THE RUSSIAN CONSTITUTIONAL COURT UNDER
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Introduction

Assuming that the new constitutional documents in Central and Eastern Europe have institutionalised democracy, the rule of law, basic human rights and basically are in line with international and European standards, the main problem is that of their implementation. A condition of democracy, constitutionalism and the rule of law would emerge if constitutional/judicial review through constitutional courts or judicial review ensures that the constitution is followed.

This would also be the case with the 1993 Russian Constitution. Whichever deficits it may have, a close reading of the original Constitutional text makes it what Richard Sakwa once called a triumph of “ethical individualism.” Although the Russian Constitution from 1993 in several aspects and especially in the area of federalism is ambiguous and consequently already in the beginning could be read from different perspectives the main tenor is the emphasis on democracy and the value of the individual person. Articles 1, 2., 6. (part 2) 17. (parts 1 and 2), 18. and 55. of the Russian Constitution are especially important. In this sense the 1993 Constitution could be seen as an instrument of change from an undemocratic or unstable system to a democratic and stable system with emphasis on respect for the individual.

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In Russia however this liberal romanticism belongs, however, to a bygone era. The text must be put in a concrete context. The problem that will be discussed in this paper is how the constitutional text will be interpreted and applied by the Russian Constitutional Court in a very different political, legal and social situation.  

The political regime has changed under Putin through a number of legislative measures which put together would imply a new constitutional order but the 1993 Constitution itself has not been changed. This is particularly noticeable in the area of federalism. The Court has in the area of federalism sustained federal statutes but has added that the separation of powers between federal authorities, especially the Presidency and the regions must be balanced, but gradually the federalist structure of the Russian Federation has been eroded.

Although a constitutional development without change of the text of the constitution is possible and often desirable in several cases, the risk is that the Constitutional document would lose its normative force and we would be confronted with large differences between constitutional text, constitutional judicial practice, constitutional practice of other institutions and constitutional reality. The constitutional and legal order could have been the final counterbalancing factor to a more authoritarian system but it seems that the Russian Constitutional Court will not take the role of being an obstacle to Putin’s centralising legislative measures.

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6 The institutional concept “court” is used here but the Russian Constitutional Court consists in reality of various judges who may have different opinions but for the sake of simplicity we will not deal with individual judges except in relation to dissenting opinions.

7 This could be seen for example in the Ruling of the Constitutional Court of the Russian Federation of 4 April, 2002 No. 8 – P. (Cases are taken from the website of the Russian Constitutional Court: http://ks.rfnet.ru/).

8 See the interview with Constitutional Court Judge Gadis Gadzhiev,”Sudya Konstitutsionnogo Suda zayavil shto federatsiya uzurpuet prava subiektov RF” 27 January 2006, http://www.nr2.ru/moskow/53983.html

9 This was said already under Yeltsin’s time. See Epokha Yeltsina Ocherki politicheskoi istorii, Moscow 2001, 384.
Putin himself, although declaring the dictatorship of law and being the Guarantor of the Constitution, is not in every matter concerned with legality\textsuperscript{10} or constitutionality.\textsuperscript{11} Stability is his main concern. That the legislative organs have extended the tenure of the Constitutional Court Judges from 12 to 15 years and then to an unlimited tenure up to 70 years of age would probably mean that Putin is concerned with their professionalism and well-being.\textsuperscript{12} Since a constitution is an open legislative act with very general norms and principles the main methodological problem for a court enforcing a constitution is to secure a minimum of predictability, a main element for a rule of law state. One should rely on constitutional norms guarantees even if judicial practice modifies and give concrete content to the abstract text.

**Existence comes first.**

The aim of this paper is to analyse the adjunctive strategy of the Russian Constitution in conjunction with its methods of interpretation. The hypothesis is that the Court wants to keep its independence and legal power and is prepared not to invalidate legislation which otherwise it could have done. By accommodating with dominant political forces the Court wants to secure not only its existence but also is influence and prestige. In contrast to the Yeltsin era where there was confrontation between President and Federal Assembly, the Duma and the Federation Council, the Court is now confronted with a much more streamlined political structure.


\textsuperscript{11} Probably, of fear of not having got fifty per cent of the voters to go to the polls, in which the Prime Minister would become Acting President, he dismissed the then Prime Minister Mikhail Kasyanov before the elections in 2004. Through this measure he partly eroded the significance of the constitutional practice of dismissing the Government after the elections, which the President had to do according to the Constitution.

\textsuperscript{12} *Sobranie.Zakonadatel'stva RF* 2001, No. 7, item 607; ibid., No.51 item 4824; ibid. 2005, No. 15, item 1273.
Such hypothesis is hardly surprising from a formal point of view. In Latvia, for example the *presumption* is that new legislation is in conformity with the Constitution.\(^{13}\) and that presumption probably applies to all constitutional courts. To invalidate new legislation must be an exception and not the rule. But we will look here if there is a *specific form* of interpretation of the Constitution which is in line with the adjunctive strategy not to oppose the dominant political forces.

Four examples which all concern legislative attempts by the Russian President and his Administration to implement what has been called “managed democracy”. The first concerns the control of information during electoral campaigns; the second and third concerns the restructuring and control of political parties and the fourth the nomination of governors in the regions.

As a point of departure we will assume that the Court’ pragmatic adjunctive strategy is based on the idea that its own existence and what could be called *political-legal capital* must not be put into jeopardy. Some scholarly analysis of the Court have also followed such approach.\(^{14}\) The situation could be compared with that of the Constitutional Court of Belarus. Through various measures the Constitutional Court in Belarus lost its real influence.\(^{15}\) The Russian Constitutional Court does not want to share that fate.

After the events in September October 1993 when the Court’s activities were suspended Boris Yeltsin contemplated abolishing the Court, but was advised not to do so.\(^{16}\) But the Court implemented a policy of restraint in relation to laws and decrees coming from the Presidency, the dominating political force which could retaliate and was more activist in relation to the general protection of human rights, especially in the area of criminal procedure and tax legislation.\(^{17}\)

\(^{13}\) Interview with the then Latvian Constitutional Court Judge Anita Usacka in December 2002.


\(^{17}\) Epstein, Knight and Shevtsova (note 7).
The second Chairman of the Court, Vladimir Tumanov, made it indirectly clear long ago that under his policies, the Court should not oppose the dominant political forces too strongly. In a sense it could be called a policy of institutional survival which acted on the principle of not opposing those forces which could strike back. Tumanov’s statement also concerned regional leaders which were unwilling to implement the Court’s decisions but these were not sufficiently strong to have the Court abolished or diminish its prerogatives. Regional actors also saw the Court as an instrument which could promote their interests.

Assuming that the Court does not want to appear to be opposed to dominant political trends does not of course mean that the Court has not invalidated legislative measures under Putin. The Russian Constitutional Court has in a number of recent rulings declared that various norms legislative acts are not in conformity with the Russian Constitution.

**Adjudicative strategy and interpretative technique**

The second hypothesis is that the Court will use an interpretative technique that will correspond to that end. The specificity of the Russian Constitutional Court like other constitutional courts is that its decisions are published. Its deliberations take place in public and its decisions are binding for the legal system. One feature of a state based on the rule of law is that court decisions, at least in hard cases, have to be based on complex and intellectually convincing reasons. In that specific sense Russia is still a state based on the rule of law. All cases treated here could be called hard cases in the sense that not immediate legal solution is at hand.

Since Russia is a party to the 1950 European Convention of Human Rights and Basic Liberties and the Court not infrequently uses norms, coming from the Convention, it is bound to convince a fairly large audience. The idea is that the relation between an adjunctive strategy and interpretative

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18 Conversation with the author in April 1995.
20 For example Rulings from 3 June 2004 No. 11 - P; 23 April 2004 No. 9-P; 17 July 2002, No. 13- P.
A (constitutional) court has in most cases discretion in the sense that the court has the possibility to choose between two or several solutions to the case which all are lawful.\(^\text{21}\) That there should be limits for judicial discretion, is founded on the reason that the constitutional and legal order otherwise would lack predictability. Discretion without limits means that normative force of a constitution and, of the legal order for that matter, would collapse.

To circumscribe judicial discretion and achieve predictability legal methods have been developed both empirically and normatively in modern legal systems. The use of discretion in the decision-making of a constitutional court should be circumscribed by certain guidelines and canons which in fact are universal.\(^\text{22}\)

It would be fair to argue that four main types of interpretive argument are to be found on the international scene: (i) textual arguments, (ii) systemic arguments, (iii) intentionalist arguments, and (iv) teleological arguments. This list could be made much detailed.\(^\text{23}\)

International research on interpretation and application of statutes has confirmed the universalist thesis: i.e. that the main types of justificatory practices of higher courts in the worlds were similar in the following aspects: (1) the set of the major type of arguments that figure in the opinions were analogous; (2) the material or sources used in the opinions were similar; (3) the patterns of justification involved in the decision were likewise akin; (4) the method of weighing various types of arguments against one another showed great similarities; (5) Precedents play a significant part in


\(^{23}\) Ibid.
legal decision-making and the development of law in all countries that were studied;\textsuperscript{24} and the role of precedents in interpreting statutes demonstrated an analogous pattern.\textsuperscript{25} But it must be added that the variety of approaches to legal interpretation increases the possibility of wide expression in spite of the fact that the above mentioned research has found some pattern in the way each method is used by the courts.\textsuperscript{26}

Although the Russian Federation was not included in the mentioned research project the third hypothesis is that the justificatory pattern in the rulings and decisions of the Russian Constitutional Court do not deviate from the justificatory practices of other courts in the world. The Russian Constitutional Court may differ in one or several aspects from the universalist pattern in the sense that it is part of the Russian legal system with its special traditions and canons of interpretation, but the difference is not very conspicuous.

Russian legal theory normally is rather conservative but enumerates all these mentioned methods in common textbooks.\textsuperscript{27}

The normative foundations of the Court’s interpretative strategy does not give much guidance.

Article 16 of the Russian Constitution says that the first Chapter consisting of constitutional principles should be guiding for the other chapters of the Constitution. The Court’s interpretation of the Constitution must fall within the broad framework of Chapter one of the Constitution. Since this part of the Constitution consists of broad, partly competing principles it gives a wide discretion to the Court.

A very important feature of the activities of the Russian Constitutional Court is the formulation of legal positions (pravovaia positsia) through its rulings (which could be compared with precedents

\textsuperscript{24} D. N. MacCormick and R. Summers, "Further General Reflection and Conclusions" in: Interpreting Precedents, (note 22), 531-532.
\textsuperscript{26} D. N. MacCormick and R. Summers (note 24).
in the continental legal family without being completely similar. Without discussing in detail the
debate in Russian legal discourse on this issue the existence of legal positions is an important
change in the structure of Russian (constitutional) judicial decision-making by the creation of new
norms through universalisation of previous rulings.\textsuperscript{28}

The Court is not only a negative legislator but also a positive one. The legislator has to consider not
only the decisions of the Constitutional Court but also the legal positions of the Court. These are
binding for all organs of public power in the Russian Federation. A change of legal positions is
possible. To change its legal position the Court has to convene a plenary session (Art. 73 of the
Federal Constitutional Court Law on the Constitutional Court of the Russian Federation). That has
also happened in practice.\textsuperscript{29} The grounds for changing a legal position must not according to a
Russian scholar be based on sudden subjective factors but be based on objective processes leading
to changes of the law and constitutional reality.\textsuperscript{30}

The activities of the Russian Constitutional Court have not been unimpressive, and in a number of
cases (which will increase in due course of time) the Court has refused to decide the new case on its
own merits i.e. rulings\textsuperscript{31} (postonovlenie) but referring to its previous legal positions with a refusal
to consider the case on its own merits (opredelenie).

It has been argued that the process of law application, is "formalistic" or lacking in argumentative
strength in Russia and in other parts of the former Soviet Union.\textsuperscript{32}

\begin{footnotesize}
\begin{itemize}
\item[28] V.A Kryazhkov & O.N. Kryazhkova, “Pravovye pozitsii konstitutsionnoga suda Rossii and ego
interpretatsia”, Sovetskoe gosudarstvo i pravo, 2005, No. 11, 13 – 21, in particular 16 with further references.
\item[29] Rulings of 11 March 1998 No. 8 –P, compared with the 20 May 1997 No 8. –P. (Cf. Kryazhkov and
Kryazhkova above note 21), 15.
\item[30] B.S. Ebseev, Chelovek, narod, gosudarstvo i konstitutsionnom stroe Rossiiskoi Federatssii, Moscow 2005,
566; L.V. Lazarev, Pravovoe positsii konstitutsionnoga suda Rossi, Moscow 2003, 113 does not mention
grounds for changing legal positions.
\item[31] “Russia’s Constitutional Court A Decade of Reforms”, Review of Central and East European Law, 2001 No.
\item[32] Egil Levits, "Interpretation of Legal Norms and the Notion of "Democracy" in Article 1 of Satversme (The
neprikoconovennost'; interview with the then Russian Constitutional Judge Tamara Morschakova, Expert, No.
10, 2001, 65; also another Russian Constitutional Court Judge, Gadis Gadzhiev, expressed similar thoughts in
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\end{footnotesize}
But in contrast to this formalistic Russian interpretative tradition the Court uses a much more open legal reasoning. The Russian Constitutional Court uses a variety of interpretative methods proceeding from the usual linguistic and semantic points of departure to teleological and systemic method and the use of principles, partly not written in the Constitution.\textsuperscript{33} The Court often refers to earlier decisions.\textsuperscript{34}

An interpretation both of constitutional norms and norms of lower legislative acts must take place. Question of legal facts only occurs if the factual implementation sheds light over the existing or possible interpretation of the challenged legislative act. This widens the area of discretion. If the Constitution is very open as is the case with the Russian Constitution\textsuperscript{35} the area of discretion is even greater.

On the other hand the Court’s decision often concern the way the contested legislative act should be interpreted, i.e. the Court could refuse to invalidate the contested act but order that its application should follow a certain pattern.\textsuperscript{36}

An important circumstance is the existence of dissenting opinion which highlights the problem from various perspectives. The norm in the Federal Constitutional Law on the Constitutional Court, prohibiting the Court to take into consideration only questions of law seems not to have prevented the Court to discuss possible consequences of a decision.\textsuperscript{37}

Discussing constitutional courts, Radoslav Prochazka has argued that one should differentiate between a preservationist and constructivist interpretation of the Constitution in transition countries in Central Europe.\textsuperscript{38} Although his reasoning is not completely clear one might in this context

\textsuperscript{34} For example Ruling of 7 June 2000. More examples could be given.\textsuperscript{35}
\textsuperscript{36} For example, Rulings, 23 November 1999 No. 16 –P.; 11 June 2002 No. 10 – P.
\textsuperscript{37} For example, Ruling of 18 January 1996 No. P – 2, Dissenting opinion (N.V. Vitruk).
distinguish between preservationist positions which would have its points of departure the original constitutional document and the situation which surrounds it. The opposite position could be seen as constructivist implying that there is a distance to the original text and situation which also would imply several methods, the points of departure of which could be linguistic, systemic and/or teleological but hardly be based on the intentions of the constitutional law-giver.

If the Court wants to accommodate its interpretative technique, its reasoning and interpretation of the Russian Constitution with its adjudicative policy of not opposing the main legislator, the Presidency it will prefer a constructivist interpretation of the Russian Constitution. In fact arguments of the framers’ intentions do not play an important role in the Courts’ reasoning, if at all. There could be practical reasons for this stand point since the discursive material for the 1993 Constitution is to be found in a series of protocol from the Constitutional Assembly from the 1993 but it is not clear what normative values these protocols may possess.

The conclusion should be that the framers’ intentions are not distinct and difficult to ascertain. Also for this reason the Court’s reasoning is primarily be based on textual linguistic grounds but systemic or teleological arguments would also be used. Also other constitutional courts act in similar directions. Thus the question is rather how this constructivist approach is used. But in simpler cases a preservationist approach is also used.

The uniqueness of a large part of the activities of constitutional courts arises a from the fact that in relation to a traditional legal syllogism it has a different structure. The major premises is a norm or a group of norms in the relevant constitution; the minor premise is a norm or a group of norms in a lower legislative act; the conclusion postulates their conformity or non-conformity.

The judgement of the Russian Constitutional Court concerning the constitutionality of the Law On Excise Taxes from 24 October 1996 is one such case. Here a linguistic-semantic method was

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used. The Court made a simple syllogism where the Constitution was the major premise, the contested legislative act the minor premise and the conclusion was that the statute contradicted the Constitution. The Court here use two kinds of expression. If the Court sustains a legislative norm, it says that the contested norm(s) \textbf{do not contradict} the Constitution. If the Court asserts that the norm violates the Constitution, it says that the norm \textbf{is not in conformity (does not conform)} with the Constitution.

But in most hard cases a constructivist interpretation occurs. The Court’s hermeneutics of the Russian Constitution is often holistic which means that is often confronted with the hermeneutic circle.\textsuperscript{40} The whole decides the interpretation of the parts and the parts decide the interpretation of the whole. It engages also in \textit{consequential}, policy oriented reasoning discussing various arguments for a certain solution and is in this sense not formalistic.

In the Chechnya ruling of July 31 1995 which has been extensively treated in the literature, the most important legal argument is \textit{teleological}. The purpose of the contested Presidential decrees to restore order in Chechnya justified serious formal problems. International documents which not had been incorporated in the Russian legal system could be set aside in spite of the fact that international treaties are part of the Russian legal system (Art. 15 (4)). The constitutional norm that legislative limitations of human rights could only by made through a formal statute (Art. 55 (3) ) was ignored in view of the extreme importance of the constitutionally protected purpose, to preserve the territorial integrity of the Russian Federation.

But the constructivist approach does not comprise all judges but is often only shared by the majority of judges. A wellknown scholar and Former Constitutional Court Judge N.V Vitruk, who often had articulated dissenting opinions, notes that the main principle for the activities of the Russian Constitutional Court should be based the principle of constitutionality and legality

\begin{footnote}
\textsuperscript{40} Russian legal theory acknowledges that the Court has a wider area of interpretation than a usual court See T.Ya. Khabrieva & N.S. Volkova “Osebennost kazualnoga tolikovaniya konstitutsii Rossiiskoi Federatsii” in \textit{Teoretitcheskie problemy rosiiskogo konstitutionalizma}, Moscow 2000, 38 – 53, especially 42.
\end{footnote}
(konstitutsionnost') and (zakonnost'). These are not precise expressions but he defined them as that one should comply with (sledit') the Constitution. It would be fair to assume that Vitruk is closer to a preservationist position.

The case that are to be discussed are four examples of constructivism; i.e., they appear to be an accommodation to present political and social reality and this accommodation is reflected in the interpretative strategy.

The method in the first case discussed below is to find the contested norm in conformity with the Constitution by saying that the contested norm must be interpreted in a certain way. In this way the meaning of the disputed norms in the legislative act is authoritatively given by the Court.

This technique was already used, for example in the Court’s Ruling from 23 November 1999 on the constitutionality of the Federal Law from 26 September 1997 “On Liberty of Conscience and on Religious Organisations” in which the contested law was not considered by the Court to be in contradiction to the Russian Constitution.

The other types of reasoning that the Court are variants of constructivism which are based on the idea that the Court does not question the way the legislator wants to achieve its purpose through the contested norms. This passivity could have legal grounds.

In the last case from 21 December 2005 the Court assumes that what the Constitution does not explicitly prohibit, it permits. Obviously, this approach cannot function well without other arguments. Besides, the Court says that the President has an implied power to nominate governors, i.e. the explicit power-giving provisions in the Constitution are not exhaustive.

**Four cases**

1. The Ruling of Russian Constitutional Court of 30 October 2003 on the review of the constitutionality of some provisions of the 12 June 2002 Law “On Fundamental guarantees of

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electoral rights and rights to participate in referendums in the Russian Federation \(^{42}\) There were two dissenting opinions: V.G. Yaroslavtsev and A.L. Kononov and a special opinion: G.A. Gadzhiev.

In its ruling the Court held that the point f) of part 2 of Article 48 of the contested law did not conform to the Russian Constitution (Art. 3, part 3, 19 parts 1 and 2, 29 parts 4 and 5, 32, part 1 and 2 and 55 part 3) since it made it possible to regard as (prohibited) agitation all not mentioned communicative or informative measures.

In respect to the other points in part 2 of Article 48 b) c) d) e) the Court held that these points should be interpreted narrowly. These points were in conformity with the Constitution but only to the extent that the journalist had a clear intent to propagate the advantages of one candidate before others. Without such clear intent the communicative activity would be regarded as not prohibited information although it might have similar features and would be outside of the reach of the prohibitions of the law.

The Court held however that restrictions for journalists in the various media was allowed during elections. The limitation grounds in Art. 55 part 3 must be “just, relevant, proportional, moderate (sorazmernyi) and necessary for the defense of constitutional values. The essence of the constitutional value must not be distorted.

The Russian Court here also refers the European human rights case *Bowman v. United Kingdom* (1998). The European Court of Human Rights held that free elections and freedom of expression are interrelated.\(^{43}\)

The European Court admitted that these rights may come in conflict and that during elections certain restrictions might be imposed which would not usually be acceptable. Besides the states have a margin of appreciation with the regard to the electoral systems.

\(^{42}\) *Sobranie Zakonadatel`tsva Rossiiskoi Federatsii* 3 November 2003, No. 44 item 4358. This case has also been treated in Fogelklou (note 33).

However only to a limited extent the cases are similar. In the European case it was a question of expenditures for electoral propaganda. In this UK case it was a question of a woman who was prosecuted for having distributed leaflets promoting an anti-abortion candidate. The UK law did not allow for more than 5 GBP expenditure for such information. This very low limit on expenditures for non candidates in the elections the European Court found violated the European Convention of Human Rights according to the Court in Strasbourg. This limitation was disproportionate.

Thus, in this European case it was not a question of limiting freedom of information among the media but in relation to electoral expenditures. In the Russian case it concerned limitation of media information to voters and here the European Court stressed the value of a free flow of information. On the other hand Russian media are in various ways clearly dependent on various financial groups which in their turn are related to various parties and candidates.

The constitutional value to be protected by the law is the voters’ right to be objectively informed. There were three dissenting opinions in this plenary judgement among them Yaroslavtsev. The following two cases (2 and 3) on political parties were decided by one chamber of the Court with no dissenting opinions.

2 The case decided by the Court on the 15 December 2004 concerned the prohibitions in point 3 Article 9 of the Federal Law from 11 July 2001 “On Political Parties”. 44 There were no dissenting opinions.

Through this provision parties founded on professional grounds, or on race, on national or religious affiliation are not allowed to be registered as parties. Also the names of the parties must not mention these specific distinguishing features according to the Law.

One of the parties of this case, the Orthodox Party of Russia, complained that this rule in the law on Parties contradicted the Articles 19 and 30 (material) equality before the Law and freedom of association and does not conform with Article 13 (5) which prohibited organisations on specific

grounds which literally did not conform to the specific prohibited grounds in the Law “On Political Parties”.

But the Court thought otherwise. Since Russia is Party to the European Convention of Human Rights and Basic Liberties and other international instruments it had to acknowledge that political parties in other parts of Europe (and not only in Western Europe) often in their names include the word Christian (e.g. in Germany) but the Court says that these names are not only confessionally oriented but have a wider connotation, expressing European values.

In the Russian context, however, such labels as Orthodox or Moslem would have a more narrow interpretation and be associated not with general but with particular values.

Besides, the Court asserts, Russian society, including political parties and religious associations, has in its present phase not achieved “a sustainable experience of democratic existence”.

In such conditions the Court says, the party system would “inevitably” lead to the emphasis on the particular rights of corresponding religious and national groups and could also lead to a deterioration of the political and social position of smaller minorities. In the Court’s view the specific Russian situation does not allow for the creation of parties on national and religious grounds.

Finally, the Court asserts, under condition of increasing religious fundamentalism which also includes national elements, the prohibition of political parties on the contested grounds correspond to “the authentic meaning of Articles 13 and 14 in connection with Articles 19 (1) and (2), 28 and 29 and is a proper implementation of the content of these provisions.”

The Court solved the dilemma of the difference between a linguistic, linguistic contextual and also systemic interpretation of the meaning of Constitution with the disputed law by constructing an empirically oriented teleological approach. A linguistic, linguistic contextual and perhaps also a systemic interpretation would consider the formulation in Art. 13 (5) as decisive but this was not
the Court’s view. This provision which among others prohibits associations which incite to religious and ethnic hatred was used by the Court as its point of departure.

The legislator has the right to implement the Constitution in a his way. corresponding to his policies and fears.

Of specific significance is that Court asserts that Russian society has in its present stage not acquired a sustainable experience of democratic life.

The Court consequently does not perceive the Constitution as an instrument of change, as a way of deepening democracy but rather the other way around. The interpretation and application of the Constitution has to be adjusted to the environment and in reality be reconstructed although the Court emphatically denies that.

The above mentioned statement means that the Court is following the arguments usually given by Putin and his Administration for his legislative measures and does not scrutinise them critically. In its sociological and political reasoning the Court makes no reference to political or sociological literature, or to opinion polls or other empirical observations but the Court may have used the official goals of the Law “On Political Parties” as they were presented by the legislator to the Parliament. It may have other motives than the officially proclaimed, e.g. to limit the number of political parties and finally to secure constitutionally a continuation of the present regime. It is of course an open fact how likely it is that the foundation of parties on the now prohibited grounds would actually lead those negative consequences that the Court supposes will occur. Even if it would be probable that a non-prohibition of religious or nationalist parties could create obstacles to a consolidation of the Russian state it is not evident that such state of affairs could not be in conformity with the Russian Constitution. After all the Court has to weigh the alleged negative consequences with the principles of equality, federalism and freedom of association and finally also ask whether such prohibition leads to more or less democracy.
However, the Court has a legal foundation for its passivity in this issue. The norm in the Federal Constitutional law on the Constitutional Court saying that the Court does only resolves questions of law has been interpreted that the Court on the that it does not assess the suitability of the methods used by the legislator to achieve his goals. This would mean entering in political discussions.


This part of the law demanded that political parties should have subsidiaries in half of Russia’s regions, i.e. at least 44 regional units. Moreover a political party should have at least ten thousand members and in each region at least one hundred members.

In this new case the Court pointed to the purpose of the law as the main ground for its ruling. Considering these conditions in conformity with the Russian Constitution, the Court again stressed the alleged undeveloped democracy in the Russian Federation and referring to its previous ruling mentioned above, held that nationalist or religious parties inevitably would distort a process of consolidation of the Russian state. The creation of such parties would prevent the emergence of a more stable system and lead to possible violations of human rights. The Court however pointed out that these present conditions in the Russian Federation have a temporary character and when the situation has changed for the better and a more stable party system has been grown up, these limits will be abolished.

Quantitative limits within the regulation of political parties do not by itself contradict the Constitution, according to the Court, stressing that freedom of association and freedom of speech as such have not been abolished. Individuals may as members of various associations throughout the country, in regions and in municipalities continue to participate in political and social life. In meetings and demonstrations, in the media people may express freely their views and opinions.

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45 Sobranie.Zakonodatel’stva RF 2005, No. 6, item 491.
The Court thus again supported the legislator’s view of the situation without clear empirical support, referring also to its earlier ruling.

4. The recent change from 11 December 2004 of the Law On “General principles governing the organisation of legislative (representative) and executive state authorities of constituent entities of the Russian Federation” (of 6 October 1999) is the latest important legal transformation of the democratic and federal order in the Russian Federation.

According to law the President shall nominate governors which should be confirmed by regional legislative assemblies. There is no requirement that the person to be appointed has to live in the territory of the federated entity. The President has no clear obligation to propose a candidate on the basis of consultations with the assembly of the entity or to choose a candidate from a list drawn up by this assembly. In a Presidential decree from 27 December 2004, however, the procedure for nominating governors is regulated which presupposes some kind of consultations. Since the assembly is under threat of dissolution if it refuses to accept the presidential nominee, its position is weak. The President can also appoint an interim head of the executive without any involvement of a body of the subject. He can also at his discretion dismiss a governor if the person has lost the confidence of the President.

Ruling of 21 December 2005 On the Case of verification of the constitutionality of some provisions of the Federal Law of 6 October 1999 No.184 - FZ “On general principles of organisation of legislative (representative) and executive organs of public power in the subjects of the Russian Federation”. There were two dissenting opinions: V.G. Yaroslavtsev and A.L. Kononov (the same judges as in the case from 30 October 2003 above).

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47 Sobranie.Zakonodatel’stva RF 2004, No.52 item 5427 with further changes.
The Court held that several parts of the complaints were not admissible on procedural grounds since these complaints concerned the situation in which the regional legislative assembly does not act according to the proposal from the President and refuses to confirm him as regional head. According to the contested law, the President might then dissolve the regional assembly. This also applies to the question of the competence of the President to present candidates for the regional assembly.

This form of abstract norm control cannot be used by the applicants. Only one provision of the contested law was declared admissible was related to the possibility for the applicants to use their passive and active electoral rights in relation to the election of regional heads.

The reasoning of the Court begins with principle of federalism in the Russian Constitution which could be interpreted differently during each phase of the development of the country. Citing previous rulings the Court says that the origin of constitutional federal structure in Russian is based on the sovereignty of the Federation as a whole and thus is not created from below but from above.

The constitutional principle of democracy does not demand that all institutions of public power should based on elective principles. The European Convention of Human Rights and other international documents do not give clear guidelines on the question which public offices should be based on electoral rights. For example if there is a two chamber parliament it is not necessary that both chambers should be based on direct elections.

Citing previous ruling the Court asserts the competence of the federal law-giver to regulate the general structure of the main public institutions of the regions. This applies in particular for the functioning of executive power. The constitutionally proclaimed unity of the executive power (77 part 2), means that the heads of regional units are directly subordinated to the President. The head of a region has not only to deal with federal issues which are of common competence between regional and federal powers but also with questions of exclusive federal competence.
A crucial question discussed by the Court is the previous Altai ruling from 18 January 1966 (No. 2 – P) which declared that the head of a region must be directly elected by the people. Since previous rulings and their legal positions (*pravovaia positsiia*) are binding on other situations similar to the first case, the problem is how to reconcile the Altai ruling with the present decision from 18 January 1996 No 2 - P.

It has been asserted that this decision is outdated but as late as 2002 it was argued that it would be a step back if the President appointed the heads of the regional executive.\(^49\)

The main point in the *Altai* ruling is that the governmental structure and the principle of separation of power should be basically similar to the federal centre in the regions\(^50\). Thus the heads of the region and the regional legislative assembly must be elected directly. The heads should “get their mandates directly from, the people”\(^51\). Another aspect is that the mutual relation between legislative and executive institutions should be based on separation of powers.\(^52\) The legislative assembly should not interfere in the activities of the executive. This part of the ruling is still valid according to the Court but the Constitution is not only interpreted through the activities of the Court but also through federal laws which could be changed in relation to new conditions. It is not constitutionally mandatory that the head of regional unit must acquire office only through elections according to the Court. The Court also says the there must procedures which lead to co-operation between the federal center and the regions concerning the nominations of governors. The Court also mentions the President’s decree from 27 December 2004 on the procedure to nominate governors which regulates this process.

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\(^{49}\) L.V Lazarev in *Kommentarij k Konstitutsii Rossiiskoi Federatsii*, Moscow 2002, 216.

\(^{50}\) L.V. Lazarev, *Pravovoe positsii konstitutsionnogo suda Rossii*, Moscow 2003, 441.


\(^{52}\) Ibid.
Concerning the President’s power to nominate candidates the Court said that this competence is not immediately given by the Constitution but that circumstance does not prevent the federal law-giver to regulate this procedure by given the President such competence. Such power for the President does not contradict the principles of federalism and separation of powers since the final decision is taken by the legislative assembly of the region. The Court does not mention in this context the President’s power to dissolve the regional assembly if it does not consent to his nominee.

Hence, the Court summarises that the contested changes in the law are not in violation of fundamental human rights and liberties, the principles of separation of powers and federalism and the main constitutional principle of popular participation in the activities of public powers.

The Court has only to decide questions of law, to assess the constitutionality of normative acts but not touch upon circumstances which surround the application of the challenged act which has led to a certain isolation from the practice of the legal system.

**Final remarks**

The Russian Constitutional Court has in a number of rulings declared that various legislative acts not being in conformity with the Russian Constitution also under Putin.

Major political decisions which have to be implemented through legislative acts will however not be opposed by the Court. This could perhaps be seen as an informal institutional rule and be an expression of the normative ideology of the Court. The kind of constructivism we are looking for could be called *accommodating constructivism* which is quite different from that kind of constructivism close to natural law ideology which reigned under the first Chairmen of the
Hungarian Constitutional Court\(^{53}\) or the principled constructivism of the German Constitutional Court.

The interpretative technique of the Russian Constitutional Court could be seen as an *adaptation* to the Russian political and social realities and tradition.\(^{54}\) The Russian Constitutional Court could from this point of view be seen as a successful institution. There are rumours that President Putin will become Chairman of the Court after he has resigned from his office.\(^{55}\) Such rumours confirm that the Court has achieved an impressive position among Russian constitutional institutions.

However this situation has also drawbacks. The role of the Constitution as an instrument of transformation\(^{56}\) has to a certain extent been lost and the Constitutional text becomes less guiding. The danger is we may be confronted with a large difference between formal constitutionalism and a constitutionalism which really shall motivate and constrain behaviour of political and administrative actors.

\(^{53}\) Prochazka, (note 38), 113 – 130.

\(^{54}\) Fogelklou (note 1), 25.


\(^{56}\) The Constitution as an Instrument of Change (note 5).