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ACADEMIC DISCUSSION

RUSSIA AND THE EUROPEAN UNION: AN ELUSIVE QUEST FOR COMMON VALUES?

*C. Ryngaert**

This article focuses on the dialogue between the Russian Federation and the European Union based on "common values" (legal sphere and the rule of law), which form the framework for the EU-Russia "common spaces" — on the economy, freedom, security and justice, as well as in the field of research and education (including cultural aspects). The author analyses the current state of the EU-Russia dialogue (section 1), East-West cooperation in the framework of the Organisation for Security and Cooperation in Europe (section 2), and the position of the Council of Europe member states on the European Court for Human Rights (section 3). The author comes to a conclusion that the concept of "common values" is to a great degree fictitious, and its viability depends on whether Russia behaves as a European country. The complete internalisation of democratic values, human rights, and good governance is still unattainable for the Russian Federation, which uses the platform of common values predominantly to achieve strategic goals (section 4).

Key words: Russian Federation, EU, common values, cooperation, OSCE, European Court of Human Rights

1. The EU Russia *common spaces*

The joint EU-Russia declaration of 2003 affirms that the parties will strengthen their strategic partnership on the basis of common values of democracy and human rights, as they are laid down in international treaties. This applies in particular to the second and third common spaces of freedom/security/justice respectively external security. The roadmap of 2005 emphasizes that progress has already been made in the human rights dialogue between the EU and Russia.

Although the EU and Russia have indeed organized a number of consultation rounds on human rights, progress is a

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relative notion. The latest EU report on the common spaces (2010) identified just three positive developments as regards Russia and human rights: the extension of the moratorium on the death penalty, the ratification of the Fourteenth Protocol to the European Convention on Human Rights (ECHR — a ratification process which had already taken far too long for that matter), and a modest modernization of the Russian legal system.[1] It is conspicuous that this report first voices its concerns over the human rights situation in Russia — in particular as regards the position of human rights defenders, attacks on journalists and activities, restrictions of the freedom of speech and association, the situation in the northern Caucasus, en the case *Khodorkovskiy*. Moreover, it is not helpful for a constructive dialogue, from a European perspective, that Russia remains opposed to the involvement in the dialogue of ministries and agencies other than the ministry of foreign affairs, and to the meetings of the EU with Russia and international NGOs concerning the human rights situation in Russia.[2] Finally, the Syria crisis has made it clear that currently, the human rights gap between the EU and Russia is nowhere as big as with respect to international crisis management. Although both parties have committed themselves, in the framework of the common space on external security, to respond jointly to international crises, Russia continues to thwart the Western demand that the UN Security Council exercise its responsibility to protect in the face of the humanitarian crisis in Syria. According to the European Security Strategy, this responsibility to protect citizens from genocide, war crimes, crimes against humanity and ethnic cleansing is one of the pillars of a value-based external policy of the EU[3].

Put differently, the common values-based dialogue between the EU and Russia has lost its momentum, if it ever had one. Thus, it is no surprise that the common spaces dialogue has been reduced to strategic security questions regarding which the EU and Russia do have concurrent interests, like the fight against terrorism and terrorist financing, illegal migration, human trafficking, money-laundering, and energy problems. These questions rather concern *transnational* challenges with often economic overtones, which do not *per se* require internalization of rule of law values.

In spite of this change of focus, however, the EU does at times openly criticize Russia's human rights record. For instance, the High Representative for the Foreign Policy of the EU, Catherine Ashton, voiced her concern over the arrest and conviction of opposition leaders in Moscow in May 2012, and reminded Russia of the freedom of speech and association, and of participation in peaceful demonstrations, fundamental rights in democratic states that, according to her, are also enshrined in the Russian Constitution[4].

[1] European External Action Service (EEAS); EU-Russia Common Spaces Progress Report 2010, March 2011. P. 49.
[2] Ibid.
[3] EU report on the Implementation of the European Security Strategy - Providing Security in a Changing World, Brussels, 11 December 2008, S407/08, p. 2. See for a discussion of the role of the EU in the realization of the responsibility to protect: [3].
[4] Statement by the Spokesperson of the EU High Representative, Catherine Ashton, on arrests of opposition leaders in Moscow, Brussels, 11 May 2012, Doc. nr. A 219/12.

In order to avoid that the EU is seen to impose 'EU values' on Russia, the EU normally refers to Russia's own commitments in the framework of the Council of Europe and the OSCE.[5] As both Russia and the EU member States (as well as shortly the EU itself, when it accedes to the ECHR) have legally committed themselves to the same values, the EU has an interest in their being respected, even if EU citizens are not victims of possible violations (the so-called *erga omnes* obligations).

Given the importance of the Council of Europe and the OSCE for the EU-Russia dialogue, in the next sections will address the positions of the EU and Russia in these organizations, as well as these organizations' attitude towards Russia.

2. The Organization for Security and Cooperation in Europe

The Conference for Security and Cooperation in Europe (CSCE), which was later transformed into the OSCE, was established to promote a security dialogue between the West and the Soviet sphere, on the basis of pan-European values.[6] As we write, however, common values are hard to come by within the OSCE. The latest OSCE summit in Vilnius (December 2011) again made painfully clear that the EU countries (together with the United States) harbour entirely different expectations from this organization than Russia does [22]. While Russia emphasizes the military security dimension of the OSCE, the EU countries advocate a more holistic 'human security' concept, that factors in human rights, democracy and good governance. After the summit in Vilnius, the Russian OSCE ambassador denounced that Russia's proposals to change the OSCE into a security community were entirely and unacceptably ignored, while Western diplomats complained that, due to Russian opposition, not a single decision concerning human rights was taken (in particular as regards the freedom of speech and the protection of journalists) [22].

For quite some time now, Russia has taken issue with the OSCE's focus on problems 'east of Vienna', namely in the post-Soviet space. For most EU countries it is indeed unthinkable that the OSCE would concern itself with, for example, the fairness of the French presidential elections: is the OSCE not a vehicle to promote Western rule of law values in the European periphery?[7] This double standards attitude has been brought into even sharper relief

[5] *Roadmap*, above note 2 3, p. 21 (common space of freedom, security and justice) and p. 35 (common space of external security).

[6] Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Declaration), preambular paragraph 4 ('*Mindful* of their common history and recognizing that the existence of elements common to their traditions and values can assist them in developing their relations') in combination with Part VII ('Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.').

[7] Note however that the Permanent Representation of France with the Council of Europe invited the OSCE to monitor the French parliamentary elections of June 2012. See OSCE/ODIHR Needs Assessment Report, Republic of France, Parliamentary Elections of 10 and 17 June, Warsaw, 22 May 2012.

after the OSCE Office for Democratic Institutions and Human Rights, together with the OSCE Parliamentary Assembly and the Parliamentary Assembly of the Council of Europe established irregularities in the Russian presidential elections of 4 March 2012.[8] Earlier, former Russian president Medvedev had accused OSCE election observers from adopting an unacceptable, openly political attitude, on the occasion of the OSCE monitoring of the Russian parliamentary elections in December (which were convincingly won by Medvedev's and Putin's United Russia party) [8]. In contrast, Russia warmly welcomes the election monitors of the Community of Independent States: as expected, CIS observers judged the latest Russian elections as free and fair. [1]

In Russia, the OSCE may be described as 'the living corpse of European security'. This may not be an exaggeration. The OSCE has lost its place as a forum to negotiate pan-European disarmament after Russia denounced the Treaty on Conventional Forces in Europe,[9] the organization could not solve 'frozen conflicts', such as Transdnestria, Nagorno-Karabach or South Ossetia, nor could it prevent the brief armed conflict between Russia and Georgia — both of them OSCE member States — in the summer of 2008.

If the OSCE cannot guarantee European security, and is hopelessly divided as to the values or interests it is supposed to defend, what future does it still have? At the moment, the OSCE may mainly serve as a useful forum for Russia and EU member states to denounce each other for their instrumentalization of the OSCE, without much risk of escalation. [12] A reform of the OSCE — asked for years by Russia — will in the near future continue to be met by EU member States and the U. S.: the latter will not be willing to place the autonomous OSCE institutions under more political control, to abandon the human security agenda, or to establish (more) OSCE missions for Western Europe. Nevertheless, Russia-EU cooperation will probably remain constructive as regards the so-called *low politics* issues — police cooperation, border control, the fight against human trafficking. [12, p. 17] As argued earlier, this does not *per se* require common European values, but rather a common perception of certain global or regional threats.

3. The Council of Europe and the European Court of Human Rights

The Council of Europe is probably the most important regional European organization promoting pan-European values of human rights, democracy and rule of law[10]. Accordingly, the expectations were high when in 1998

[8] OSCE/ODIHR Election Observation Mission Final Report concerning Russian Federation, Presidential Election of 4 March 2012, Warsaw, 11 May 2012.

[9] Federal Law No. 276-FZ of November 29, 2007, on the Suspension by the Russian Federation of the Treaty on Conventional Armed Forces in Europe, and Decree of the President of the Russian Federation No. 872 of July 13, 2007, on the Suspension by the Russian Federation of its Application of the Treaty on Conventional Armed Forces in Europe and Related International Treaties.

[10] See: the Statute of the Council of Europe, London, 5 May 1949, ETS No 001, preambular paragraph 1 and Article (1)(a).

Russia joined the Council of Europe and acceded to its treaties[11]. By acceding, Russia recognized the right of individuals to file a complaint with the European Court of Human Rights (ECtHR) alleging a violation of the European Convention on Human Rights (ECHR, 1950). Doubtless, this has strengthened the position of individuals in Russia. Russia's accession to the Council of Europe has indeed caused a constant stream of requests to the ECtHR. At the same time, a (large number of) Russian courts recognize the effect of the ECHR in the Russian legal order[12]. Nonetheless, Russia's attitude *vis-à-vis* the Council of Europe and the ECHR is ambiguous. On the one hand, Russia wishes to loyally carry out the commitments made, by, among other things, announcing rather far-reaching legal reforms. On the other hand, a considerable part of the political establishment is not amused by the large number of judgments of the Court faulting Russia, thee ensuing high costs for Russia, and the threats posed by legal reform to the — for certain stakeholders beneficial — *status quo*.

The latter explains, *inter alia*, why Russia delayed the entry into force of Protocol nr. 14 to the ECHR — which increases the efficiency of the Court's judicial procedure — why fundamental legal reforms that would allow the Russian legal system to function in accordance with the demands of Strasbourg are not carried out to their fullest extent[13], and why some Russian officials refuse to cooperate with the Court. In the *Katyn* case (2012), for instance, Russia refused to hand over necessary documents to the Court, as a result of which the latter could not pronounce itself on the Russian investigation of the mass murder of Polish officers during the Second World War in Katyn[14].

But it also possibly explains why the ECtHR at times seems to spare Russia. In the *Khodorkovskiy* case (2011), for instance, the Court ruled that there was no evidence that the Russian government had initiated the prosecution against the oligarch Khodorkovskiy to appropriate the assets of the Yukos oil firm[15]. One may safely assume that the Court, by adopting this pragmatic attitude, wanted to meet the concerns of those who argue that the Court is involving itself too deeply in the internal political affairs of Russia

[11] See for a more extensive analysis of the relationship between Russia and the Council of Europe: [17].

[12] See for a more extensive analysis: [21].

[13] The ECtHR employs the so-called 'pilot procedure' to allow the Contracting Parties to carry out fundamental reforms in case of systematic human rights violations. Often a pilot judgment in one ECHR case suspends the procedure in all other cases in which the same systemic problem arises, until the state remedies it. See for the pilot procedure with respect to Russia in: [13].

[14] EctHR. Janowiec and Others v. Russia, Application nos. 55508/07 and 29520/09, 16 April 2012.

[15] Such a prosecution would violate Article 18 ECHR. See ECHR, *Khodorkovksiy v. Russia,* Application no. 5829/04, 31 May 2011. In the *Yukos* case, however, the Court held that the Russian authorities had meted out unreasonable punishment to Yukos for tax violations, and had given the company insufficient time to prepare its defense. The Court reserved the question of compensation for a later date, however. See EHRM, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application no. 14902/04, 20 September 2011.

[18]. Also in judgments rendered in cases involving other — Western — states has the Court adopted such a stance: in the case *Lautsi,* the Court's Grand Chamber overruled an earlier decision of the Court that had obliged Italy to remove crucifixes from public schools[16]. In fact, the criticism leveled at the Court in some Western states does not fundamentally differ from Russia's criticism: a lack of sensitivity of the Court for local circumstances and perceptions, or in more legal terms, too narrow an interpretation of the margin of appreciation left to the member States. Especially in the Netherlands and the United Kingdom, calls to restrict the Court's power sound increasingly louder[17]. Ironically, the United Kingdom — the European country that probably has the worst relations with Russia — is currently running errands for Russia by advocating a radical overhaul of the Court. In 2012, the British conservative government proposed to codify the principles of subsidiarity and margin of appreciation (to protect member States' national sovereignty as regards value judgments) and to render admissibility determinations stricter (to clear the Court's backlog, but also indirectly to limit the number of cases against member States). Quite reasonably, in human rights circles it was pointed out that such a reform of the Court would mainly have pernicious effects for *Russian* applicants [16].

It could be gleaned from the foregoing analysis that Russia's critical stance *vis-à-vis* the Council of Europe and the European Court of Human Rights is hardly unique, and is shared in some Western European circles. If also the West increasingly emphasizes the local cultural anchoring of values, the quest for values which the EU countries and the Russia have in common becomes nearly impossible. One would almost forgive the cynic who concludes that the protection of national sovereignty against supranational control is the only value shared by the (cited) EU countries and Russia. In any event, the stance adopted by an EU member State such as the United Kingdom *vis-à-vis* the Court can hardly be said to further the integration of Russia into the European value system: it provides new ammunition for those in Russia who accuse the West of using double standards in its human rights discourse.

4. Concluding observations

The 'dialogue' in the framework of the EU-Russia common spaces, and the dynamics within the OSCE and the Council of Europe make it clear that Russia and the EU member States mainly pay lip-service to common, pan-European rule of law values, at several levels. The human rights dialogue in the framework of the EU common spaces appears to be a dialogue of the deaf. The OSCE has become a minor player because of the divergent priorities of Russia and the West. The future of the European Court of Human Rights — which supervises the implementation of the European values that

[16] ECtHR Grand Chamber. Lautsi v. Italy. Application no. 30814/06, 18 March 2011.

[17] See for the Dutch critics: [4; 23; 9, p. 608). As far as the UK is concerned, it is especially the Court's decision that UK prisoners have the right to vote which has raised eyebrows (*Hirst v. United Kingdom* , Application no. 74025/01, 6 October 2005). See [15].

are enshrined in legally enforceable rules — *vis-à-vis* Russia is unclear, but the various possible scenarios are no cause for optimism. Either the Court adopts a hands-off approach (see *Khodorkovskiy)*, Russia refuses to cooperate with the Court (see *Katyn*) or to give effect to its decisions, or the member States of the Council of Europe limit the Court's power. Either way, the advocates of pan-European values stand to lose.

The dialogue between the EU and Russia will continue to exist, but the danger is real that Russia will use it selectively and instrumentally to realize its own strategic objectives, without fully internalizing European values[18]. Inevitably, this raises the question whether Russia truly belongs to Europe or rather to Asia. For ages the exact Russian identity has been the subject of discussion — both in Russia and in the West[19]; it fluctuated throughout the ages depending on political preferences. As is known, the very origins of Russia are the Christian values that also determined Western cultural life [14]. In the early 18th century Peter the Great (further) 'europeanized' Russia, and in the 19th century, after Napoleon's defeat, Russiawas undeniably a leading player in the European concert of nations. This 'European identity' was rejected in the 20th century, when the Soviet Union defined its identity specifically in opposition to the 'capitalist' West. The late 1980s and the 1990s again witnessed a rapprochement of Russian elites and the West: in 1987 Gorbachev emphasized that the West and the Soviet Union were part of a 'common European home'[10, p. 191], and a later Russian minister of foreign affairs added that Russians defined their subjective identity as 'European'[11, p. 10].

Since 2000, when Putin come to power, Russia seems to distance itself again from the West. It is not unlikely that Russia will increasingly seek to emphasize its nexus to Asia and seek a rapprochement with China to develop a values project that competes with the Western model[20]. The importance of Russia's relationship with Asia and China can notably be derived from Putin's article 'Russia and the changing world', published during the presidential election campaign of 2012 [2]. However, what this (Eur-)Asian values project precisely consists of, except defense of national sovereignty, primacy of the community over the individual, and opposition to foreign interference in internal affairs, remains an open question.

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[18] This instrumentalization is also notable in other republics of the post-Soviet space. See in particular: [5, p.79-80] (authors positing in this respect that the EU *stabilizes* rather than *transforms*).

[19] See on the 'subjective' and 'objective' identities of Russia [7]. See on the non-European 'objective' identity for example [20, p.166].

[20] See [19]. The EU's external normative attraction in this respect is possibly exaggerated: [6, p.649].

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