THE RUSSIAN CONSTITUTIONAL COURT AS A MEDIATING LINK BETWEEN RUSSIAN AND EUROPEAN LAW?

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ABSTRACT

One of the main ambitions of the Russian Constitutional Court from the moment of its establishment has been to work as an intermediator between Russian law and the Western legal tradition, reshaping the former by bringing it closer to the latter. Such a role gave to the Court a justification for its existence in Russian law where this Court has never had any real power of constitutional control over the political authorities and their enactments. Human rights have been an important topic in these intermediating activities of the Court which actively utilised the human rights language to change the statist perspective common to Russian legal education, scholarship and practice of law. The topic of human rights turned out to be of great importance for the self-legitimation of the Court in Russian law and for aligning Russia with the European legal standards. Changes in the state ideologies in the 2000s involved for the Court the need to reconsider its

* The main ideas of this contribution derive from the lecture presented by the author at the Institute for East European Studies of Freie Universität Berlin on 7 February 2018. The contribution has been prepared during a fellowship at the Institute of Eastern European and Comparative Law of University of Cologne with the financial support of the Alexander von Humboldt Foundation.
The author expresses his heartfelt thanks to Professor Natalia Varlamova and Professor Burkhard Breig for their insightful suggestions on the initial draft of this contribution. The author is also much indebted to two anonymous reviewers for their constructive comments. Any errors or omissions are the responsibility of the author and not of those who kindly helped to steer me along the way.

approaches and to employ more conservative interpretations of human rights. After a number of discrepancies with the European Court of Human Rights, the Venice Commission and other European institutions, the Court increasingly relied on exceptionalist argumentation. In author's opinion, with this the Court not only abandons its original function in the Russian legal system, but also could lose its institutional niche in Russian law. Assuming to have the sovereign power of exception, the Court could enter into an indirect normative conflict with the presidential power.

1. INTRODUCTION

The main argument of this contribution is that one of the main ambitions of the Russian Federation Constitutional Court (the RF CC) was and still is to work as an intermediator between Russian law and the Western legal tradition, reshaping the former by bringing it closer to the Western legal culture. Playing this role, the RF CC continues the Soviet legal tradition, according to which the educational function was among the most important tasks of Soviet courts. For the RF CC this role means a powerful tool for self-legitimation and serves as a good argument for maintaining the constitutional justice as an independent branch of the judiciary. Playing this role, in the first years of its existence the RF CC widely employed Western liberal conceptions to change the statist perspective common to Russian legal education, scholarship and practice of law. In the first decade of its existence, the RF CC served as a conductor for the Western general principles of law into Russian law and was recognised in the Russian legal community in such a role.[1]

From 2000 on, changes on the Russian political landscape nudged the RF CC toward a more traditionalist position, although without any definitive rupture with the previous narratives. In the author's opinion, this shift is not congruent with the role that the Court has played in the Russian legal system since its establishment in 1991. The new traditionalist agenda certainly reflects the RF CC's strategy to avoid any confrontation with the political leadership and its new anti-liberal ideologies, and at the same time makes this Court vulnerable to the perils of the tensions between arbitrariness and constitutionalism.[2]

Whether and, if so, to what extend does the Court thereby risk losing its legitimacy? This is the research question of the present contribution which

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[1] E.g., N. Vitruk, *Konstitutsionnoe Pravosudie v Rossii (1991–2001 gg.)* [Constitutional Justice in Russia (1991–2001)], Gorodets, Moscow 2001.

[2] A. Trochev, 'The Russian Constitutional Court and the Strasbourg Court: Judicial Pragmatism in a Dual State', in L. Mälksoo and W. Benedek (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge University Press, Cambridge 2018, pp. 125–149.

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will be analysed against the backdrop of the developments that influenced the RF CC's perception and interpretation of its mediating role. Mirroring this perspective, one can also ask how these developments influenced changes in the Court's narratives. To keep the contribution to a manageable length, the author will not go into description of the case law of the RF CC, assuming that readers have a general idea about the keystone rulings of this Court or can address the abundant literature devoted to this case law.

The analysis will be split into three sections. In the first section, the contribution will propose a general overview of the problems that the RF CC had to solve to legitimise its institutional existence in Russian law and in its relations with supranational courts such as the Strasbourg Court. The second and third sections will propose a description of the varying strategies of the RF CC. This description will be arranged into two periods of the RF CC's activity: before and after the Court changed its seat from Moscow to Saint Petersburg, respectively. This will prepare the ground for a conclusive evaluation of the theoretical background of these developments and their possible perspectives.

2. THE PROBLEM OF LEGITIMATION

One of the main ambitions of the RF CC[3] in 1991–1993 was to harmonise Russian law, including the 1978 Russian Soviet Federal Socialist Republic (RSFSR) Constitution, with the new liberal political agenda of the post-Soviet Russia.[4] On the one hand, the RF CC continued to play the symbolic role once assigned to the URSS Committee of Constitutional Supervision (1989–1991)[5] – to reassure Russia's way to a *Rechtsstaat*.[6] On the other hand, the RF CC took

[3] Decisions of the RF CC are principally of two kinds: rulings *(opredelenie)* which reject applications on grounds of inadmissibility and judgments *(postanovlenie)* which decide cases on their merits. The former (rulings) can have 'negative' or 'positive' content *(pozitivnoe soderzhanie)* – in the first case a complaint is simply rejected on formal grounds, in the second case the RF CC provides for substantial justification for the rejection. The RF CC may also issue addresses *(poslanie)* to the RF Federal Assembly (the RF Parliament). Additionally, in the years of the 1993 constitutional crisis the RF CC issued a number of conclusions *(zakliuchenie)* which expressed its opinion on political matters. Under the 1994 Law the Court has no power to issue such conclusions. Formally, the RF CC has the power to take part in impeachment procedure against the RF President by confirming the legality of this procedure. Not only has such a power has never been utilised by the Court, but also there is still no law that would regulate the procedure of impeachment.

[4] H. Hausmaninger, 'Towards a New Russian Constitutional Court', (1995) 28(2) *Cornell International Law Journal*, pp. 349–386.

[5] The USSR Law 'On Constitutional Supervision in the USSR' (23.12.1989).

[6] A. Blankenagel, 'Verfassungskontrolle in der UdSSR: Das kurze Leben und der schnelle Tod des Komitees für Verfassungsaufsicht', (1993) 32(3) *Der Staat*, pp. 448–468; A. Nussberger, *Verfassungskontrolle in der Sowjetunion und in Deutschland – Eine Rechtsvergleichende*

over the educational function which always was a distinguishing feature of Soviet courts.[7] In both these respects, the RF CC attempted to take the lead in improving Russian legal culture through pushing it closer to the Western legal tradition and, with it, became one of the 'engines' of Westernisation of Russian law.

From the moment of its establishment in 1991, the RF CC confronted a difficult issue of legitimation of its existence. The 1978 Constitution, even in its amended version, was not a firm starting point because of its equivocal language and its purportedly 'illegitimate' Soviet past. The Court's activism in citing general principles of law[8] to overrule the 'incorrect' statutory law during the first years of its existence could be explained in this perspective.[9] The 1993 Constitution solved this problem of constitutional legitimation, but its liberal wording in the years of Putin's rule gradually came into collision with the factual state policies. To reconcile the words of the Constitution with the political agenda and, based on a tacit compromise with the political authorities, to create a theoretical-discursive field in which these would be motivated[10] to respect the Constitution became a new challenge for the RF CC. In particular, the Court indirectly reconceptualised its approach to general principles which are referred to when the RF CC accesses constitutionality of statutory norms. Instead of seeking the source of their validity in international law, the RF CC adhered to an implicit decisionism[11]

Gegenüberstellung des Komitet Konstitucionnogo Nadzora und des Bundesverfassungsgerichts, Nomos, Baden-Baden 1994.

7 H.J. Berman, 'Educational Role of the Soviet Court', (1972) 21(1) *International and Comparative Law Quarterly*, pp. 81–94.

8 The term 'general principles of law' is utilised here in the sense of Gustav Radbruch's formula: 'There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity'. G. Radbruch, 'Five Minutes of Legal Philosophy', (2006) 26(1) *Oxford Journal of Legal Studies*, p. 14. See also G. Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)', ibid., pp. 1–11. Here this term does not refer to 'general principles of law' as to one of the sources of the international law.

9 M.F. Brezinski, 'Toward "Constitutionalism" in Russia: The Russian Constitutional Court', (1993) 42(3) *International and Comparative Law Quarterly*, pp. 673–690; B. Bowring, 'Russia and Human Rights: Incompatible Opposites?', (2009) 2(1) *Göttingen Journal of International Law*, pp. 33–54.

10 The RF CC has never been able to 'control' the political authorities, – with the exception of the short-period attempts during the constitutional crisis in 1993 (see below), – its main function used to be to 'motivate' them.

11 The term 'decisionism' is employed in the present contribution in the sense of the Schmittean doctrine, where it describes the ability of a sovereign to sum up the mythic consciousness of the moment and integrate it into a political structure to justify exceptions from the law. See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press, Chicago 2005. More specifically, it is 'the monopoly to decide' about exceptions justified by the mythic consciousness constructed by the decision-maker himself. Ibid., p. 13. Reasoning the RF CC in terms of social consciousness *(obshchestvennoe soznanie)*, legal consciousness *(pravosoznanie)*, understanding of law *(pravoponimanie)*

considering itself and its own 'understanding of law' *(pravoponimanie)* as a supreme source of validity of legal norms in Russian law.

Before the years of *Perestroika*, general legal principles in Soviet law had been mainly interpreted as the ideological background of the legal regulation and not the idea about what the law ought to be.[12] Although liberal rights and freedoms were formally enshrined in the Soviet constitutional law,[13] their interpretation and implementation had important ideological limitations.[14] The very conception of 'rights' was hardly conceivable in this theory in the sense of 'rights against the state' or against the political power, which evidently underplayed the relevance of this conception in Soviet law (although the concept of 'rights' was widely employed in Soviet ideological discourses) as compared with the Western legal tradition. Such limitations made fundamental rights useless for ordinary Soviet citizens and devoid of their normative meaning in the Soviet legal system.[15] After the ideological limitations fell away in the late 1980s, an array of principles and conceptions were borrowed from the Western legal tradition. It could have seemed that Russian law could be restarted on new theoretical grounds. Nonetheless, the instilled ideas did not bring the desired results. On the one hand, this borrowing took place without any coordinated efforts to concord new liberal ideas with the Soviet and post-Soviet institutional and intellectual frameworks. On the other hand, the experience of lawlessness in the Soviet period made the majority of the population sceptical about the real value of their rights. Needless to say that

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suggests this perspective, especially in the light of the reliance of the RF CC on the concept of sovereignty which is interpreted in a close affinity with the Schmittean theory of sovereign. See e.g., M. Antonov, 'Conservatism in Russia and Sovereignty in Human Rights', (2014) 39(1) *Review of Central and East European Law*, pp. 1–40.

12 Although a number of 'legal principles' enshrined in Soviet law – such as legality, democratism or humanism, – they worked only as 'empty signifiers' (in the Lacanian sense) and have never been endowed with any normative value, e.g., L.J. Berchenko, *Leninskie printsipy sovetskogo prava.* [Lenin's Principles of Soviet Law], Mysl', Moscow 1970; E.A. Lukasheva, 'Printsipy sotsialisticheskogo prava' [The Principles of Socialist Law], (1970) 6 *Sovetskoe gosudarstvo i pravo*, pp. 21–29. Ideological principles that were intended to underpin the discretion of the Party's officials, were not in the province of law The 1983 book of Professor Vladik Nersesiants on the distinction between statutory law *(zakon)* and general legal principles (*pravo* or the law as it ought to be) has been the first theoretical attempt to tackle this matter in what concerns the history of political philosophy. See V.S. Nersesiants, *Pravo i zakon: iz istorii politicheskikh uchenii* [Law and the Statutory Law: From the History of Political Teachings, Mysl, Moscow 1983.

13 Chapters on fundamental rights *(osnovnye prava)* of citizens have been included in all the Soviet Constitutions, from the 1936 Stalin Constitution on.

14 D.L. Coleman, 'The Contradiction Between Soviet and American Human Rights Doctrine: Reconciliation Through Perestroika and Pragmatism', (1989) 7 *Boston University International Law Journal*, pp. 61–83.

15 J.T. Evrard, 'Human Rights in the Soviet Union: The Policy of Dissimulation', (1980) 29 *DePaul Law Review*, pp. 819–868.

this scepticism could not but grow larger during the years of 'wild capitalism' in the early 1990s.[16]

From this standpoint, it became quite clear that any sensible reforms of Russian law required fostering a new type of legal culture based on the respect of rights. Not coincidentally, the main focus of many Russian legal scholars since the 1980s until now is centred on the 'understanding of law' – the concept that refers to different types of legal culture, different styles of legal thinking and respective legal methodologies.[17] Calling for changes (quite often, for cardinal ones) in 'understanding of law', the post-Soviet lawyers struggled to translate the Western legal discourse (and the pre-revolutionary Russian liberal discourse of the early 20th century)[18] into forms suitable to the post-Soviet legal realities and understandable to the lawyers educated in the Soviet legal theory. This 'understanding' was supposed to provide new conceptual and ideological frames of reference for lawmakers, judges and other lawyers.

Trying to overcome the disrespect of rights (the problem that is commonly discussed in Russia in terms of 'legal nihilism') and to adjust the Russian law to the Western legal tradition, the RF CC – then composed of the lawyers some of whom authored rather liberal writings in the Soviet era (among others, Ernest Ametistov, Boris Ebzeev, Anatolii Kononov, Tamara Morshchakova, or Oleg Tiunov) – in the early 1990s engaged itself in construction of such a frame of references.[19] Thereby, the Court has found for itself a relatively safe institutional niche. Its jurisprudence became for Russian lawyers one of the important reference points for conceptualisation of such basic principles

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16 A. Yakovlev, *Striving for Law in a Lawless Land: Memoirs of a Russian Reformer*, M.E. Sharpe, New York 1995; V. Sergeev, *The Wild East: Crime and Lawlessness in Russia*, M.E. Sharpe, New York 1998.

17 According to the authoritative definition by Professor Nersesiants, 'an understanding of law sets out general parameters of different conceptions of law, defines the paradigm, the principle and the muster (the semantic model), the scientific content, the subject matter and the method of the corresponding juridical conception'. See V.S. Nersesiants, *Obshchaia teoriia prava i gosudarstva* [The General Theory of Law and State], Norma, Moscow 2002, p. 27. In its turn, each type of 'understanding of law' derives from 'principally different theoretical positions on the question about difference and correlation between law and statutory law'. See V.S. Nersesiants, *Filosofiia prava* [Philosophy of Law], Norma, Moscow 1997, pp. 32–33.

18 E.g, A. Tumanova, 'The Liberal Doctrine of Civil Rights in Late Imperial Russia: A history of the struggle for the rule of law', (2016) 57(4) *Cahiers du Monde Russe*, pp. 791–818.

19 One of contemporary Russian legal scholars, Professor Kruss from the Tver University, labelled this self-legitimation of the RF CC as 'constitutionalization of law'. In this light, the RF CC is to define the 'constitutional understanding of law' *(konstitutsionnoe pravoponimanie)* which shall contain the main theoretical and philosophical truths about law that are valid in Russian legal order. See V.I. Kruss, *Konstitutsionalizatsiia prava: osnovy teorii* [Constitutionalization of Law: The Fundamentals of a Theory], Norma, Moscow 2016. The main philosophical message of Professor Kruss's decisionist theory is that the law shall be understood in the way the RF CC sees and interprets it, and that there is no supreme interpretative authority above the RF CC.

as civil and human rights, rule of law, separation of powers, inviolability of property, etc.

The activism of the RF CC in its first years was clearly inspired by the non-positivist idea about universal principles that stand above the law and therefore may provide yardsticks for constitutional control over legal enactments issued by the political authorities. There was a panoply of legal methods involved into the Court's reasoning: from ius-naturalist arguments[20] to the idea of social contract.[21] Reasoning with such arguments prompted the RF CC to try to impose constitutional control over the presidential power in 1993. Albeit in full accordance with the letter of the 1978 Constitution, the Court's decision to support the Parliament against the President turned out to be a political mistake. Yeltsin brought tanks to Moscow, shelled the Parliament and won the political battle.

Seemingly, the Court learned well the lesson of 1993. In the following years it largely abandoned its previous suprastatutory discourses and adhered to a more statist agenda – in the sense of endorsing the state will. This agenda was practically commendable: adopting Russian legal culture to the Western legal tradition was possible within the pro-Western agenda of Yeltsin's government. Such a pragmatic choice seemed to be a good solution for legitimising the constitutional justice in Russia and rearranging its relations with the political authorities. The new symbolical politics of the Court then largely amounted to balancing the political discretion of the authorities with the liberal standards approved or tolerated by them.[22]

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[20] E.g., in his dissenting opinion in the case of the CPSU (Judgment of the RF CC, no. 9-P, 30.11.1992; see more comments on this Judgment below), the RF CC Justice Ebzeev made clear references to the natural-law doctrine: '[H]uman rights are not a donation made by the state to its citizens who instead would be obligated to absolutely obey the state. Human rights are an attributive feature of any democratically organized society and of human personality. Human rights define the limits of the state power. Pursuant to the Constitution, the state may not transgress these limits without risking to become totalitarian and to lose its legitimacy.' Ebzeev's later evolution to much more conservative ideas in the consequent years can serve as an illustrative example of the general tendency of the RF CC. See e.g., V.E. Churov and B.S. Ebzeev, 'Utrachennye illiuzii: po povodu Postanovleniia ESPCH po delu Respublikanskaia partiia protiv Rossii' [Lost Illusions: About the Judgment of the ECtHR in the Case Republican Party of Russia v. Russia], (2011) 6 *Zhurnal Konstitutsionnogo Pravosudiia*, pp. 28–39. Another example of the natural-law language can be found in the 2007 case about burials of terrorists where the RF CC faced the Antigone philosophical problem. The majority ruled out the natural-law approach in favour of strict positivism, while three dissenting Justices (Gadzhiev, Kononov and Ebzeev) underscored the eternal and immutable values of law. SeeJudgment of the RF CC, no. 8-P, 28.06.2007. Justice Kononov thus began his dissenting opinion: 'From the time immemorial law is considered to be the art of good and justice. I believe that the moral foundations and ethical principles are the main and irrefutable criteria of validity of every statutory law […]'.

[21] See in general A. Makarkin and P.M. Oppenheimer, 'The Russian Social Contract and Regime Legitimacy', (2011) 87(6) *International Affairs*, pp. 1459–1474.

[22] A. Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990–2006*, Cambridge University Press, Cambridge 2008.

A number of later discrepancies between the RF CC and the European Court of Human Rights (the ECtHR) called into question this mediating/educating role of the RF CC.[23] The conflict between Russia and the West triggered by the Ukrainian events in 2014, cast even more doubts on the RF CC's ability to keep its institutional niche and to continue with its educational mission. The anti-globalist rhetoric and the Court's de facto negation of prevalence of international law[24] made it clear that fidelity to the letter of law or literal interpretation of the RF Constitution are not its methodological tools any longer.

The RF CC became more careful when using references to universal principles of law. On the one hand, such principles could eventually be interpreted otherwise by international courts and agencies and thereby undermine the legitimacy of the RF CC (which really happened more than once). On the other hand, should the Court opine that it can judge the political authorities and their commands from a suprastatutory perspective, as had been the case before 1993 (and in a very few cases also after this date), it would be fraught with new possible political discrepancies. Instead, in the 2010s the Court preferred to stay in the shadow of the exceptionalist agenda first raised by the political authorities in their narratives about restoring the 'great power' of Russia.[25] These narratives were supported by references to some alleged features of Russian legal mentality and to redefine Russian 'limits of concession' to the Western standards.[26] However, such opportunism does not help the Court to avoid theoretical impasses. This exceptionalist agenda, as it is interpreted by the RF CC, implies that the Court may attempt to grasps the most important of the 'sovereign powers' – the supreme ability to define exceptions from rules.

This methodological shift of the RF CC might have far-reaching consequences. The power of exception that the Court has conferred onto

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23 R. Provost, 'Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime', (2015) 37(2) *Human Rights Quarterly*, pp. 289–340; R.M. Fleig-Goldstein, 'The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgments', (2017) 56(172) *Columbia Journal* of *Transnational Law*, pp. 172–218.

24 Judgment of the RF CC, no. 6-P, 19.03.2014; Judgment of the RF CC, no. 1-P, 19.01.2017.

25 The term 'exceptionalism' is taken here to mean that rules and principles of international law should apply to all states except for one particular state, see M. Ignatieff, 'Introduction: American Exceptionalism and Human Rights', in M. Ignatieff (ed.), *American Exceptionalism and Human Rights*, Princeton University Press, Princeton and Oxford 2005, p. 4. The Russian exceptionalist doctrine is addressed in a large number of publications, e.g., P. Roter, 'Russia in the Council of Europe: Participation à la carte', in L. Mälksoo and W. Benedek (eds.), *Russia and the European Court of Human Rights, supra* note 2, pp. 26–56.

26 B. Bowring, 'Russia and The Council of Europe: An Incompatible Ideology, And a Transplanted Legal Regime?', in P.S. Morris (ed.), *The Nature of Russian Discourses on International Law: Sociological and Philosophical Phenomenon*, Routledge, Abington 2018.

itself in the Judgment 21-P,[27] calls into question not only its educational role but also its institutional survival. The Court still does not pretend to have any real checks-and-balances power vis-à-vis the political authorities and, under the present political circumstances, seems to be unable to forward any such pretentions.[28] At the same time, undertaking to act as one of the 'sovereigns' in what concerns Russia's international obligations, the Court enters into a virtual competition with the presidential power. In the Russian legal order, it is this latter that undoubtedly plays the role of a 'sovereign' (the one who decides about exceptions in the last instance) and is unlikely to want to share this role with any other powers or institutions. Whether this virtual competition would ever result in a factual conflict remains to be seen.

3. THE MOSCOW PERIOD (1991–2008)

In the first years of Yeltsin's rule the discrepancy between the laws, their interpretation and their application grew large, due to breakdown of the institutional and ideological frameworks and a number of other reasons. Among such reasons was the weak respect for rights: hardly Soviet judges or law-enforcement officers were prepared to change their legal mentality overnight and to start thinking about rights differently.[29]

The RF CC in the first years of its existence implicitly tried to act as a medium of the liberal understanding of rights. For the first time in Russian legal history, a court endeavoured to compare what the state enacted as the law

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[27] Judgment of the RF CC, no. 21-P, 14.07.2015. This Ruling was delivered by the Court upon the request of Russian State Duma (Parliament) deputies about the extent of execution of ECtHR judgments in cases in which such execution can contravene the previous decisions of the RF CC. The RF CC's summary position amounted to the recognition of binding force of ECtHR judgments, under the condition they do not violate the RF Constitution. In case of concerns or doubts about constitutionality, lower courts shall postpone their hearings and deliver the cases to the consideration of the RF CC which determines whether an ECtHR judgment is in conformity with the RF Constitution or not. The RF CC justified this approach, reasoning that the participation of the Russian Federation in any international treaty does not mean giving up national sovereignty. Neither the ECHR, nor the legal positions of the ECtHR based on it, can cancel the priority of the Constitution. Their practical implementation in the Russian legal system is only possible through recognition of the supremacy of the Constitution's legal force.

[28] A. Trochev and P.H. Solomon, 'Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State', (2018) 51(3) *Communist and Post-Communist Studies*, pp. 201–214.

[29] Soviet approach to rights implied that they are only instruments of social evolution: rights did not constitute limits to state or collective interventions into individual freedom but just reflected the existing socio-economical structure and the place that belongs to social classes and, indirectly, to individuals that are members of these classes. See J.N. Hazard, *Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States*, University of Chicago Press, Chicago 1969.

with what is supposed to be objectively legal from the perspective of general principles of law. In its capacity of a mediator between the government and the civil society, the RF CC struck down a number of important legal enactments.[30] Its reasoning contrasted with the formalist language of the Russian Supreme Court (the RF SC) employed in the cases where the RF SC also undertook to defend individual rights against the statutory law.[31] In itself, such an approach was revolutionary for a country in which the unchecked discretion of the state authorities reigned over many years and the law was tantamount to the command of the political rulers.[32] It comes as no surprise that such new approaches shattered the entire Soviet conception of judicial power and law-application.[33]

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The RF CC confronted the political authorities in a number of important cases. In its very first ruling, the Court invalidated Yeltsin's decree on fusion of police and secret services, employing a broad argumentation based on the Western conception of separation of powers.[34] In the 1992 'CPSU' case the Court partly struck down Yeltsin's decree against the Communist Party of Soviet Union (CPSU), again basing on general principles of law. Invoking inviolability of the property, the RF CC reasoned that the state could not just seize the property, whose ownership status was entangled in complicated ways between the state and the Communist Party. With the reference to the general principle of freedom of association, the Court spoke about the freedom for ex-CPSU members to restart a new communist party.[35] Furthermore, employing the separation-of-power language, the RF CC invalidated in February 1993 the presidential decree on prohibition of the National Salvation Front.[36] In a number

[30] In total, the RF CC made 27 final judgments in that time period. See R.B. Ahdieh, *Russia's Constitutional Revolution, Legal Consciousness and The Transition to Democracy: 1985–1996*, Pennsylvania State University Press, University Park, United States of America 1997, p. 80ff.

[31] E.g., in the case of Ilchenko which was indicted for not reporting about a crime committed by her relatives, *Biulleten' Verkhovnogo Suda RF* [Bulletin of the RF Supreme Court], 1993, no. 8, p. 6. The subsumption technique that is characteristic for the reasoning of the RF SC, implies that this Court does not discuss the applied laws on its merits, even if their validity is challenged because of their content, but confines itself to verifying formal criteria of validity (legislative procedure, normative hierarchy, official publication, and so on). It is also not common for the RF SC to go into discussion about general principles of law such as justice, reasonability, equal protection – in the distinction to the RF CC which abundantly refers to these principles.

[32] R. Schlesinger, *Soviet Legal Theory: Its Social Background and Development*, OUP, Oxford 1951; R. Sakwa, *Russian Politics and Society*, Routledge, Abington 1993.

[33] P.H. Solomon, *Courts and Transition in Russia. The Challenge of Judicial Reform*, Westview Press, Boulder 2000.

[34] Judgment of the RF CC, no. 1-P-U, 14.01.1992.

[35] Judgment of the RF CC, no. 9-P, 30.11.1992. See comments L.M. Tracy, 'Prospects for an Independent Judiciary: The Russian Constitutional Court and the CPSU Trial', (1993) 26(3) *Akron Law Review*, pp. 581–608.

[36] Judgment of the RF CC, no. 3-P, 12.02.1993.

of other cases, the Court also referred to general principles of law engaging itself in protection of individual rights.

From March 1993, the Court stood on the side of the Parliament against Yeltsin who underscored the purportedly illegitimate pedigree of the RSFSR Constitution and questioned the legitimacy of the Parliament and the RF CC. A cardinal shift has taken place in the autumn of 1993 when the RF CC invalidated Yeltsin's Decree No. 1400 about disbanding the Parliament and ordered Yeltsin's impeachment.[37] Removing Zorkin from the position of Chief Justice and adding to the RF CC seven loyal justices, the then RF President decided to maintain the Court after gaining the upper hand against the Parliament. This was quite explicable in the light of Yeltsin's political agenda of westernisation and liberalisation. In 1994 a new law on the RF CC was adopted which reshuffled the justices and revised the Court's powers, technically ruling out its direct conflicts with the presidential power.[38] In 1995, seven Yeltsin's candidates finally entered the Court and it became operative again.

The RF CC and its strategies did not remain unchanged over the years. The RF CC in its 1991–1993 rulings was the first Russian court to challenge the statist conception of law and the idea that everything, with any content whatsoever, decreed by the state shall be considered as legally binding. Conceptual reference points for this new approach were largely absent in the previous legal development of Russia, with the exception of the first Russian constitutional experiment in the early 20th century and the literature of that period.[39] From this vantage point, the choice of the RF CC to evoke general principles in some cases or to abide by the letter of the law in other cases could create the impression that the Court's decisions are discretional.

After its defeat in the confrontation with the presidential power in 1993, the RF CC prudently demonstrated its reluctance to meddle in political affairs.[40] It generally followed the official political agenda and in the period 1993–2000 preferred to work 'overly cautious substantively'.[41] This stand explains the

[37] Conclusion of the RF CC, no. 3-1, 23.03.1993; Conclusion of the RF CC, no. 3-2, 21.09.1993.

[38] The RF Federal Constitutional Law, no. 1-FKZ, 21.07.1994.

[39] Svod osnovnykh gosudarstvennykh zakonov Rossiiskoi Imperii [The Code of the Fundamental State Laws of the Russian Empire], 23.04.1906.

[40] The RF CC Justice Gadzhiev, commenting on the decision of the RF CC against Yeltsin in September 1993, admitted in 2011 that 'At the present time, the Court responsible for constitutional control is not inclined to make decisions contrary to the general policy of the State […] and shall be engaged into meticulous correction of legal errors'. See G.A. Gadzhiev, 'My sobralis' vecherom, deistvitel'no, bez mantii' [We really came together in the evening and without judge's robes], *Novaia gazeta*, 17.06.2011, available at https://www.novayagazeta.ru/articles/2011/06/16/45133-sudya-gadis-gadzhiev-my-sobralis-vecherom-deystvitelno-bez-mantiy, last accessed 15.05.2019.

[41] H. Schwartz, *The Struggle for Constitutional Justice in Post-communist Europe*, The University of Chicago Press, Chicago 2000, p. 159. In 1993–1995 the RF CC was inactive because of the long process of election of new judges. In the following two years, the Court

Court's inclination for formalism at that time – there were no significant gaps between the blackletter statutory law and the political objectives of the Yeltsin's government. The Court's main role was therefore to refine formulations, to remove inconsistencies, to reshape ideas and thereby to help better formulate the sovereign will through a more or less coherent *Rechtsfortbildung*. As far as the sovereign will was in line with the wording of the Constitution, there have been no conceptual hiatuses – the RF CC could safely rely on the positivistic methodology.

After a relatively short preparation period, in 1996–1998 Russia ratified the ECHR, joined the CoE, and recognised the jurisdiction of the ECtHR.[42] Adhesion to the CoE required revisiting, overhauling or reinterpreting a large number of domestic laws, and the RF CC took an active part in this overhaul. Following one of Yeltsin's political ambitions – the harmonisation of Russian law with European and international human rights standards – the RF CC found a plausible reason to justify its existence and underscore the importance of its educational role. The Court not only started to use widely the language of the ECtHR and references to its case law, but also shared substantial positions of the Strasbourg Court in many respects.[43] This new language was an important novation for Russian legal doctrine: instead of the vague ideological legal principles from the Soviet era, the RF CC introduced into Russian law an array of Western principles (such as 'proportionality', 'legal certainty', 'non-discrimination') which had not been used before by Soviet and Russian courts. In the 1995 case of Smirnov, the RF CC invalidated the article of the RSFSR Criminal Code according to which those who decided not to return *(nevozvrashchentsy)* to the USSR/Russia are traitors, clearly keeping in mind the principle of proportionality.[44] Another landmark decision was the 1999 judgment establishing the moratorium on the death penalty.[45]

has not repealed a single statutory provision as unconstitutional, and until the beginning of 2000s its position was also mostly formalist – only in exceptional situations the RF CC entered into consideration of constitutionality of statutory rules, for the most part rejecting petitions. See e.g., K.L. Schepelle, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe', (2006) 154(6) *University of Pennsylvania Law Review*, pp. 1838–1840.

42 B. Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Four Years On', (2000) 11(3) *Helsinki Monitor*, pp. 53–72.

43 B. Bowring, 'Politics and Pragmatism: The Constitutional Court of the Russian Federation and Its 20 Years of Engagement with the European Convention on Human Rights', (2018) 1(1) *East European Yearbook on Human Rights*, pp. 5–31. According to the RF Constitution, the international law is a part of the Russian legal system, so using the jurisprudence of the ECtHR at that period was quite reconcilable with legal positivism. This latter also admitted a pragmatic strategy of Russia's relation to the ECtHR and its judgments over the years (before 2014) – to pay compensations but to leave it to the legislator to decide about statutory amendments suggested by the ECtHR.

44 Judgment of the RF CC, no. 17-P, 20.12.1995.

45 Judgment of the RF CC, no. 3-P, 02.02.1999.

For a while, the political authorities supported the incorporation of Western legal standards into Russian law, at least their formal inclusion. Implementation of these standards under the Yeltsin's rule could easily be conceptualised as implementation of the sovereign's will insofar as the President explicitly agreed to them and implicitly assigned to the Court to revise the domestic law accordingly. Unlike the RSFSR Constitution, the 1993 RF Constitution was based on the Western law, and contained clear-cut liberal principles, so that its text prompted the RF CC to harmonise its jurisprudence with that of the ECtHR.

A relatively untroubled cooperation between the RF CC and the ECtHR continued until the mid-2000 when the first politically sensitive judgments were made against Russia.[46] These judgments alerted the Russian political elite and the RF CC that subscribing to human rights standards was not just a declaration of intent but involved certain positive obligations and constraints on the use of the state power. The RF CC also had to learn that there can be a significant gap between the sovereign will of the Russian state, on the one hand, and the international law, on the other – a gap that could not be normatively reconciled in terms of the RF Constitution.[47] The ideal of 'the dictatorship of the law' proclaimed by Putin in 2000[48] required that the political will of the authorities is absolutely binding once it has the form of the law. In this logic, there was no need for judicial control over the substance of the law and the political will embodied therein. For a while, the RF CC could stay afloat sticking to its educational role as a medium of westernisation of Russian law, as far as westernisation still remained on the political agenda. This development summed up the main results of the Moscow period of the RF CC when in 2008 it moved to Saint Petersburg. The Court needed to revisit its methodology, which nonetheless required quite some time.

4. THE SAINT PETERSBURG PERIOD (2008 ONWARDS)

The shift in the RF CC's attitudes to European law did not happen at once: one had to wait a couple of years before the change of the Court's philosophical

[46] ECtHR, *Gusinsky v Russia*, no 70276/01, 19.05.2004; ECtHR, *Ilascu and Others v Moldova and Russia*, no 48787/99, 08.07.2004; ECtHR, *Shamayev and Others v Georgia and Russia*, no 36378/02, 12.04.2005.

[47] 'The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied', see the RF Constitution, Article 15, para. 4.

[48] V. Putin, 'Otkrytoe pis'mo izbirateliam' [An Open Letter to the Electorate], 25.02.2000, available at http://kremlin.ru/events/president/transcripts/24144, last accessed 15.05.2019. See comments, e.g., J. Kahn, 'Russia's "Dictatorship of Law" and the European Court of Human Rights', (2004) 29(1) *Review of Central and East European Law*, pp. 1–14.

breakthroughs became unquestionable. During the first years of the Saint Petersburg period, the RF CC did not seek any direct confrontation with the ECtHR and concorded its jurisprudence with the Strasbourg approaches in a number of milestone cases.[49] While the narratives of the Parliament, the Government and other state institutions quickly took very conservative hues, those of the RF CC remained rather mild before 2010: the Court did not react immediately to the changed ideological winds and remained at the crossroad for a rather long while. The political message of Yeltsin's government implied that Russian law needed a conceptual and ideological overhaul to comply with the international standards. This message in the late 2000s became obsolete. Nonetheless, the Court could not abandon its previous discourses without losing face and its institutional *raison d'être*.[50]

AQ: Please suggest another word for <plead> or should it be <plead for>?

A petty claim about parental leave of a small military serviceman, Konstantin Markin, had no evident political implications.[51] The case had been routinely rejected by the RF CC as have thousands of other applications annually

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49 E.g., the case on rights of patients under psychiatric treatment, in ECtHR, *Shtukaturov v Russia*, no 44009/05, 28.03.2008; the RF CC agreed with the ECtHR's judgment in 2009: Judgment of the RF CC, no. 4-P, 27.02.2009 or the pilot case concerning payment obligations of the state. ECtHR, *Burdov 2 v Russia*, no 33509/04, 15.01.2009, which was largely welcomed in the RF CC's jurisprudence. See e.g., Ph. Leach, H. Hardman and S. Stephenson, 'Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia', (2010) 10(2) *Human Rights Law Review*, pp. 346–359.

50 For the Court it was a difficult choice – many Justices stood on the 'Western' side on the axe of the eternal Russian debate between Westernisers and Slavophiles (Slavophiles wanted Russia to be developed upon values and institutions derived from its early history, opposing the influences of the West, while Westernisers claimed that Russia should be a part of the European civilisation). For example, Zorkin devoted his doctoral and habilitation theses, as well as many of his first books to such Westernisers in Imperial Russia as Boris Chicherin, Nikolai Korkunov, Sergei Muromtsev, and a plead of Russian liberals to whom he devoted a number of books, see e.g.,V.D. Zorkin, *Iz istorii burzhuano-liberalnoi politicheskoi mysli Rossii vtoroi poloviny XIX – nachala XX v.: B.N. Chicherin* [From the History of Bourgeois-Liberal Political Thought of the Second Half of the XIX and the Beginning of the XX Centuries], MGU, Moscow 1975; *Pozitivistskaia teoriia prava v Rossii* [The Positivist Theory of Law in Russia], MGU, Moscow 1978; *Muromtsev*, Iurlit, Moscow 1979; *Chicherin*, Iurlit, Moscow 1984. Remarkably, in these works Zorkin boldly expressed positive evaluations of the 'bourgeois thinkers' that were quite unexpected and evidently went astray from the Soviet ideology). His convictions remained mostly the same in the mid-2000s, e.g., V.D. Zorkin, *Rossiia i Konstitutsiia v XXI veke: Vzgliad s Ilyinki* [Russia and the Constitution in the XXI Century: A View From Ilyinka Street], Norma, Moscow 2007.

51 Mr. Markin,a military serviceman was not entitled to the same parental leave as provided for military servicewomen by Russian law. Rejecting his claim, the RF CC argued about a historical division of roles between men and women in Russian society and that allowing military servicemen to have parental leave would endanger the Russian military defense. After Markin won his case at the ECtHR and this contentious matter about the rights of military men came to the surface of public opinion, the contested regulation was repealed upon the request of the RF Ministry of Defense.

processed by the clerks of the Court. A short rejection ruling did not contain anything specific and repeated the ordinary bureaucratic language of the RF CC, pathetically referring to 'public responsibilities protected by the law'.[52] The ECtHR considered the application of Markin on its merits and harshly criticised this argumentation, accusing the RF CC of ignoring the fundamental non-discrimination principle.[53] Even if the Grand Chamber slackened this criticism in its 2012 judgment,[54] the Rubicon had been crossed.

The clash between the RF CC and the ECtHR about the *Markin* case was not only about legal discrepancies in what concerns the protection of rights. The unleashed criticism of the ECtHR came rather unexpectedly for the liberal Justices of the RF CC who were confident that their educational and institutional mission was to bring Russian law closer to the Western law. The language of the 2010 *Markin* judgment hinted that the RF CC cannot adequately understand the Western legal tradition, let alone teach it to Russians. Thereby, the ECtHR carelessly ruined all the best intentions and pretentions of the RF CC to be a 'Westerniser' for the post-Soviet Russian legal system, without considering the difficult position of the RF CC at that moment.

AQ: Suggest carelessly instead of 'uncarefully'. Is this ok ?

It did not take long to hear conservative discourses from the Kremlin in the connection with the *Markin* judgment. In December 2010 the then RF President Medvedev underscored that Russia has not given any part of its sovereign rights to supranational courts and called on the RF CC to protect Russia's sovereignty.[55] The 2010 judgment about gay parades in the *Alekseev* case,[56] the 2011 HIV visa-restrictions case,[57] the 2011 *Yukos* judgment only added to the tensions,[58] but the 2013 judgment in *Gladkov and Anchugov* where the ECtHR required change to the Constitution to better protect the rights of prisoners[59] was too much of a good thing. Putin condemned the 'politicised jurisprudence' of the ECtHR, and unambiguously stated that Russia can denunciate its international treaties and leave the ECtHR if this Court continues to encroach on Russian sovereignty.[60]

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[52] Ruling of the RF CC, no. 187-O-O, 15.01.2009.

[53] ECtHR, *Markin v Russia*, no 30078/06, 07.10.2010.

[54] ECtHR, *Markin v Russia*, no 30078/06 (GC), 22.03.2012.

[55] D.A. Medvedev, *Konstitutsionnyi sud neobkhodim* [The Constitutional Court is Necessary], *Vesti*, 11.12.2010, available at https://www.vesti.ru/doc.html?id=413251, last accessed 15.05.2019.

[56] ECtHR, *Alekseyev v Russia*, nos 4916/07, 25924/08 and 14599/09, 21.10.2010.

[57] Ruling of the RF CC, no. 155-O, 12.05.2006, and ECtHR, *Kiyutin v Russia*, no 2700/10, 10.03.2011.

[58] ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, no 14902/04, 24.06.2011.

[59] ECtHR, *Anchugov and Gladkov v Russia*, nos11157/04 and 15162/05, 04.07.2013.

[60] *Putin ne iskliuchil vozmozhnost' vykhoda RF iz-pod iurisdiktsii ESPCh* [Putin Did Not Exclude that Russia Leaves the Jurisdiction of the ECtHR], Interfax, 14.08.2014, available at https://www.interfax.ru/russia/391379, last accessed 15.05.2019.

The RF CC could not remain aloof from this general exceptionalist trend of the government.[61] Nevertheless, during several years the RF CC diligently sought to strike a reasonable balance with the ECtHR: accepting its judgments in some cases,[62] and at the same time averting it from encroaching on 'inalienable sovereignty' in other, politically sensitive cases. The accurate language of the RF CC in the 2013 Markin-2 ruling is symptomatic for this attitude,[63] as well as the balanced ruling in the new LGBT case of *Alekseyev*.[64]

However, the wind has evidently changed, and the RF CC had to follow it. In this, the Court had a double purpose: to align with the state policies and to protect itself against further Western criticism. Predictably, the choice was made in favour of conservatism and exceptionalism. If the RF CC cannot find a common language with the ECtHR about Russia's national specificity, it can simply fix a borderline to avoid further confrontation. Following this strategy, the RF CC chose to draw 'limits of concession'[65] and to define Russia's specific constitutional identity.[66] The new conservative agenda could not fail to produce a chilling effect on the RF CC's attitudes toward European law – these became much more selective. From a rather sincere commitment to reshape Russian law according to the Western standards, after 2010 the RF CC gradually evolved to a cautious scepticism, which reflected the Court's understanding of its new assignment to 'protect sovereignty'.[67]

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61 See on this trend B. Harzl, 'Nativist Ideological Responses to European/Liberal Human Rights Discourses in Contemporary Russia', in L. Mälksoo and W. Benedek (eds.), *Russia and the European Court of Human Rights, supra* note 2, pp. 355–384.

62 For example, accepting the *Ananyev* judgment about detention cells as a pilot decision for reformation of the system of criminal execution. See ECtHR, *Ananyev and Others v Russia*, nos 42525/07 and 60800/08, 10.01.2012.

63 Judgment of the RF CC, no. 27-P, 06.12.2013.

64 Ruling of the RF CC, no. 1718-O, 24.10.2013.

65 V.D. Zorkin, 'Predel ustupchivosti' [The Limit of Concession], *Rossiiskaia gazeta*, 29.10.2010, available at https://rg.ru/2010/10/29/zorkin.html, last accessed 15.05.2019.

66 This notion, along with a significant number of Western legal conceptions, is employed in Russian constitutional law but with a specific nativist interpretation. See M. Aksenova and I. Marchuk, 'Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights', (2018) 16(4) *International Journal of Constitutional Law*, pp. 1322–1346.

67 In the Russian language, the term 'sovereignty' is frequently utilised as tantamount to 'autarchy' or to 'autocracy'. Protection of sovereignty in this light is readily taken to mean 'protection of the exceptional status' or 'protection of the existing political regime'. See e.g., I.D. Levin, *Suverenitet* [Sovereignty], Iurizdat Miniusta, Moscow 1948; B.L. Manelis, *Problemy suvereniteta* [Problems of Sovereignty], Moscow 1966; V.S. Shevtsov, *Gosudarstvennyi suverenitet: voprosy teorii* [State Sovereignty: Theoretical Questions], Nauka, Moscow 1979; N.A. Ushakov, 'Suverenitet i ego voploshchenie vo vnutrigosudarstvennom i mezhdunarodnom prave' [Sovereignty and Its Implementation in National and International Law], (1994) 2 *Moskovskii zhurnal mezhdunarodnogo prava*, pp. 3–21; V.D. Zorkin, 'Apologiia Vestfal'skoi sistemy' [An Apology of the Westphalian System],

The puzzle for the RF CC was how to confirm its allegiance to the Western legal tradition, to continue asserting its fidelity to human rights, and at the same time to discard moralising discourses of the supranational courts. On the other hand, the Court was expected to drive the West away from meddling in Russia's 'sovereign affairs' – this expectation has been explicitly voiced by the political leadership on many occasions. This mission was impossible from the very beginning, as sovereignty – from the standpoint of the ECtHR's jurisprudence – cannot work as a panacea against liability for human rights violations. Without turning upside down its previous narratives, the RF CC decided to pick up only a part of the European legal standards to the extent they are compatible with the national interest and the native legal culture. The Court executed this manoeuvre by tracing an intellectual distinction between 'true' European values (mainly the conservative ones) and their 'perversions' in the sense of 'liberal all-permissiveness'.[68]

In line with the exceptionalist foreign policies of the government, the Court gradually rearranged its reasoning, uncannily mixing its anti-globalist rhetoric with odd liberal formulations. The RF CC sided itself with the imaginary 'other Europe' allegedly based on conservative religious philosophies, traditional family values, Westphalian sovereignty and a strong vertical of state power. The following years were marked by the rise of the 'civilisational argument'[69] that on many accounts contradicted the blackletter law of the Russian Constitution.

The year 2014 proved to be another pivotal moment in the existence of the RF CC. It was with the Ukrainian crisis and the contentious issue of Crimea, when the RF CC sided with the government, awkwardly excusing it for the violations of international law.[70] The 2014 judgment on just satisfaction in the *Yukos* case[71] struck off all remaining hopes for finding a compromise with the ECtHR. Any prospects of the RF CC to continue with its educational role as a medium between the Russian and the Western legal traditions became very dimmed.

In July 2015, the RF CC delivered its milestone decision about the prevalence of the RF Constitution over international law.[72] This decision paved the way

Rossiiskaia gazeta, 22.08.2006, available at https://rg.ru/2006/08/22/zorjkin-statjya.html, last accessed 15.05.2019; S.A. Komarov (ed.), *Kommentarii k Konstitutsii RF* [Commentaries on the RF Constitution], Iurinstitut, Saint Petersburg 2014, pp. 46–47.

68 V.D. Zorkin, *Spravedlivyi miroporiadok: sovremennye podkhody* [The Just World Order: Contemporary Approaches], 30.11.2017, available at http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=83, last accessed 15.05.2019.

69 A. Nussberger, 'Foreword', in L. Mälksoo (ed.), *Russia and European Human-Rights Law: The Rise of the Civilizational Argument*, Brill Nijhoff, Leiden 2014, pp. 1–3.

70 Judgment of the RF CC, no. 6-P, 19.03.2014.

71 ECtHR, *OAO Neftyanaya Kompaniya Yukos v Russia*, no 14902/04, 31.07.2014.

72 Judgment of the RF CC, no. 21-P, 14.07.2015.

to further exceptionalist conclusions: the RF CC has the right to decide about Russia's international obligations and to ensure that the ECtHR does not transgress the subsidiarity principle in Russian cases. After all, interpretations given by the RF CC shall prevail over any other opinions not only about Russian law, but about law in general (including international law). Such constitutional interpretations constitute an inalienable part of sovereignty – this thought is not expressed verbatim but is more than obvious in the Court's reasoning.

Soon followed the 2015 Federal law No. 7-FKZ that gave the RF CC the power to reassess judgments of the ECtHR as to their enforceability in Russia.[73] So far, the RF CC acts quite moderately in its first cases under this new law,[74] but firmly reasserts its sovereign power over final legal interpretations. In these first decisions, the Court does not fully reject the ECtHR's approaches, but implies that the RF CC has better knowledge about the native legal culture and therefore is in a better position to decide what from international human rights law can become legally binding in Russia.[75]

5. CONCLUSION

The functions factually belonging to the RF CC in the Russian legal system are quite far away from what one would consider as the power of constitutional review in Western democracies.[76] The Court's wider ambitions to exercise the function of constitutional control over the political authorities have been muted in the course of the 1993 constitutional crisis. So far, the RF CC has not endeavoured to reclaim this function, which under the present political situation would inevitably result in a political stalemate.

The RF CC's smart strategy after 1993 has been to endeavour to be adaptable to varying political agendas. Surely, this might suggest comparisons with the situation of constitutional courts in a number of other Eastern-European countries.[77] The Court and its Justices were able to develop more or less coherent narratives of their flexible approaches, first basing on liberal political

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73 The RF Federal Constitutional Law, no. 7-FKZ, 14.12.2015.

74 Judgment of the RF CC, no. 19.04.2016; Judgment of the RF CC, no. 1-P, 19.01.2017, no. 1-P.

75 L. Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights', (2016) 12(02) *European Constitutional Law Review*, pp. 377–395.

76 L. Epstein, J. Knight and O. Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government', (2001) 35(1) *Law and Society Review*, pp. 117–164.

77 E.g., W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer, Dordrecht/The Netherlands 2005.

philosophy and gradually moving to conservatism.[78] From time to time the Court holds some legal provisions as unconstitutional, but after 1993 this happens only in the cases where the substantial governmental interest is not involved and where the RF CC therefore did not engage in confrontation with the supreme political authorities.

However, this adaptability has its limits, both theoretically and practically. Seen against the backdrop of the Kelsen-Schmitt debate about 'Who shall be the Guardian of the Constitution',[79] the RF CC seems to want to combine irreconcilable methodological positions. If validity of the constitution is derived from the sovereign will, then the sovereign (the presidential power) may directly express itself and provide authentic interpretations of its will. In this Schmittean perspective, a constitutional court is a needless decoration, an odd link in the chain of political decision-making. The RF CC seems to be reluctant to accept the opposing, Kelsenian monist perspective, in which validity of the constitution is subordinated to and derived from international law – the standpoint, which would better fit the Court's narratives prior to 2010.

In this theoretical deadlock the RF CC becomes more and more realist,[80] considering itself as a source of the sovereign will – against the international law and, virtually, against the sovereign prerogatives of the presidential power. The 2015 Ruling No. 21-P can be considered as an important step toward decisionism implying that the Court may decide about situations of exception (the Schmittean *Notfall*) and, in the name of protection of sovereignty, legitimise formally illegal (contrary to the letter of the law/the Constitution/ international treaty) decisions in such situations. The positivist theory of law does not seem to be an appropriate methodological tool for conceptualisation of this state of affairs any longer.

In this light, the last enlargement of the powers of the RF CC allowing it to check validity and enforceability of the ECtHR's judgments could have been a dangerous gift. The RF CC finds itself in an ambiguous situation in which the international legal norms and principles introduced into Russian law by the 1993 Constitution are not much relevant either for the educational role, or for the decision-making of the Court. In the actual situation where the RF CC cannot implement the liberal principles of the Constitution against the sovereign will,

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78 A.N. Medushevsky, 'Law and Justice in Post-Soviet Russia: Strategies of Constitutional Modernization', (2012) 3(2) *Journal of Eurasian Studies*, pp. 116–125.

79 L. Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge University Press, Cambridge 2015.

80 In the sense of the philosophy of legal realism summed up in the formula 'the constitution is what judges say the constitution is'. Apart of it, the RF CC also readily embraces the 'legal realism' in the sense of international law – it is factual power that decides who is right and wrong.

its legitimacy and, taken largely, practicability of its existence can be questioned again (as in 1993). One may ask whether the advisory function could be more effectively carried out by the presidential power or by other institutions. It will therefore come as no surprise if one day the RF CC falls under the jurisdiction of the RF SC, becoming one of its chambers[81] or starting to work according to the French model of constitutional control.[82] The presidential decision[83] to move the RF SC to Saint Petersburg, just across the Neva river from the RF CC, may be symbolic for this further possible development.

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[81] In 2010, this happened with the former RF Higher Arbitrazh Court.

[82] A similar development took place in Kazakhstan in 1995 when the Constitutional Court was turned into the Constitutional Council empowered to provide official comments on acting Kazakh legislation.

[83] Putin predlozhil perevesti vysshuiu sudebnuiu vlast' v Sankt-Peterburg [Putin Proposed to Move the Supreme Judicial Power to Saint Petersburg], *Rossiiskaia gazeta*, 14.11.2012, available at https://rg.ru/2012/11/14/peterburg-anons.html, last accessed 15.05.2019. In 2014, a new law on the RF SC has been adopted (the RF Federal Constitutional Law, no. 3-FKZ, 05.02.2014), Article 22 of which proclaimed that the seat of the RF SC will be in Saint Petersburg. At the present moment, a new building for the RF SC is being constructed in Saint Petersburg on the bank of the Neva river.