Constitutional Political Economy, 13, 73–87, 2002.

The Demand for Constitutional Law

KATHARINA PISTOR* kpisto@law.columbia.edu
Associate Professor of Law, Columbia Law School, New York, USA

Abstract. A growing concern in transition economies is the gap between the law on the books and the law in practice. The existence of such a gap has long been recognized even in countries with a long legal tradition and where, by and large, the formal law seems to be observed. In transition economies as well as in many emerging markets and developing countries, this gap appears to be especially pronounced. This paper argues that an explanation for this phenomenon can be found in the process of law development in these countries. They have extensively imported law from other countries in an attempt to stage a "catch-up" in legal development. This was facilitated by foreign legal advisors preaching the existence and transferability of best practice in other parts of the world. The missing link in this equation has been the demand for law. This paper seeks to explain the meaning of the demand for law in the context of evolving Russian constitutional law drawing extensively from research on legal transplants and the lack of demand for law in other areas of the law.

JEL classification: K10, K22, K40, K42.

1. Introduction

The transition economies of Central and Eastern Europe and the former Soviet Union have over the past ten years implemented far-reaching legal reforms. These reforms encompassed all major areas of the law from constitutional law over civil and commercial to administrative and criminal law, but encompassed also procedural rules as well as laws on the organisation of courts and the legal profession. Overall, constitutional and civil/commercial law making has taken the lead over administrative and criminal law reform. This reflects what were perceived to be the fundamental issues of transition: the political transition from a one party system to a pluralistic rule of law based system on the one hand, and the economic transition from a centrally planned economy to a market based system on the other. In the world of policy makers, countries need three things: reasonable laws, adequate institutions, and market-oriented incentives (Gray and Hendley 1997). They got the first item mostly by way of legal transplants from the West. The task now is to work on items two and three, as lack of law enforcement in transition economies has become an endemic problem (Kaufmann and Kaliberda 1996). This paper suggests that the problem of lack of enforcement may run deeper than is commonly assumed. Weak enforcement is generally perceived to be a supply side problem, which could therefore be fixed by improving these institutions. Weak enforcement may, however, signal a lack of demand for legal rules and for the institutions that enforce them (Pistor 1996). Without a demand for law, law will not be

* Contact address: 435 West 116th Street, New York, NY 10027. Tel.: +212-854-0068; Fax: +212-854-7946.

effective, as the experience of two hundred years of legal transplantation from the West to other parts of the world documents (Berkowitz, Pistor, and Richard 2002). The reason is that no state controls sufficient resources to ensure legal compliance by means of coercion only. Every formal legal system therefore relies heavily on voluntary compliance. The challenge of developing effective formal legal systems is to ensure that they respond to and foster demand. This paper develops an analytical framework for the demand for constitutional law. Its major point is that to be effective the constitution should establish a credible framework for solving the major cleavages in a given society. What constitutes a major cleavage differs from country to country. This calls for different legal solutions in different countries, but also requires that the key parties to a conflict participate in or at least support the constitution-making process. Absent legitimacy generated by participation and/or support for this process, the constitution will fail to solve the underlying cleavages. As a result problem solving will take place outside the constitution, undermining the respect for and effectiveness of the formal legal framework.

The paper proceeds as follows. Section 2 discusses the relation between formal law and social norms and its implication for the importance of a demand for law. Section 3 links this discussion to recent findings about the impact of the process of lawmaking on the effectiveness of legal institutions. Section 4 applies the lessons of these findings to the process of constitution making. It suggests that as in other areas, a critical level of identification with, or internalisation of, formal legal devices is necessary for them to matter in practice. Section 5 applies this framework to the Russian constitution of 1993. The paper argues that the process of lawmaking impaired the subsequent use of constitutional mechanisms to solve major cleavages in Russian politics. The major cleavages discussed are the allocation of control rights over the economic reform process between the president and the parliament on the one hand, and over the future of the federation between the center and the regions, on the other. As a result, the constitution plays only a marginal role for conflict resolution with respect to these issues. Section 6 makes suggestion for future research and concludes.

2. Formal Law, Social Norms and the Demand for Law

The process of lawmaking as used in this paper refers to the process of developing legal rules that are enforced by the state in a particular jurisdiction. There is an extensive literature on the development of social norms and informal rules (Coleman 1990; Cooter 1996; Ellickson 1991) as well as a growing literature on the interaction between informal and formal rules (Knight 1998; Sunstein 1996).[1] Social norms develop among members that belong to the same social group. They are effective only as long as members of that group observe them. Lack of observance implies that the norm seizes to exist. Existing social norms are transmitted to new members through a process of internalisation, which is re-enforced by social sanctions. New norms develop in response to new challenges. To become part of the prevailing normative system, norms must be widely accepted. Changes in normative systems depend on the authority of the first movers, the affinity

of the new to pre-existing norms, and the pressure the social group faces in adapting to a changing environment.

Formal lawmaking differs from the production of social norms in that the jurisdiction of formal rules is not determined by membership and common observance of norms, but by the reach of the state. Thus, formal law can transgress social groups and create norms irrespective of their affinity to existing normative systems. Formal rules can exist on the books without ever being enforced. Their enforcement is determined by the allocation of resources to coercive law enforcement. The primary resource of the state, however, is its citizenry. The ability of the state to tax its citizens depends on its ability to offer public goods for which there is a substantial demand. If the taxes charged exceed the benefits citizens expect from the state, they will opt out of the formal legal system. The more people opt out, the lower the state's ability to provide public goods, leading to a downward spiral. The result is a weak state and are high social costs, because transactions that benefit from the provisioning of public goods will not be carried out or only at substantial transaction costs. The common view of the nature of public goods, of course, suggests that precisely because reliance on market forces alone will result in under-investment, the state steps in, and as a result, everybody is better off. This view assumes that the state commands the resources to force all dissenters to comply, i.e. that they will pay their taxes voluntarily. If this is not the case, the success of state intervention will depend on a general consensus that the production of public goods is legitimate and desirable, even though the individual may not be convinced that the specific purpose is a worthwhile cause. Demand for public goods thus refers to a general consensus about the legitimacy of state action, not necessarily to the production of a particular public good. Yet, constant failure to meet demand will undermine the legitimacy of state actions.

The question then is, how legitimacy is created. This paper proposes two crucial ingredients: General alignment of formal norms with underlying social norms; and legitimacy of the lawmaking process. If the formal law fails to provide solutions for actual conflicts, it will be ignored. An important implication is that there is not an optimal law independent of preexisting norms and beliefs. The alignment of formal with social norms (Cooter 1996) does not imply the need for unanimous or even majority consent about the desirability of each formal rule. If the process of lawmaking is generally perceived to be legitimate, even rules that do not find widespread support may be observed. Only when the result of formal lawmaking consistently contradicts underlying beliefs, will the legitimacy of the lawmaking process be called into question. The following two stylised examples of lawmaking in a weak state and lawmaking in an all-powerful state illustrate this point.

The emergence of formal legal systems, i.e. a comprehensive body of law enforced by the state, is associated with the emergence of the modern state in Europe (Ertman 1997).[2] Rulers who were able to enforce peace within their own lands and collect resources form their subjects were at an advantage over others that failed to do so. Enforcing the peace of the land implied that state rules prevailed over the interests of social groups who used self-help and feuds to enforce their rights. The success of these new fragile institutions depended on the legitimacy of the transfer of law enforcement (and by implication lawmaking) to state institutions. At a time when the state did not command a police force

and a well-developed criminal justice system, the major impact of state intervention was to disallow private enforcement and to induce parties to accept a court's ruling instead (Jacobi 1998). Parties opted into this system of formal law enforcement, because they expected a significant gain, namely the discontinuity of widespread feuds and anarchy. The sustainability of this system depended on the respect for court rulings. This was crucial, because private actors rather than the state enforced court verdicts, as the latter lacked the necessary resources. The major sanction for violating the peace of the land was for the delinquent to be placed outside the protection of the law: he was declared "vogelfrei" (free as a bird) and as a result could not seek legal protection to enforce his own rights. The effectiveness of this sanction depended on actions taken by other private parties, i.e. they would terminate business relations and refuse to deal with this person in the future. If courts consistently contradicted what was widely perceived to be just, their rulings had little chance of being enforced. Still, conflicts between court rulings and social norms were unavoidable in a conflict situation in which both parties based their claims on conflicting social norms. The respect for court verdicts therefore hinged on a general consensus that being inside the law was superior to being outside it, i.e. that state intervention was overall legitimate.

While the alignment of formal law with social norms and legitimacy of the lawmaking process is crucial when the state is powerless, a powerful state might be able to do without much reliance on social norms, or legitimacy for that matter. Dictatorships and totalitarian regimes have demonstrated time and again that it is possible to rule against society for long periods of time. While these regimes in fact do not command unlimited resources, the threat of arbitrarily enforced and excessive punishment is a powerful means to disguise the state's actual weakness and keep the public at bay. In addition, such regimes typically invest heavily in propaganda and mass education. I.e., they seek to create top down the social consensus that shall legitimise their regime. These strategies become vulnerable when the power of the ideology wears off, i.e. when the regime fails to deliver, and when an increasing part of the population senses its actual weakness. The toppling of the communist regimes in Central-Eastern Europe and the former Soviet Union and most recently the ousting of former President Milosevic of Yugoslavia provide ample evidence of the vulnerability of regimes that rely on a combination of ideology and perceived threat rather than on legitimacy and social consensus.

It is tempting to describe modern constitutional democracies as lying somewhere between these two extremes – the weak state who depends on private law enforcement on the one hand, and the totalitarian state that uses arbitrary and excessive enforcement to achieve high levels of voluntary compliance. This would, however, miss an important characteristic of constitutional democracies, namely that in these regimes the state draws its legitimacy from the formal legal system. Constitutionalism rests on the premise that the state is at once subject and object of the law. State action is not unlimited, but confined by formal legal principles that establish the procedure for the transfer of power, allocation of rights and responsibility among different branches of the government, and the protection of fundamental rights. Constitutionalism imposes important limitations on the principle of democracy, or the responsiveness of the legal systems to changing demands of society (Holmes 1995). The principles enshrined in the constitution can typically be changed only

with supermajority and some constitutions place the fundamental principles of the state order entirely beyond the reach of the legislature.[3]

The fundamental importance of the formal legal order in constitutional democracies shifts attention to the design of this order, to constitutional engineering, and away from the problem of social norms, and the demand for law. It is therefore not surprising that the transplantation of constitutions that have withstood the test of time in other countries has been seen as a viable strategy to build a similar order elsewhere (Sartori 1997). However, the crucial role the formal legal order plays in constitutional democracies does not mean that the link between the state and society can be dispensed with entirely. Only to the extent the constitutional order is perceived to be legitimate does the state benefit from the presumption that its actions are also legitimate. Where a general consensus about the legitimacy of the formal legal order does not exist, voluntary compliance with the law will be low, which in turn undermines the respect for the formal legal order. The key question thus becomes what it takes to build a legitimate constitutional order.

3. Lawmaking and Effective Legal Institutions

The development of a constitutional order is one element in the increasing formalisation of legal relationships since the late eighteenth century. Before turning to the specific tasks of building a legitimate constitutional order, a brief discussion of the evolution of formal law therefore seems appropriate.

Virtually all countries around the world today have a well-developed formal legal system, consisting of a constitution and a set of formal rules governing commercial and civil relations as well as the right of the state to inflict punishment or to impose administrative regulations and sanctions. Countries can be divided into those that developed their formal legal order internally and those that copied it from other countries. The first group is called "legal origins", the second "legal transplants" (Berkowitz, Pistor, and Richard 2002).[4] The group of legal origins comprises primarily countries in Western Europe, especially England, France, and Germany. The legal systems of France and Germany, though to a lesser extent England, were strongly influenced by Roman law and they have also borrowed extensively from each other. Nevertheless, their classification as origin countries is justifiable on the grounds that despite their geographic proximity and common roots, these countries produced quite distinct legal orders, suggesting a strong influence of domestic actors on the lawmaking process. The rest of the world received their formal legal order from origin countries by way of colonisation, warfare, or through voluntary reception. The strong influence of origin countries on transplants is best documented in the area of civil law. Countries around the world are commonly classified as countries that belong to the English common law family, the French or the German civil law families (Glendon, Gordon, and Osakwe 1994; Merryman, Clark, and Haley 1994; Zweigert and Kötz 1998). The dissemination of constitutional law does not follow the same pattern as that of civil law. For example, for civil law the Latin American countries belong to the French civil law family, while they borrowed their constitutional order to a large extent from the United States (Kolesar 1990). For the

current discussion, this is less relevant than the fact that the constitutional order was also derived form foreign models.

The remarkable similarities in the law on the books of countries belonging to the same legal family raises the question, whether legal systems in these countries also perform similarly. We lack systematic data for the performance of the constitutional order. However, recent findings on the effect of transplanting civil and commercial codes in the nineteenth century and its impact on the development of effective legal institutions hold potentially important lessons for the functioning of constitutions. Berkowitz et al. (2002) coded forty-nine countries according to the origin of their formal legal systems, classifying them as either legal origins or legal transplants.[5] Regressing the source of formal legal systems (origins vs. transplants) against indicators for the effectiveness of legal institutions *today*, Berkowitz et al. find that legal institutions in origin countries are significantly more effective than in transplant countries.[6] The results hold even when controlling for GDP, refuting the suggestion that the wealth of countries alone determines the effectiveness of their institutions (La Porta et al. 1998). From which legal families transplants received their formal legal order is largely irrelevant for these results. In other words, legal families have virtually no predictive value for the effectiveness of legal institutions.

The results appear to be rather discouraging for any attempt to transplant law from one country to another. Yet, the same study finds that in transplant countries where a demand for the transplanted formal legal order existed at the time of the transplant, the effectiveness of legal institutions is not significantly different from origin countries. Demand is captured by two variables: an independent choice over and/or the adaptation of the transplanted legal order to the country's own needs; or the existence of a population in the law receiving country that was familiar with the fundamental principles of the formal legal order. Countries that exhibit either of these demand variables are called receptive transplants. Examples for countries that adapted foreign transplants include Japan, Chile and Argentina. Examples of countries that were familiar with the transplanted legal order are neighbouring countries of Germany or France in Europe who shared the same legal traditions as well as the settler colonies of England, US, Canada, Australia, and New Zealand. The settlers 'brought the law with them', rather than the law being imposed on a society with a very different social order, as in occupied territories of Southeast Asia and Africa.[7] Countries that lack these features, i.e. on whom the formal legal order was imposed without adaptations and without any regard for the familiarity of the population with the transplanted law are called unreceptive transplants. Most former colonies are unreceptive transplants. They are saddled with significantly less effective legal institutions.

Analyses of legal development in transition economies support the importance of initial conditions in the law receiving countries for the development of effective legal institutions. Transition economies that had developed their own formal legal order prior to World War II exhibit significantly more effective legal institutions than countries that lacked similar preconditions (Pistor, Raiser, and Gelfer 2000). By contrast, countries that either made no effort to reform the legal order they had earlier received as part of the Ottoman or the Austro-Hungarian empire after acquiring independence following World War I, or

countries that had not developed a formal legal order before becoming part of the Soviet Union, have much weaker legal institutions today. Major efforts to improve the law on the books in these countries have not neutralised the negative effect the weak institutions have had for the development of financial systems in these countries.

To summarise, past experience with the development of a formal legal order around the world suggests that the transplantation of formal law alone is not sufficient for building an effective legal order. For the latter, the initial conditions, or the demand for the received order is crucial. The following section discusses the implications of these findings for the development of constitutionalism.

4. Building a Legitimate Constitutional Order

The adoption of a constitution usually signals the emergence of an independent nation that has acquired the right to determine its own affairs. Constitutions are typically not imposed, but are adopted by the people inhabiting the territory that comprises the state. Thus, the very act of constitution-making seems to place countries in the category of receptive transplants. After all, they are free to choose which model to adopt or how to design their own constitution.

Constitution making may, however, be captured by an interest group who uses its current dominance to impose a structure that benefits its interests rather than building a constitutional order for a broad constituency. Or it may be used to signal respect for rule of law, while power is allocated and enforced outside the constitutional order. Thus, the adoption of a constitution alone does not mean that there is a demand for the particular order that is adopted. The formal constitutional order is of relevance only, if the allocation of rights and responsibilities in the constitution has a significant impact on how rights and responsibilities are allocated and exercised in society. This does not imply that the constitutional order must be a true and complete reflection of the allocation of power in society or vice versa, or that any evidence of power and influence that cannot be traced to the constitution implies irrelevance of the formal constitutional order. Rather, the relevance of the constitution is contingent on its ability to solve major cleavages of the society it governs. The more divided a society on ethnic, religious, ideological grounds, in the distribution of wealth and social power, the more complex the task (Chua 1998). A constitutional order that fails to meet these challenges, however, is unlikely to have much more than a book life.

Developing constitutional mechanisms to solve major cleavages in society requires that the parties who represent different fractions participate in the drafting and/or ratification process. Public support by representatives of organised social interests seems more important than a general support expressed by all the people in a referendum. Disorganised individuals may support a formal order simply for its own sake. The support of the organised elite is crucial in order to commit it to using constitutional rather than extra-constitutional mechanisms to solve future conflicts (Weingast 1997).

Assessing the relevance of the constitutional order requires the identification of major cleavages in a given country. Major cleavages are defined as key issues of potentially

prolonged conflict in a society. Examples include ethnic and religious divides or conflicts between different regions that comprise a state, which frequently have their roots in ethnic and/or religious conflicts or in significant differences in their access to wealth and political control.

There are important historical and contemporary examples for the creation of a formal framework based on the cooperation of representatives from both sides of the religious or ethnic divide. For example, a major contribution to the (relative) success of the Peace of Westfalia (1648) was the inclusion of the different religious fractions in the peacemaking process. The parties committed to respect their respective religions and that of their subjects. The formal device they used to buttress this commitment was unanimous rather than majority vote for all matters concerning religious affairs (Wyduckel 1998).

Similarly, the South African transition from apartheid to the new 1994 constitutional order can be attributed to the participation of both parties in the design of the transitory legal order. The creation of specific institutional mechanisms for the incorporation of particular interests helped the old elite embrace this process despite the fact that it would almost certainly be deprived of direct political control in the new order (Klug 2000). An important element was the instigation of a constitutional court even prior to the adoption of the new constitution and the inclusion of previous as well as new judges. Moreover, the creation of a truth and reconciliation commission ensured that past atrocities were addressed, but that the creation of a new constitutional order was not made conditional on resolving them. Not all institutional devices were genuine new inventions, nor were all of them successful. The point is that borrowing took place in light of the specific conflicts that existed in South Africa and that the creation of new mechanisms was supported by the opposing fractions.

Temporary political or economic circumstances may develop into major cleavages, because mechanisms to resolve conflicts are absent, or they aggravate rather than mitigate them. An example is the allocation of political control rights under the constitution of the Weimar Republic in Germany. The lost war, the political turmoil following the abdication of the monarch, and the deteriorating economic conditions created the potential for conflict in an otherwise relatively homogenous society. The conflicting interests were represented in parliament, but a combination of party fractionalisation, high turnover of governments, and the shift of control rights to the president who had extensive emergency powers increasingly deprived parliament of its political leverage. As a result, parliament lost its function to resolve conflicts to the street and to a president who sought to establish law and order top down. In what can be described as conscious institutional design to avoid these problems, the *Grundgesetz* (Basic Law) of 1949 forced parliament to resolve important conflicts by enhancing its responsibility. Parliament was refused the right to dissolve itself and its right to replace the government prior to the end of its term was made conditional upon its ability to elect a new government (constructive vote of non-confidence). Moreover, the strong president of the Weimar Republic was replaced with a figurehead. Political power was vested with the government, headed by a chancellor who became directly accountable to parliament. Party fractionalisation was contained by the five percent clause. Whatever the merits of these formal solutions analysed in isolation, against the background of the political experience of the Weimar Republic and its

aftermath they are perceived to have added to the political stability that was achieved in the German Federal Republic. Attempts to dissolve the parliament have been rare, most likely because of the high threshold established by the law for dissolving the parliament. Only one constructive vote of no confidence and three votes of confidence were ever posed,[8] and the instrumentalization of the vote of confidence as a means to circumvent these high barriers has been severely criticized.[9]

An important lesson from these experiences is that the process of norm transmission by way of internalisation is not confined to social norms. A shared consensus about the important role of institutions to resolve conflicts creates a commitment to use these institutions in future conflicts. This raises the prospects for success, which in turn re-enforces the commitment to the institutional design.

5. Constitutionalism in Transition Economies: The Case of Russia

This section applies the above framework to the development of constitutionalism in Russia. Russia is a particularly interesting case, because a constitution was adopted after the major cleavages of the transition process had become apparent. Moreover, unlike the countries of Central and Eastern Europe, who sought to re-establish their link with the Western legal tradition, Russia was committed to find her own way. Thus the constitutional development in Russia exhibited greater potential for innovative solutions for genuine Russian problems. Finally, the size and diversity of the country facilitates the identification of major cleavages, which in smaller and more homogenous countries may be more subtle. Still, the framework developed in this paper is equally applicable to other transition economies.

The major cleavages that had become apparent by the summer of 1993 were the struggle between the president and the parliament over who should control the economic reform process, and the relation between the federal government and the regions. Both issues were closely intertwined as parties to each conflict tried to benefit from and build coalitions with parties to the other conflict. Their particular significance resulted from the fact that whoever obtained control during the decisive first years after the end of the communist regime would have substantial leverage over the reallocation of economic and political control rights in the country. In the conflict between the federation and the region, control rights over natural resources and taxation were at the forefront. In the conflict between the president and the parliament it was the control over the budget and the privatisation process. For neither case did the existing constitutional order at the outset of the reform process provide a framework for resolving the dispute.

The wave of declarations of independence by republics and other subjects of the Russian Federation following Russia's own independence called into question the viability of the existing formal order. It had rested on the presumption that the relationship between the federation and the 89 republics, autonomous republics and regions was a purely intra-statal relationship. The "subjects" of the Russian Federation now called for a new relationship based on treatises between quasi-independent entities. In March 1992, a federal treaty was signed between the Russia and its "subjects".[10] The language as to the exact nature of the

relationship remained ambiguous, but its adoption evidences that neither side considered the previous formal legal order as binding.

The relation between the president and the parliament was more complicated. By accepting the emergency powers the parliament gave the president in the fall of 1991, President Yeltsin implicitly recognised the superiority of the parliament under the prevailing constitution over matters of economic reform. Once the emergency powers had elapsed, however, he refused to relinquish his prerogative over economic reforms. Formally, the constitution supported the position of the parliament, although ultimately it remained ambiguous. According to Article 104 of the constitution then in existence, the Congress of Peoples' Deputies was recognised as the supreme organ of state power. But this formulation dated from before the creation of the Russian presidency. The relation between these two organs of state power was never clarified.

President Yeltsin tried to resolve the conflict by calling a referendum in April 1993. But even though the people supported him, the referendum could not possibly accomplish a sustainable solution for the political stalemate. It supported the President on the issues that were included in the referendum, but did not establish a framework for resolving future conflicts and thus could not serve as a commitment device for the parties involved. Obviously, it would not be possible to hold a referendum on every issue. Attempts to pass a new constitution with the support of Russia's republics and regions were unsuccessful, but they testify how the president sought to play out the conflicting parties in both conflicts against each other. Ultimately the stalemate was resolved by gun power. The president used his temporary victory to push through a new constitution. It was ratified by referendum in December of 1993.[11]

Neither of the opposing parties in the two conflicts – the parliament or the subjects of the federation – participated in drafting the constitution. A draft constitution that had been promulgated by the parliament was ignored in favour of a constitution that came out of the presidential administration. The constituting parts of the Russian federation were equally ignored, as they were not called upon to ratify the constitution.

Not surprisingly, the new constitution biases conflict resolution in favour of the President. The decisive influence of the President over key decisions rests on his power to appoint and dismiss the government (Art. 111). Parliamentary approval is still required, but the threat to dissolve parliament after it refuses to support the President's candidate for three consecutive votes, degrades the approval to a hold up game. In effect, as long as the parliament disapproves of the president's position, it has little influence over the main political agenda. It therefore does not provide the function of a forum for seeking consensus and cooperation among diverging fractions.

Similarly, the constitution establishes the priority of the federal constitution and of federal laws, albeit in somewhat disguised form. The key issues of conflicts are placed under the joint jurisdiction of the federation and the regions, including the use of land and natural resources. The issue of whether the constitutions and other legal acts of the federation's subjects are consistent with the federal constitution is placed under the joint jurisdiction of the federation and its subjects (Art. 72.1). Yet, in case of a conflict between federal and regional laws, the federal laws shall prevail (Art. 76). This outcome is not automatic, i.e. regional laws and regulations that violate the law are not null and void. The

procedure foreseen by the constitution for such events is a petition with the Constitutional Court (Art. 125).

The resolution of conflicts the 1993 Constitution offers by shifting the ultimate control rights to one of the parties has not helped solve the underlying cleavages. For this to happen, the conflicting parties would have had to perceive the new allocation of rights to be legitimate, to be a necessary compromise to ensure the benefits of a functioning state. Instead, the formal devices are for the most part ignored, and persisting conflicts carried out outside the constitutional framework. The showdown between the president and the parliament in the spring of 1998 over the appointment of Sergei Kiriyenko as prime minister demonstrated to the parliament its ultimate powerlessness – and to the rest of the country that deputies valued their privileges as members of the Duma higher than political principles.[12] The selection of the political outsider Vladimir Putin as prime minister (and subsequently as Yeltsin's successor as president) further underlined the fact that actual decision making in Russia takes place primarily within the President's entourage.

That the constitution did not provide a viable mechanism for resolving conflicts between the Russian Federation and its constituting parts is best evidenced by the two wars in Chechnya. Leaving aside this extreme case, evidence suggests that the constitutional structure has little impact on the actual relation between the federation and its constituent parts. Thirty-nine of the eighty-nine subjects of the Russian Federation have signed bilateral treatises with the federation in open defiance of the framework established by the constitution. Conflict between laws and regulations passed by the regions and federal legislation is widespread, but little is done about it. One may argue that this is in part a design-fault, and instead of referring conflict cases to the Constitutional Court, regional laws that violate federal laws or the constitution should be declared null and void. However, this alone would not guarantee that law enforcers in the regions would in fact abstain from enforcing these regional laws and uphold federal laws instead. Rather the conflict is so endemic as to defeat any simple formalistic solutions.[13]

The Constitution was also of little relevance in shaping the new allocation of powers when the new president came to power. After his election as President, Putin vowed to re-establish law and order and to stop the de facto decentralisation of power and decision making throughout the Russian Federation. He used his decree power to create seven federal districts, each of which will be administered by a presidential representative.[14] The question, whether this could be done without amending the constitution did not even arise. An additional element in his strategy has been the reshuffle of the upper house of the parliament, the Federation Council. Under the new rules, each Federation Council Member will be replaced by two representatives, one nominated by the executive branch, the other by the regional legislature.[15] While there has been resistance against the adoption of this law, the Federal Council surprisingly quickly accepted these changes. The reason may well be that comparatively little was at stake and that the battle over the control of the subjects of the Russian Federation will be fought elsewhere.

These – admittedly impressionistic – accounts of constitution-building in the Russian Federation suggest that formal law in general and constitutional law in particular plays only a minor role in Russia today – the flood of new legislation notwithstanding. The importance of law has certainly been enhanced since the collapse of the socialist

system. For example, those in power have largely accepted rulings by the constitutional court (arguably because they have not been particularly challenging). Yet, there is also evidence of open defiance of the existing constitutional order, perhaps not surprisingly, particularly in cases surrounding the conflicts between regional and federal rules.[16] It is therefore questionable that law has been accepted as a primary means for resolving major cleavages in society. The continuing use of law as an instrument in the battle over power undermines the prospects for transforming law into a framework for solving conflicts.

6. Concluding Remarks

The above analysis draws from a growing literature about the relation between formal law and social norms and applies the major lessons of this literature to constitutional law. It argues that constitutional law does not differ from other areas of the law with regards to the importance of aligning formal law with underlying social norms and of the legitimacy of the lawmaking process. Establishing a legitimate constitutional order is not primarily a design problem – even tough major flaws in the design can undermine the functioning of that order. Without an active engagement of parties that represent major social cleavages the formal law will only lead a book life. To be sure, a constitution cannot possibly resolve all existing or anticipated conflicts. But it should allocate decision-making rights and establish procedural devices for solving conflicts revolving around the delineation of these rights. The credibility of the allocation of decision-making rights as well as of the procedural devices depends on a commitment by the organised elite to using these procedures rather than other means now and in the future. A commitment device cannot be imposed, but must be engendered by demand. The implication is that the process of constitution making is crucial for the future of constitutionalism.

The brief analysis of the recent Russian experience with constitutionalism lends support to this analysis. The fact that the conflict between the president and the parliament has lost much of its drama after the adoption of the new constitution is no proof for a workable framework. It simply reflects the parliament's reduced role under the new constitutional order. Lack of law enforcement, wide spread corruption and a still growing informal sector are ample evidence that many have opted out of the formal legal system. So is the spread of regional legislation that is in open conflict with federal law.

Further analysis is warranted to buttress these claims and to test more broadly the demand theory for constitutional law and the relationship between constitution making and the functioning of the constitutional order. The primary focus of such an analysis would be the process of lawmaking and the operation of the constitution in practice. Engineering the specific design features of a constitution would be considered as the transmission belt between the process of constitution making and outcome, not the ultimate focus of analysis. With regard to the process of constitution making, the task would be to identify major points of conflicts and the interests behind them at the time of constitution making. Analytically, there is an obvious danger that conflicts that arise at a later point might influence the identification of cleavages at the time of constitution making. Yet, these

obstacles do not seem to be insurmountable as there are sufficient secondary sources that document focal points of conflict in various countries. As far as the actual operation of the constitution is concerned, the simplest solution would be to use existing data on the effectiveness of legal institutions (Knack and Keefer 1994). They typically include variables on the perceived effectiveness of the judiciary, rule of law defined as the priority of law over other devices for transferring power and solving conflicts, low levels of corruption, of government expropriation of private property and government contract repudiation.[17] In addition, more direct measures of the functioning of the constitutional order could be introduced, including the use of formal dispute settlement devices such as the constitutional court in critical areas and evidence of compliance or defiance of their rulings.

Notes

1. See also the contributions to several recent symposia on social norms, including Social Norms, Social Meaning, and the Economic Analysis of Law, 27 Journal of Legal Studies, pp. 553; Law, Economics, and Norms: Social Meaning and Social Norms, 144 University of Pennsylvania Law Review, pp. 2181.
2. The Roman law, which was rediscovered during this period, has similar features. See (Stein 1999).
3. Compare Art. 79 Section 3 of the German Basic Law: The principles of federalism, a social rule of law state, democracy and the respect for the dignity of human beings cannot be changed even by the supermajority required for amendments of the constitution.
4. Legal transplants have a long history. Indeed, many elements of the formal legal order in origin countries result from extensive borrowing. See Watson (1974).
5. For a detailed classification of countries as transplants and origins, compare (Berkowitz, Pistor, and Richard 2002).
6. Standard indicators on the effectiveness of legal institutions were used for this analysis, including rule of law, the effectiveness of the judiciary, the absence of corruption, low risk of contract repudiation and expropriation by the state. All of these indicators are perception data generated from surveys.
7. The indigenous population in these territories quickly became marginalized or extinct, wherefore their pre-existing social order had little influence on the receptivity of the country to the foreign law.
8. In September 1972 by Willi Brandt government following the failed vote of non-confidence, by Helmut Schmidt in an attempt to safe his government in May 1982, and by Helmut Kohl after the successful vote of no confidence in October 1982.
9. The harshest critique has been raised against the Kohl government's use of the vote of confidence, which was seen as a strategic device to call early elections. See Epping in (Starck 2000) Art. 68 Rn. 5, 6. On the constitutionality of this decision see BverfGE 62, 1.
10. The treaty was signed on 31 March 1992. Two republics, Tatarstan and Chechnya, refused to sign the treaty.
11. Constitution of the Russian Federation, adopted by referendum on 12 December 1993.
12. For a detailed account of this affair, see the report on Russia, in East European Constitutional Review 1998, pp. 25–28.
13. State Prosecutor Yuri Skuratov noted at the end of 1998 that more than 2000 regional laws contradicting the Russian constitution had been revoked. He estimated that about one third of the 16,000 laws that had been issued since 1995, i.e. well after the enactment of the new constitution were in violation of federal legislation. See report on Russia in East European Constitutional Review 1998 (Winter), pp. 30–34 at p. 32.
14. Ukas of the President of 13 May 2000, Sobranie Zakonodatel'stva # 20 (15 May 2000), Item 2112.
15. Law of the Russian Federation On the Procedure for Forming the Federal Council of the Federal Assembly of the Russian Federation, adopted on 26 July 2000; available at http://www.akdi.ru/sf/form.HTM.

16. See Katanian (1998) for a discussion on how the rulings of the Constitutional Court on residence permits has been ignored by the Moscow city government and other regions.
17. Some of these data were first introduced by Knack and Keefer (1994) and Mauro (1995). They are used in many studies, including the above cited studies by La Porta et al. (1998) and (Berkowitz, Pistor, and Richard 2002).

References

Berkowitz, D., Pistor, K., and Richard, J.-F. (2002) "Economic Development, Legality, and the Transplant Effect." *European Economic Review* (forthcoming).

Chua, A. L. (1998) "Markets, Democracy and Ethnicity: Toward a New Paradigm for Law and Development." *Yale Law Journal* 108(1): 1–107.

Coleman, J. S. (1990) *Foundations of Social Theory.* Cambridge, Mass: Harvard University Press.

Cooter, R. D. (1996) "The Theory of Market Modernization of Law." In: Bruno, M. and Pleskovic, B. (eds.) *Annual World Bank Conference on Development Economics* 191–217. Washington D.C.: The World Bank.

Ellickson, R. C. (1991) *Order Without Law - How Neighbors Settle Disputes.* Cambridge, Ma: Harvard University Press.

Ertman, T. (1997) *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe.* Cambridge: Cambridge University Press.

Glendon, M. A., Gordon, M. W. and Osakwe, C. (1994) *Comparative Legal Traditions: Text, Material and Cases on the Civil and Common Law Traditions, with Special References to French, German, and English.* St. Paul, Minn.: West.

Gray, C. W., and Hendley, K. (1997) "Developing Commercial Law in Transition Economies: Examples from Hungary and Russia." In: Sachs, J. D. and Pistor, K. (eds.) *The Rule of Law and Economic Reform in Russia* 139–164. Boulder, Co.: Westview Press.

Holmes, S. (1995) "Constitutionalism." In: Lipset, S. M. (ed.) *The Encyclopedia of Democracy* 299–305. London: Routledge.

Jacobi, J. (1998) *Besitzschutz vor dem Reichskammergericht.* Frankfurt a. M.: Peter Lan Verlag.

Katanian, K. (1998) "The Propiska and the Constitutional Court." *East European Constitutional Review* 6(Spring): 52–57.

Kaufmann, D., and Kaliberda, A. (1996) "Integrating the Unofficial Economy into the Dynamics of Post-Socialist Economies - A Framework of Analysis and Evidence." In: Kaminski, B. (ed.) *Economic Transition in Russia and the New States of Eurasia* Armonk, NY: M.E. Sharpe.

Klug, H. (2000) "State Reconstruction: Constitutional Transformations in a Globalized World." In: Halliday, T., Garth, B., and Nelson, R. (eds.) *Law's Disciplinary Encounter: New Frontiers in Law's Engagement with Social Sciences*: forthcoming.

Knack, S., and Keefer, P. (1994) "Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures." *Economics and Politics* 7(November): 207–227.

Knight, J. (1998) "The Bases of Cooperation: Social Norms and the Rule of Law." *Journal of Institutional and Theoretical Economics* 154(4): 754–763.

Kolesar, R. J. (1990) "North American Constitutionalism and Spanish America: "A Special Lock Ordered by Catalogue, Which Arrived With the Wrong Instructions and No Keys?"." In: Billias, G., Athan (ed.) *American Constitutionalism Abroad* 41–63. New York, Westport, Connecticut, London: Greenwood Press.

La Porta, R., Lopez-de-Silanes, F., Shleifer, A., and Vishny, R. W. (1998) "Law and Finance." *Journal of Political Economy* 106(6): 1113–1155.

Mauro, P. (1995) "Corruption and Growth." *The Quarterly Journal of Economics* CX(3): 681–712.

Merryman, J. H., Clark, D. S., and Haley, J. O. (1994) *The Civil Law Tradition: Europe, Latin America, and East Asia.* Charlottesville, Virginia: The Michie Company, Law Publishers.

Pistor, K. (1996) "Supply and Demand for Contract Enforcement in Russia: Courts, Arbitration, and Private Enforcement." *Review of Central and East European Law* 22(1): 55–87.

Pistor, K., Raiser, M., and Gelfer, S. (2000) "Law and Finance in Transition Economies." *The Economics of Transition* 8(2): 325–368.
Sartori, G. (1997) *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes.* New York, NY: New York University Press.
Starck, C. (ed.) (2000) *Das Bonner Grundgestz: Kommentar.* Muenchen: Frans Fahlen.
Stein, P. (1999) *Roman Law in European History.* Cambridge: Cambridge University Press.
Sunstein, C. R. (1996) "Social Norms and Social Roles." *Columbia Law Review* 96: 903–968.
Watson, A. (1974) *Legal Transplants: An Approach to Comparative Law.* Edinburgh: Scottish Academic Press; London: distributed by Chatto and Windus.
Weingast, B. R. (1997) "The Political Foundations of Democracy and the Rule of Law." *American Political Science Review* 91(2): 245–263.
Wyduckel, D. (1998) "Rechts- und staatstheoretische Voraussetzungen und Folgen des Westfaelischen Friedens." *Rechtstheorie* 29(2): 221–234.
Zweigert, K., and Kötz, H. (1998) *Introduction to Comparative Law.* Oxford: Clarendon Press.