanisation, and that it even actively sought and promoted European entanglement by seeking the membership of the Council of Europe and advocating a strategic partnership with the European Union as well as a Partnership for Peace with NATO.

The coming to power of V.V. Putin as the new Russian president in 2000, inaugurated a radical change in the Russian attitude towards "Europe". Moscow started to challenge both the appropriateness and the legitimacy of EU norms and values as the breeding ground for its own future development. The institutional symptoms of this development soon became apparent. Bilateral cooperation on new issues, not originally envisaged by the PCA, such as the high level dialogues on energy and the EU-Russia Common Spaces formed an additional layer of joint EU-Russia mechanisms on top of the institutional framework, laid out in the PCA. In the field of energy security both sides, the European Union and Russia, started to clearly define their interests: the European Union looking at energy security in its broad concept related to soft security, which implies avoiding cartels, monopolies and to ensure market rules and competition in the sector, and Russia working towards a monopoly in export and transport infrastructure for basic natural resources. The reason why Russia refused to ratify the Energy Charter was obviously because it would be forced to allow third parties to its infrastructure [10].

"Europe" 's well-meant insistence on common values and normative convergence from 2000 on was perceived by Russia as overly intrusive (as an interference in internal affairs), and as demanding Russia's full capitulation in the face of (western) Europe. As a result, the highly asymmetric donor-recipient (or master-pupil) relation, from which EU conditionality thinking starts, became rejected by Russia.

This development was harmful for the idea of "Europe" as such. The very identity of the European Union as a post-modern international actor became questioned by Russia. Russia went against the recognition of the European Union as an essentially post-sovereign international actor, which undermined the legitimacy of EU norms and values as a basis for bilateral cooperation with the EU. One-sided transformation, harmonization and gradual integration with EU norms and values became no longer accepted by Russia. Instead, Russia returned to a traditional Westphalian concept of international relations, based on interstate bargaining [42].

### **EU New Neighborhood Policy**

It took some time before the geopolitical consequences of the EU New Neighborhood Policy, launched by the European Commission in 2003, became apparent. Clearly, this new foreign policy orientation of the European Union meant a radical change in EU enlargement policy. "Europe", however, used its diplomatic language. The New Neighborhood Policy's official aim sounded as an attractive and understandable foreign policy mission: to create a "ring of friends" around the European Union [14]. The less positive message was implicitly included: that the newly appointed "buffer states" of the European Union did not get a ticket for EU membership at least not in the immediate or middle term future. The New Neighborhood Policy of the European Union announced an at least temporary stop to further enlargement of the European Union. But exactly this decision opened the way, in the eyes of the European Union, for new ambitions of the European Union in its "Near Abroad", which included some of the Newly Independent States of the Commonwealth of Independent States, among which Russia.

The European Union rose as a security actor, convinced as it was to bring its “soft power” to third countries and to guarantee security through economic, political and moral persuasion, rather than through military intervention. Believing strongly in its “normative power”, the European Union saw a new task, together with Russia and including Russia, in its New Neighborhood. But these norms, on which the EU could work together with Russia, were understood as rather technical standards that relate to the realm of economic activities (norms mainly derived from the EU’s *acquis*). In this way, the European Commission was still aiming at an approximation of the legislation of the New Neighborhood Countries with EU law and to come to a free trade relation with the New Neighborhood countries. The European Parliament and the Council of Europe, however, pointed at the values, on which the European Union is built: democracy, rule of law, human rights, free competition. Those values relate to a higher order of normative principles, building the very foundation and existence of EU-Russia relationship, where exactly political conditionality builds the normative power of the European Union, and makes it different from other actors [16].

Remarkably, however, for the first time in post-Soviet history, Russia explicitly opposed to the Eurocentric approach which underlies the European New Neighborhood Policy and to the change in its geopolitical appearance. In the eyes of the Russian political elite the New Neighborhood Policy of the European Union was a one-sidedly conceived EU foreign policy, based on a unilateral definition of norms and values. With the launch of the EU New Neighborhood Policy we see the idea of “normative power Europe” openly contradicted by Russia [17]. Russia made clear that it was not willing to accept the basic assumptions of that policy. As a consequence, Russia discretely communicated not to be willing to be included in the New Neighborhood Policy.

This implied a change in the attitude of Russian foreign policy as well. In the nineties, since the signing of the PCA in 1994, and even in its Medium Term Strategy towards the European Union, Russia accepted the basic assumptions of the European foreign policy approach and went along with its concept and formulation, with the idea of conditionality and compliance, although the Medium term Strategy already shows different orientations (and interests) from the Russian side.

The awareness that Russia no longer followed the path of convergence towards European values, but had departed on a path of its own (*svoi put*’) was already expressed and recognized as a general conclusion by EU documents at the beginning of 2004 [3]. Since then, Russia questions the feasibility and legitimacy of convergence, as its aspiration to become a member of the European Union was no longer at issue.

EU norms were first contested openly by Russia at the occasion of EU enlargement to seven Central and East European countries in May 2004. Russia opposed against an “automatic” application of the EU-Russia Partnership and Cooperation Agreement to the new post-communist members of the European Union. By doing this, Russia used the opportunity structure to start a reasoning (i.e. the building of ideas and perceptions in a constructivist way) according to which the need to abide by EU norms, especially when EU accession is not on the menu (as it is the case with ENP), is questioned [25].

The issue of the so-called “double standards” announced itself as a question of authority in the field of normative interpretation. At the Samara Summit, for example, Angela Merkel openly criticized Putin for not allowing the opposition to peacefully demonstrate on the streets in Samara [33]. But president Putin answered with indignation that the human rights of Russian minorities in Estonia and Latvia were not respected as well under the eyes of “normative power Europe”.

The four Common EU-Russia Spaces that were created as a surrogate for bilateral relations between Russia and the EU, soon became witnesses of the deadlock in EU-Russia relations. The Common Spaces, agreed on in May 2003, implied a new structured format of EU-Russia cooperation within four Common Spaces: the Common Economic Space, the Common Space of Freedom, Security and Justice, the Common Space on External Security and the Common Space on Research, Education and Culture [11]. This structured format, however, did not take the normativity of EU conditionality as its paradigm. Instead it presupposed a dialogue between equals on a complex and almost unlimited field of rather technical topics. EU-Russia dialogue in this way became much more intensive than the transatlantic dialogue of the EU with the US.

Although the rules of the game had already been changed, there was still hope for modernizing Russia within a shared strategic vision of Europe as a “Common EU-Russia Economic Space, a European Project for the 21<sup>st</sup> century”, a project for modernization that was worth to work together for, as many of both sides still believed in at that moment.

How to understand the EU-Russia Common Spaces in the worsening climate of EU-Russia relations? Its resulting documents, as for example the concept paper on the “Common European Economic Space”, adopted at the EU-Russia Summit in Rome (November 2003), show a lack of visible progress when com-

pared with the PCA [9. P. 1-4]. Especially looking at the comparatively fast speed track through which approximation and integration was realized at the same time within the Eurasian Economic Space (especially the Single Economic Space, but also the Eurasian Economic Cooperation), one can say that Russia clearly made its choice to give priority to its active integration policy within the CIS, and that relations with the West, although important, were instrumentalised for geopolitical reasons. WTO membership was, for example, a necessary condition to clear the path for free trade between the EU and Russia<sup>3</sup>.

At the International Security Conference in Munich in February 2007 President Putin announced the final turning of the plot, coming back to Russia's well known assertive style of foreign and security policy [39]. Concluding a new European Security Pact and revising the NATO-centric system of European security seemed, at least in the eyes of Russia, almost a natural consequence after the NATO operation against Yugoslavia in 1999. The war in Georgia (August 2008) and the recognition, after military occupation, of the Georgian provinces Ossetia and Abkhazia as sovereign states, the war over gas with Ukraine (January 2009) were clear signs that Russia was not accepting the enlargement of NATO with Georgia and Ukraine. The security agenda, which was concentrated before on US/NATO-defense guarantees, started to overshadow the idea of a common European future.

From then on, Russia would follow its own path shaking off and delegitimizing all existing treaties and memberships in European institutions. For example in the course of that same year 2007 Russia unilaterally withdrew from the Conventional Forces in Europe Treaty (CFE), one of the cornerstones of cooperation and trust in the military field.

The EU answered by launching a new regional initiative within the ENP, named the Eastern Partnership [7]. The EU's Eastern Partnership initiative does not promise EU membership, but it pre-supposes the political choice of the country in question to follow the EU way of modernization via approximation with European law, standards and institutions. This implies that the Eastern Partnership repeats "what the EU has been doing since the collapse of the Eastern bloc, i.e. the export of its *acquis* and standards to post-communist countries" [6. P. 25]. According to the Russian Foreign Minister Sergei Lavrov, the Eastern Partnership was an attempt to expand the EU's sphere of influence [1].

### The Turning of the Plot

From 2012 on, when President Putin started his third term, the rules of the game for EU-Russia relations changed drastically. International and European jurisprudence started to be considered by at least a part of the Russian political and judicial elite as an unacceptable infringement on its state sovereignty. The case Markin I (2012) [8] on parents' leave for men in the Russian army, in which the ECtHR judged that Russian legislation, denying parents' leave for men in the Russian army, is against the European Convention of Human Rights, provoked a sharp reaction from the Russian side: to judge Russian constitutional legislation means an infringement on the sovereign rights of the Russian Parliament and the Russian Constitutional Court [27. P.132].

The Plenum of the Supreme Court of the Russian Federation, having advised in 2003 that judges should comply with European legislation and jurisprudence, in 2013 became much more careful in its wordings. Ruling about the way judges should behave towards the jurisprudence of the ECtHR it advises to "take into account" (*utschitivatsia*) the jurisprudence of the ECtHR when applying Russian legislation or treaties. This implies that Russian judges should use European law and jurisprudence as a subsidiary source, not as an autonomous one [36. P. 826-844].

An amendment to the law on the Constitutional Court of the Russian Federation, which came into force on 14 December 2015 [41], gave the Russian Constitutional Court the power to declare "impossible to implement" judgements of an international human rights body on the ground that its interpretation of the international treaty provisions at the basis of the judgement is inconsistent with the constitution of the Russian Federation [26]. This law empowered the Russian Constitutional Court to exercise a constitutionality review over a binding decision of an international tribunal. In the case *Anchugov and Gladkov versus Russia* Russia's Constitutional Court has subsequently ruled that it was "impossible to implement" the final judgement of the ECtHR delivered on 4 July 2013 [13]. In this case, the ECtHR held that Russia's blanket ban on convicted prisoners' voting rights was incompatible with the European Convention on Human Rights. The

<sup>3</sup> The Russian Federation became the 156<sup>th</sup> WTO-member on 22 August 2012.

applicants brought the case because, according to article 32(3) of the Russian Constitution, they were ineligible to vote in parliamentary and presidential elections given their status as convicted prisoners.

Such an interpretation as given by the ECtHR was declared by the Russian Constitutional Court to be contrary to art. 32(3) of the Russian Constitution (inherited by the Russian Constitution from Stalin times). In its lengthy decision, the Russian Constitutional Court confirmed the supremacy of the Russian Constitution over judgements of the ECtHR. Its reasoning sounds as follows: since Russia cannot ratify a treaty inconsistent with its constitution, judgements of the ECtHR cannot be grounded on interpretations contrary to the constitution thereby cancelling the supremacy of the constitution [19].

In anticipation of the decision of the Russian Constitutional Court, the COE Commission for Democracy through Law (the Venice Commission) issued an interim opinion judging it “unacceptable” for the Russian Constitutional Court to challenge binding judgements of the European Court [12]. According to the Venice Commission, the ECtHR has legal authority to interpret the European Convention for Human Rights, and the state parties have an obligation to execute the judgements of the Strasbourg Court. As a member of the Council of Europe and a state party to the ECHR, Russia remains liable to fulfill the human rights obligations, stemming from the ECtHR judgements.

Russia's position on compliance with ECtHR judgements is radically different. The Russian Constitutional Court invokes both articles 26 (*pacta sunt servanda*) and 31 (general rule of treaty interpretation) of the Vienna Convention on the Law of Treaties, claiming that a state can refuse to comply with a decision of the ECtHR, which is contrary to the ordinary meaning to be given to the terms of the ECHR in their context and in the light of its object and purpose. Neither can a judgement of the ECtHR be considered binding in the case of a conflict with the norms of *Jus cogens*, among which the Russian Constitutional Court counts the principle of sovereign equality and non-interference in internal affairs [29. P.170-198].

One should know that the Russian Constitutional Court acquired its new function to control rulings of human rights bodies as a result of a “compromise”. On 14 July 2015, the Russian Constitutional Court issued a decision, in which it refused to declare unconstitutional the 1998 Russian Federal law on Russia's ratification of the ECHR and its protocols, as it had been invited to do so by 93 deputies of the Russian Duma. The MP's had made clear that their plea on the lack of constitutionality was motivated by the allocation by an international judicial authority of an unprecedented sum of 1,9 billion euro to the shareholders of Yukos, as well as by the finding of the ECtHR in the case *Anchugov and Gladkov versus Russia*. The Yukos shareholders were awarded this huge sum in 2014 by an international arbitration tribunal, that judged against Russia and in favor of former shareholders of Yukos, an oil company that had previously been owned by oligarch Mikhail Khodorkovski, before he was imprisoned for embezzlement [18]. The Yukos shareholders brought their action under the Energy Charter Treaty, an international treaty signed by Russia, but not ratified.

In the July decision of 2015, the Russian Constitutional Court declared that it could only rule on the constitutionality of a bill to ratify an international treaty. Nevertheless, the Constitutional court pointed out that the judgements of international bodies, among which the ECtHR, have to be complied with in conformity with the principle of constitutional supremacy. As the guardian of constitutional supremacy, the Russian Constitutional Court “authorized” the legislator to create a legal mechanism which allows the Court to rule on the constitutionality of any judgement of the ECtHR and declare “impossible to implement” those judgements which it holds inconsistent with the Russian Constitution.

The Secretary General of the CoE, mr. Thorbjorn Jagland, reacted in a moderate way, commenting that Russia remained an integral part of the legal space of the Council of Europe. He also called upon the Russian parliament to implement the judgement of the Strasbourg Court. But Human Rights Watch reacted to the Russian Constitutional Court's ruling in a more direct way, stating that: “The Constitutional Court's new powers risk getting the European system of human rights protection in Russia closing of a final avenue help for victims of abuses” [37].

Also Valentina V. Tereshkova of the Siberian Federal University in Krasnoyarsk warns: “The deviation from the legal obligation of the ECtHR judgments of the ECtHR in the case of *Anchugov and Gladkov v. Russia* (in part) and in the Yukos case (in full), may lead to a breach of the international obligations of the Russian Federation” [36. P. 826].

One can agree with this warning. Submitting to the jurisdiction of the ECtHR was a condition for Russia joining the Council of Europe in 1996. The filter of ECtHR judgements by the Russian Constitutional Court is incompatible with CoE membership, which supposes compliance with all judgements of the Strasbourg Court. International law cannot be applied *à la carte*.

## Sanctions

The case of Chechnya, and in particular the many condemnations of the Russian state during the Second Chechen War, was illustrative for the fact that the European institutions (the European Union, the Council of Europe, OSCE) did not have coercive power to effect change on Russia [21]. The pressure of “normative entanglement” – Russia is a member of the Council of Europe and of the OSCE, and should live up to the obligations derived from that membership – could not be made hard. The choice of European institutions to condemn Russia’s actions rather than to apply sanctions was based on the aim of engagement through dialogue rather than disengagement through sanctions. The EU’s image as a civilian power was at stake.

The question was how long this pragmatic partnership would be sustainable. The questioning of Europe’s security and defense identity came first of all from the Transatlantic pressure on the soft power concept of the EU. How to act as a civilian (or largely civilian) power when Russia, strengthened by 9/11, refers to the need for an international fight against terrorism? As a victory of Transatlanticism, the American sanctions, originated from the Magnitski Act [23], were uncritically copied by the European Union. But when president Trump decided to harshen these sanctions in August 2017, it became obvious that the US and “Europe” did not have the same interests in sanctions against Russia.

No state has ever been excluded from the Council of Europe. There have been incidents. In 2014 for example, the Parliamentary Assembly of the Council of Europe voted to suspend the voting rights of Russia’s delegation to the Parliamentary Assembly of the Council of Europe (PACE) in response to Russia’s annexation of Crimea and other military activities in Ukraine (Donbas).

To cancel or suspend the Russian membership in the Council of Europe is a measure that (theoretically) should be taken after all condemning reports ordered by the Parliamentary Assembly and after all judgments of the European Court of Human Rights, leaving no doubt about the infringements by the Russian state of the European Convention on Human Rights. The Russian reaction to *Anchugov and Gladkov versus Russia* asks for an initiative in that sense from the Council of Europe. This scenario of final exclusion of Russia as a member of the Council of Europe is however rejected, because of the fear that increasing isolationism would lead to unpredictable consequences for the future of Russia, but also for European and world peace. That is why the “old” EU members are not eager to follow the “new” Central European members as Poland and the Baltic countries in their urge to quit bilateral negotiations with Russia and to stop striving for (partial) institutional integration.

The economic leverage (and here interests come into the play) of the European Union, to hit Russia with sanctions where it would hurt, namely in its exports, is impossible because exports of Russia mainly consist of hydrocarbons that the Union badly needs. What is worse, the EU as an international actor, relying on normative power as its very essence, is left without wings in its relation to Russia. Russia declared itself exempted from EU values and norms and the conditionality they imply. The loser in the big game on norms, values and interests appears to be the European Union, and this not only in its relation to Russia, but first of all in its relation to the US. The European Union is not able to use its leverage, which is economic power and normative force, to insist on domestic transformation in Russia. That is because the technique of building asymmetric post-sovereign institutions and relationships with Russia is criticized by Russia, as the content of the *acquis* (which is mainly the basis for the New Neighborhood and Eastern Partnership action plans) is not negotiable and it is the Union that sets unilaterally the parameters for interaction and negotiation.

## Whose agenda will prevail?

The question is how long Russia will remain part of the European system, in particular of normative Europe. One scenario is that soon it will leave “Europe” to become itself normative in a Eurasian context. In this way, Western Europe, as “Western Eurasia” risks to become subject of Russia’s normativity within Eurasia. Economics will come first, politics and human rights as the very last.

Whose agenda will prevail in the future of pan-European integration: the EU’s or Russia’s? There were times, at the period of the Orange Revolution, when it was thought that soon the time would come that Russia would witness how Ukraine and Georgia –perhaps even Azerbaijan– would speed by Russia on the road to European integration through ENP. This process would eat away Russia’s traditional sphere of influence.

These times are over: Russia is building a Eurasian sphere of influence, the Eurasian Economic Union is growing in strength as a new economic integration pattern [22]. In this framework, the European Union is approached by Russia in an instrumental way, as a trade partner, a facilitator for obtaining and maintaining WTO membership, a Western Eurasian partner in Russia’s competition with the United States.



Waiting for the laggard to come into line, waiting for a recalcitrant partner because the country is so immense and slow to turn the tanker, following the US in their harshening sanctions policy towards Russia, is not a good solution for EU foreign policy. As a *deus ex machina* Russia soon will come with its own sovereign, unilateral, non-negotiable conditions for Western Europe.

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## **РОССИЯ И ЕВРОПА: МЕНЯЮЩИЕСЯ ПРАВИЛА ИГРЫ**

Меняющиеся отношения между Европой и Россией напоминают греческую драму. После распада Советского Союза (в конце 1991 г.), сложившиеся правила в двухсторонних отношениях вызвали лишь чувства неизбежной трагедии. На начальном этапе вновь возникших отношений две политические стороны были полны надежд и ожиданий, и никто из них не мог предвидеть, как будут развиваться события. В середине пьесы некоторые «изменения сюжета» привели историю к неожиданному концу. В статье анализируется, как процесс расширения НАТО и ЕС негативно повлиял на отношения между Россией и Европой. В исследовании особое внимание уделяется роли России в создании Евразийского экономического союза. Показано, как создание данного объединения привнесло новое содержание во взаимоотношения ЕС и России.

*Ключевые слова:* международные отношения, европейские исследования, верховенство закона, европейское расширение, восточное партнерство, российский Конституционный суд, санкции.

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