

**Judicial Review and
Individual Legal Activism:
The Case of Russia in Theoretical Perspective**

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In Memory of

Stig V. Svensson

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ABSTRACT

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This dissertation deals with judicial review of governmental action and individual legal activism. It investigates whether judicial protection of individual rights and individual legal activism, within the field of public law, can be seen as an alternative or complement to electoral control of political and administrative powers. To discuss the effect of various standing rules and the potential societal function of public law adjudication, a model for analyzing the character of public law adjudication has been developed. The model allows for a characterization of public law adjudication as either Liberal or Republican, depending on features of standing rules, court proceedings, and court decisions. It concludes that judicial protection of individual rights and individual legal activism within the field of public law can be seen as an alternative or complement to electoral control of political and administrative powers, especially when public trust in, and the powers of, the legislative assembly and political parties is low and decreasing, and if the preconditions for individual legal activism are of such a character that access to justice is available to the larger public and not only a limited group of advantaged individuals.

This theoretical framework is then used to analyse judicial protection of individual rights and individual legal activism in post-Socialist Russia. The results show that the Russian state is best described as authoritarian and that the traditional principal-agent relationship is weak. Thus, in order to strengthen the individual in relation to the state, alternatives for exercising control and participation are required. An analysis of the legislative framework, i.e., the law as it is laid down in the books, shows that Russian administrative law is rights-based and that the character of Russian public law adjudication is closer to the Republican model than the Liberal. However, the Russian support structure is still weak and finds itself in an increasingly inhospitable environment – legally, financially, and politically. In addition, this dissertation concludes that Russia's membership in the CoE has had an impact on judicial protection of individual rights within the sphere of public law in terms of: improving the legislative framework; developing Russian court jurisprudence referring to the ECHR and to the jurisprudence of the ECtHR; exerting pressure on the Russian state to improve practices of the state bureaucracy; stimulating individual legal activism, and increasing individuals' knowledge and awareness of their lawful rights and how to implement them.

Keywords: Judicial review, judicial protection, individual rights, individual legal activism, democracy, support structure, standing rules, legal aid, public law adjudication, civil society, Council of Europe, access to justice, Russia, post-Socialist, legal transition.

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This is a dissertation in Constitutional Law, but my employment has been with the Department of East European Studies, at the Faculty of Social Sciences, Uppsala University. Although I sometimes has felt awfully lonely as a legal scholar, this mixture of two academic worlds has indeed been stimulating. Amongst other things it means that I have had the opportunity to present texts at Higher Seminars at both the Faculty of Law and the Department of East European Studies. The comments and recommendations provided in both places have been of great help. I especially want to thank Fredrik Sterzel, Lena Marcusson, and Daniel Lindvall for valuable comments on the text. Besides, Ivan Pavlov has provided important comments on parts of the text on the Russian legal order. Iain Cameron and Jane Henderson have been generous with references and material. In addition, Eric Boberg has read and commented on early drafts of specific chapters of the dissertation.

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Abbreviations

BVS	Byulletin Verkhovnogo Suda
CIS	Commonwealth of Independent States
CoE	Council of Europe
CPC	Civil Procedural Code
CPSU	Communist Party of the Soviet Union
CRF	Constitution of the Russian Federation
DO	Ombudsmannen mot etnisk diskriminering
ECHR	European Convention for Human Rights and Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FSB	Federalnaya Sluzhba Bezopasnosti
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JämO	Jämställdhetsombudsmannen
JO	Justitieombudsmannen
JT	Juridisk tidskrift
JQC	Judicial Qualification Commission
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of Council of Europe
RF	Russian Federation
RF:n	Regeringsformen
RSFSR	Russian Soviet Federated Socialist Republic
SZ	Sobranie Zakonodatelstva
UDHR	Universal Declaration of Human Rights

PART ONE

Introduction

1. Introduction

Human rights as an ideology and as a set of moral principles have won widespread recognition as part of the foundation upon which modern societies rest, alongside democracy, market economy, liberty, and the rule of law. Although the protection and implementation of human rights cannot be guaranteed throughout the world, none the less the international community holds them as goals to aspire to. These goals are connected to international benefits such as aid, security, and investment. The hope is that states and their citizens internalize these rights, in order for them to be enforced in a national context and hence domesticated.¹ Implementing human rights depends on national constitutional, legislative, administrative, and judicial institutions, although the international order is becoming more active in this regard. The domestication of human rights also depends on other factors, such as the economy, civil society, domestic political and legal culture, and the extent of international pressure.²

While the traditional way of implementing rights in Continental and Eastern Europe has been the state providing for rights by adopting policies and laws that are implemented by a body of state administrative organs, the USA experienced a rights revolution early in the 20th Century and onwards, which meant that rights were defined and safeguarded by the courts. However, the growing intervention in individuals' lives by state bureaucracies³, and difficulty in using the electoral process to correct abuses and to exercise political participation, have also encouraged a rights discourse in Western Europe.⁴ The atrocities of World War II, racial segregation, and social and economic injustices are other factors that have contributed to the global rights discourse. In Central and Eastern Europe, this discourse has enjoyed a revival in the aftermath of the fall of the Soviet Union. This can be exemplified by new constitutions that pay considerable attention to a

¹ Dennis Galligan and Deborah Sandler, "Implementing Human Rights", in *Human Rights Brought Home. Socio-Legal Perspectives on Human Rights in the National Context*, eds. Simon Halliday and Patrick Schmidt, Oxford, Hart Publishing, 2004, (23-56), pp. 23-24.

² *Ibid.*, p. 30.

³ Concerning the impact of the growth of administrative law on modern positive law in the United Kingdom, see Martin Loughlin, *The Idea of Public Law*, Oxford, Oxford University Press, 2003, p. 26.

⁴ Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford, Clarendon Press, 1989, pp. 12-14.

bill of rights and judicial review in an effort to establish the rule of law. Thus, the rights discourse is vibrant in both “new” and “old” democracies, although for different reasons. However, the common denominator is that this development has set in motion a process of domestication of international human rights standards, i.e., a process of implementing international human rights standards in the national context.

International human rights standards have to an increasing degree become the starting point for evaluating and criticising domestic affairs and the practice of national administrations. Interestingly, these standards empower not only the international community and various international organizations. They also empower individuals and NGOs by providing a tool for evaluating and criticising how the state is conducting its affairs. And most importantly, they have the potential to strengthen individuals in their relation to the state by providing enforceable rights. Still, for that to be the case certain preconditions and prerequisites have to be met; these relate to *inter alia* the status of civil society, the judiciary, and procedural law (see Part II). The argument put forward in this dissertation is that the domestication of human rights can open up alternative and complementary channels for political participation and control of political and administrative powers.

Concerning political participation and control of political and administrative powers, in most democratic societies emphasis is traditionally put on open and free elections.⁵ The European post-Socialist⁶ states suffer from several problems in relation to electoral control, for example manipulation and lack of information, volatile political party constellations, and distrust in political parties and parliamentary assemblies.⁷ In Western Europe also, representative democracy is

⁵ Patrick Birkinshaw, “Decision-Making and Its Control in the Administrative Process – An Overview”, *Law, Legitimacy and the Constitution*, eds. Patrick Auslan and John F. McEldowney, London 1985, (151-169), pp. 152-153.

⁶ In scholarly work states that used to form part of the interest sphere and control of the Soviet Union are frequently referred to as post-Communist states or post-Socialist states. The term post-Communist is used most frequently and seems to be accepted by both the public at large and by the academic community. Still, the term post-Socialist would be the correct term to use taking into consideration that communism was never achieved. Thus, for the purpose of this dissertation the term post-Socialist states will be used and it refers to the states that used to form part of what has been called the Socialist Legal System. See, Michael Bogdan, *Comparative Law*, Deventer, Kluwer Law and Taxation Publishers, 1994, and William Burnham, Peter B. Maggs and Gennady M. Danilenko, *Law and Legal System of the Russian Federation*, third ed., Huntington, Juris Publishing, 2004, pp. 3-6.

⁷ On the low trust in political parties and parliamentary assemblies see Jonas Linde, *Doubling Democrats? A Comparative Analysis of Support for Democracy in Central and Eastern Europe*, Örebro, Örebro University, 2004. “Political parties and the national parliaments are the least trusted institutions in

being challenged by declining voter turnout and declining interest in party politics. Thus, also in this regard, a similar and parallel process is under way in “new” and “old” democracies, although the background and the context in which these changes are taking place differs substantially. Put together, this makes it difficult, and probably insufficient, for citizens to engage in political participation and to exercise control of political and administrative powers through traditional channels.⁸ Thus, alternative and complementary channels and mechanisms for participation and control need to be found.

Cappelletti has argued that the traditional purpose of the legal procedure – that of settling disputes among private citizens – has been supplemented with a new purpose – that of controlling political power.⁹ The aim of this dissertation is to contribute to the discussion on, and understanding of, alternative and complementary channels for political participation and control of political and administrative powers. Thus, the focus question in this specific study is *how can the study of judicial control of political and administrative powers contribute to the knowledge and understanding of alternative channels for political participation and the exercise of democracy?*¹⁰ This dissertation concerns not only the fact that judicial review is possible, but more specifically:

- how and to what extent judicial review can contribute to the strengthening of democracy on the one hand, and
- how we conceptualise judicial review in order to understand its societal role, on the other.

*post-Communist Europe and have been so during the whole post-Communist period.” Ibid. p. 156. Concerning volatile political party constellations in Russia, see Richard Rose and Neil Munro, *Elections without Order. Russia’s Challenge to Vladimir Putin*, Cambridge, Cambridge University Press, 2002.*

⁸ The degree to which electoral control is relevant as a means of controlling administrative powers depends on *inter alia* the relationship between elected politicians and the state administration in terms of appointment procedures and requirements, and to what degree politicians are responsible for the administrative branch.

⁹ Referred to in Per Henrik Lindblom, *Studier i processrätt*, Stockholm, Norstedts Juridik, 1993, p. 71.

¹⁰ The argument, that the right and possibility to contest decisions and actions of public bodies and civil servants before a court of law can function as an alternative to the electoral process, has been proposed by a number of scholars. See for example Charles R. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in a Comparative Perspective*, Chicago, The University of Chicago Press, 1998, p. 16. See also Martin Shapiro cited in Alec Stone Sweet, *Governing with Judges. Constitutional Politics in Europe*, Oxford, Oxford University Press, 2000, p. 25, and in Cappelletti, *The Judicial Process in Comparative Perspective*, p. 43.

In seeking clarification of these questions, the focus will be on judicial protection of individual rights and freedoms and access to justice¹¹ within constitutional and administrative law.¹² This will be further developed in Part II.

The questions here raised have largely been neglected in the discussion on various ways of exercising political participation and democratic control. This may well be explained by the fact that the majority of both legal scholars and political scientists have for numerous reasons failed to see the potentially constructive connection between the legal institution of judicial review, and democracy. Rather, judicial review is often considered to restrict democracy.¹³ In Europe, with its strong tradition of parliamentary political systems, judges and courts have been viewed as the mouth and tool of the legislative power in enforcing its policy. Hence, a (too extensive) control by the former of the latter has been considered undemocratic. Another plausible explanation is the expansion of the welfare state, focusing on the material wellbeing of its citizens. In this context, the most important task for the state administration is to implement substantive state policy. Material rights supersede procedural rights. The state is the provider, the individual the receiver, and in this context the task of constitutional and administrative law is not primarily to enable the control of state power. Rather, it should contribute to, and facilitate, implementation of material state policy.¹⁴

Traditionally, the focus of political and legal theory and thought has been on the state and its institutions. However, the ongoing domestication of international human rights standards and the purpose of this dissertation require an alternative

¹¹ In this dissertation, access to justice is given a narrow interpretation in the sense that it refers only to the legal procedure, i.e. judicial protection of individual rights. Other mechanisms of importance for invoking individual rights and hence a part of access to justice can be ombudsmen, arbitration, and mediation. See Per Henrik Lindblom, *Grupptalan. Det anglo-amerikanska class actioninstitutet ur svenskt perspektiv*, Stockholm, Norstedts Juridik, 1989, pp. 3-4. See also, Part I, Chapter 2.3.

¹² It seems to me that access to justice within the field of constitutional and administrative law has not been devoted the same theoretical and conceptual attention as has been the case concerning access to justice in criminal and civil law. Why is that? One plausible explanation could be the fact that most public law scholars have the state as their subject of study and starting point. Another explanation might be the implications of the “welfare state-era”. See, Kaarlo Tuori, “Har förvaltningsrätten en framtid?”, *Förvaltningsrättslig tidskrift*, årgång 66, 2003, häfte 4 (553-574), and Anna Jonsson, ”Individen och staten - att påverka eller påverkas,” *Nordic Journal of Human Rights*, Vol. 21, No 2:2003, (129-146).

¹³ See Part II for a more elaborate discussion on the relationship between judicial review and democracy.

¹⁴ For a discussion on the implications of the “welfare state era” on administrative law see Tuori, “Har förvaltningsrätten en framtid?”. And for a discussion on the relationship between democracy and state administration in this context see, Lennart Lundqvist, *Förvaltning och demokrati*, Stockholm, Norstedts Juridik, 1991.

approach, an approach that allows for the individual to constitute the starting point for analysing the relationship between the state and the individual within the realm of constitutional and administrative law.

One of the most important aspects of democracy and the rule of law is the existence of legal rules governing and limiting the actions of public officials, in combination with access to an impartial judiciary in order to enforce these limits. The present study is mainly about decision-making within the public sector and the possibility for individuals, alone or in a group, to exercise judicial control of state administration. The control I am referring to is the control that is exercised *ex post facto*. For this reason, focus will be put on accountability of public decision-makers and civil servants, invoked by individuals before a court of law. These issues will be discussed in the context of both “old” and “new” states. Here, it is suggested that the importance of alternative and complementary channels to electoral control might be higher in post-Socialist countries and in countries with an authoritarian mode of governance¹⁵. It is also suggested that the domestication of human rights in post-Socialist societies cannot be achieved by focusing only on the state, its laws and institutions. It will be argued that the role of civil society has been underestimated; indeed, that once relevant legal institutions and legal frameworks for human rights protection have been established, then focus has to be shifted to the consumers of human rights protection, i.e. private individuals and their support structures.

¹⁵ To be defined and further discussed in Part II, Chapter Two.

2. Research Design

2.1 Purpose and Research Questions

The purpose of this dissertation is threefold. The first and overall purpose is to investigate how and to what degree judicial protection of individual rights and individual legal activism within the field of constitutional and administrative law can be seen as an alternative or complement to electoral control of political and administrative powers.

The second purpose is to discuss, in the abstract, the character of constitutional and administrative law adjudication and the concept of individual legal activism in relation to different modes of state governance. Hence, Part II will be devoted to a theoretical and conceptual discussion on why, when, and how judicial protection of individual rights and individual legal activism can function as an alternative or complement to traditional political channels. Both pros and cons will be discussed. The theoretical framework presented in Part II will thereafter be used to analyse judicial protection of individual rights and individual legal activism in post-Socialist Russia. Although focus will be on post-Socialist countries, and Russia in particular, the theoretical framework is equally relevant for established democracies and rule of law states.

The third purpose is to assess the impact of Russian membership of the Council of Europe (CoE) on judicial protection of individual rights within the constitutional and administrative law sphere.¹⁶

The purpose of the dissertation will be accomplished by inquiring into the following questions:

1. Why and under what circumstances can judicial protection of individual rights and individual legal activism be an alternative or complement to traditional

¹⁶ According to Daniel Tarschys, former Secretary General of the Council of Europe (hereafter CoE) at the time of Russia's admission, "*the invitation to Russia should be seen as an act of historical importance and a response to fundamental questions, such as: Do democracy and stability in Russia have a greater chance of survival if closer contacts are established with Europe?*", Daniel Tarschys, "Enlargement: the Russian Chapter", in *The Challenges of a Greater Europe. The Council of Europe and Democratic Security*, Strasbourg, Council of Europe Publishing, 1996, p. 59.

channels of political participation? In order to answer this rather wide question, the pros and cons of, the preconditions for, potential consequences of, and the role played by the CoE for, judicial review and individual legal activism in both established European rule of law states and post-Socialist states will be explained and discussed. (Part II)

2. a) To what extent does Russian constitutional and administrative procedural law offer judicial protection of individual rights? (Part III)

b) Are the legal preconditions for individual legal activism present in Russia? Is individual legal activism likely to contribute to the consolidation of democracy and rule of law in the Russian Federation? (Part III)

3. What is the impact of Russian membership of the CoE on the judicial protection of individual rights, the human rights movement, and individual legal activism in Russia? (Part III)

In Part IV of the thesis – whether judicial protection of individual rights in combination with individual legal activism can constitute an alternative or complementary mechanism for political participation and control – will be discussed in the light of the findings in Parts II and III.

2.2 Methods Used to Address the Research Questions

In order to structure the study and clarify what arguments belong to what analytical level, a difference between the overall and the more specific purpose of the dissertation deserves to be upheld, even though they are inseparable in the sense that they cannot be decided in isolation from each other. This dissertation's main purpose – to discuss whether judicial review in combination with individual legal activism can improve democracy by strengthening accountability and participation - should be distinguished from the secondary purpose. The secondary purpose is to investigate what is required in terms of standing rules and support structures for this to be a viable alternative. Thus, the second purpose is of a more legal-technical nature. In order to address both purposes, I have developed a model which helps in the understanding of how judicial review in constitutional and administrative law cases can constitute an alternative or complement to electoral control. The model also contributes to our understanding of standing rules and implications of a narrow or wide definition of *locus standi*. It provides an alternative to the traditional understanding of judicial review at the same time as it lays bare potential societal implications of judicial review and individual legal activism. Not only does the model contribute to fulfilment of the

main and secondary purposes, but it also makes it possible to study Russia in a comparative context (even though a comparison is not conducted in the current study).¹⁷

As stated above and to be further developed below, the study to be conducted here is structured taking both societal and legal aspects into consideration. The problem is of such a character that the traditional positivistic legal method¹⁸ alone does not supply the tools necessary for answering the questions raised above. However, this does not mean that the positivistic method - including analyses of legislative texts, court decisions, and legal doctrine - will not be used. Indeed, it will be used in order to clarify where the Russian legal system stands today regarding judicial control of political and administrative powers on the one hand and the possibility to engage in individual legal activism on the other.

One of the purposes of this dissertation is to investigate judicial protection of individual rights and the prospect for individual legal activism in Russia. To a non-Russian lawyer, this raises issues of a methodological and epistemological character, which is commonly the case when foreigners or “outsiders” study legal orders other than their own.¹⁹ Several issues can be raised, such as language skills (in this case Russian) and awareness of methodological issues such as methods of interpretation, sources of law, and legal doctrine tradition. Another concern might be the knowledge and understanding of the historical and sociological context of that specific country. These are all considerations that need to be taken into account when engaging in the study of a foreign legal order. Nevertheless, benefits also attach to being a foreigner conducting a study of a foreign legal order. Being an “outsider” might allow us to detect specifics, problems, and alternative solutions that an “insider” risks missing through closeness to the system, as a result of being a part of the system. In addition, a foreigner conducting an analysis of a foreign legal order indirectly, and more or less consciously, takes as a starting point somewhere in the legal order within which their legal education was obtained. This, in turn, implies an undisclosed comparative approach. It has been this author’s ambition not to keep that unavoidable and indirect comparative

¹⁷ The model is presented in Part II, Chapter Three.

¹⁸ Jan Hellner, *Metodproblem i rättsvetenskapen. Studier i förmögenhetsrätt*, Stockholm, jure, 2001, p. 118. The positivistic method should be distinguished from the doctrine of legal positivism.

¹⁹ For a discussion on possible difficulties see for example, Geoffrey Samuel, “Epistemology and Comparative law: Contributions from the Sciences and Social Sciences”, and Marek Zirk-Sadowski, “Legal Epistemology and Transformation of Legal Cultures”, both in *Epistemology and Methodology of Comparative Law*, ed. Mark van Hoecke, Oxford, Hart Publishing, 2004.

approach undisclosed.²⁰ Therefore, the ideal types of different modes of governance and the model of the character of public law adjudication serve to put the current study of the Russian legal order in a comparative context. The purpose of this approach is to highlight both differences and similarities between the Russian legal order and some of the established Western rule of law states. The approach adopted in this dissertation also allows for further investigation of other legal orders, since due to limitations in both space and time a systematic comparison cannot be made here. Still, the comparative context can be upheld by using the ideal types and the model just mentioned.

In conclusion, the study of law, especially if a social-legal approach is adopted, requires that the difference between law in books and law in society be recognised. This dissertation takes as its starting point the formal structures, i.e., the legislative framework as it is “in the books”. Still, the potential impact of judicial review on societal development will be discussed. However, this dissertation has no ambition to establish any causal connections in this regard.

2.3 Delimitations

At least three different kinds of delimitations deserve to be highlighted here:

- Empirical delimitations.
- Theoretical delimitations.
- Delimitations concerning the period under investigation.

The main concern in this study is judicial control of political and administrative powers as a result of individual legal activism. Traditional methods of control are usually exercised through political mechanisms such as elections (referendums and parliamentary and presidential elections), membership in political parties and interest organisations, separation of powers and checks and balances on a horizontal level, ombudsmen and various audit offices. Another important mechanism for constitutional enforcement, besides judicial review *a posteriori* and the political mechanisms, is *judicial preview*, i.e. (abstract) constitutional review *a priori*. Political mechanisms and constitutional review *a priori* will not be dealt with in this dissertation since, although these are important control mechanisms, they are not a self-evident forum for individual activism (the ombudsman

²⁰ I concur with Loughlin in his statement that “*There is no neutral language of public law. We can understand what a writer is saying only if we understand the political tradition within which the writer works.*” Loughlin, *Public Law and Political Theory*, p. 230.

excluded) in the sense that one single individual, without support and direct actions from a collective (political party, lobby group, etc.) can invoke the process. This study focuses exclusively on the judicial procedure in its investigation of individual legal activism as an alternative and complement to traditional ways of political participation. The judicial procedure is one of the few procedures of control, and possibly participation, that can be invoked on the initiative of a single individual - an initiative that is not, in a Rule of law state, subjected to discretionary treatment before it is acted upon. Likewise, it is the only process that:

- enables a binding, final, and enforceable decision stating the position of the individual in relation to the state,
- allows at the same time potentially much broader general implications of the very same decision, in the sense that it affects the positions of others in the same situation.²¹

This process might, in the long run, contribute to changes of the policy under question.

As to the empirical delimitations of this study, the issue of corruption is most likely to arise when dealing with control of political and administrative powers. Corruption is a serious concern in contemporary Russia.²² Still, the matter will not be dealt with extensively in this dissertation, taking the following into consideration. To start with, to the author's knowledge no reliable and adequate data exist on the extent and exercise of corruption within the legal system in Russia.²³ However, it is common knowledge that corruption does exist.²⁴

²¹ See Per Henrik Lindblom, "Processens funktioner – en resa i gränslandet", in *Festskrift till Stig Strömholm, Del II*, Uppsala, Iustus, 1997, (593-632).

²² According to *Transparency International's Corruption Perception Index 2003* Russia is ranked number 86 (together with Mozambique) out of 133 countries. Finland is ranked number 1 and Bangladesh number 133. See http://www.transparency.org/pressreleases_archive/2003/dnld/cpi2003.pressrelease.en.doc. See also Louise I. Shelley, "Crime and Corruption: Enduring Problems of post-Soviet Development", *Demokratizatsiya*, Vol. 11, No. 1, Winter (2003), (110-114), and "The Challenge of Crime and Corruption" in *Russia's Policy Challenges: Security, Stability and Development*, ed. Stephen K. Wegren, New York, M.E. Sharpe, 2002, (103-121).

²³ On political corruption, see Daniel Smilov, "Structural Corruption of Party-Funding Models: Governmental Favoritism in Bulgaria and Russia", in *Political Corruption in Transition. A skeptic's Handbook*, eds. Stephen Kotkin and András Sajó, Budapest, Central European University Press, 2002, (327-352).

²⁴ The President of the RF Constitutional Court, Valerii Zorkin, stated in an interview that there is widespread corruption among judges in Russia. Thereafter, the Supreme Court urged Zorkin to present the evidence on which he made his statement. RFE/RL NEWSLINE Vol. 8, No. 205,

Corruption is likely to have an effect in high profile cases and in cases involving large economic benefits.²⁵ In addition, “everyday” life corruption is also likely to be high. However, the cases that are of interest to us, i.e. administrative and constitutional law cases that are not high profile cases, are not as likely to be distorted by corruption as high profile cases. Although corruption definitely is a matter of concern, it will not be dealt with further for the reason given and because the topic as such merits a study of its own. The lack of time and space forces us to put this question aside for the time being.

As to the Russian court system – as will be shown below, Russia has an *arbitrazh* court system, which also deals with important administrative law issues. The *arbitrazh* court system will not be dealt with in this study, due to both lack of time and space. Besides, extensive research has been carried out on this topic, especially by Kathryn Hendley.²⁶ The statistical data produced by Hendley are of interest to this study, hence these will be referred to below.

Russia is well integrated into the international system, being a member of organisations such as the UN, CoE, OSCE and Partnership for Peace. Additionally, Russia is signatory to numerous international treaties, conventions, and agreements. Still, in this study focus will be on the CoE and the influence of the European Convention for Human Rights and Freedoms (hereafter ECHR) and the European Court of Human Rights (hereafter ECtHR) on legal reform in Russia, since this organization has exerted considerable influence on legal reform and human rights protection in Russia.²⁷ Besides, Russian membership of the CoE has meant that Russia for the first time in history has been subjected to an external judicial sanction mechanism. This, together with the fact that the present investigation takes its starting point in the “rights argument” and the rights and

Part I, 29 October 2004. See also, Georgy Satarov’s statement that corruption in Russian courts is high, in “The Shadow of Judgement”, *Vremya Novostei*, October 19, 2004.

²⁵ Which can be illustrated by the legal process against Mikhail Khodorkovskii, initiated in October, 2003 and still being handled by the courts at the beginning of 2005. In addition, for an illustrative example of how the judicial procedure has been used as a means of extortion, see the ECtHR’s decision in the case of *Gusinskij v. Russia*, 19 May, 2004, (*Application no. 70276/01*).

²⁶ Kathryn Hendley, “Suing the State in Russia”, *Post-Soviet Affairs*, vol. 18, no. 2, 2002; Hendley and Peter Murrell, “Dispute Resolution in Russia: A Regional Perspective”, in *Unleashing Russia’s Business Potential: Lessons from the Regions for Building Market Institutions*, ed. Harry G. Broadman, Worldbank Discussion Paper No 434, March 2002; Hendley, Murrell, and Randi Ryterman, “Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises”, *Wisconsin Law Review*, no 3, 2001, (685-715); Hendley, “Appellate Decision-Making in the Russian *Arbitrazh* Courts: A Three Year Assessment”, *Review of Central and East European Law*, vol. 24, no. 4, 1999, (465-491).

²⁷ To be further examined and explained in Part III.

positions of individuals, justifies focusing on the effects of Russian membership in the CoE, especially since individuals can file complaints before the ECtHR. It could be stated, and rightly so, that the European Union (hereafter EU) has had a large impact on administrative law in Europe.²⁸ However, focus will be on the ECHR and the ECtHR, since our focus is on human rights, individual legal activism, and judicial protection of rights, not only in EU member states, but also in non EU-member states. Still, the ECHR does constitute a vital part of EU law.

The study ranges, in its main parts, from 1993-2003. Although the historical context is of great importance for the understanding of processes today, focus in Part III will be on the period from 1993, when the Constitution of the Russian Federation (“CRF”) was adopted, to 2003, when it celebrated its tenth anniversary. The historical context will be presented briefly in Part I. Interesting changes have taken place both in the political and the legal sphere since 2003, but out of practical considerations focus will be on the changes between 1993-2003. Still, recent changes will be highlighted in the conclusions.

To recapitulate: the overall purpose of this dissertation is to investigate how and to what degree judicial protection of individual rights and individual legal activism within the field of constitutional and administrative law can be seen as an alternative or complement to electoral control of political and administrative powers. The issue of judicial review often meets the argument that it should be restricted out of economic and efficiency concerns. Not seldom are arguments heard that generous *locus standi* rules will create heavy case load burdens on courts, thereby causing time delays, or that it will be too costly for the judicial system and for the state and that it is therefore not in the interest of the individual since it would risk harming access to justice. Although those concerns might be legitimate and sometimes of importance for the overall assessment of access to justice, they will not be dealt with in this dissertation. Whether these worries are justified or not is open to question and could probably only be decided in a national context. Concerning civil and political rights, the state can limit the cost for their implementation by adhering to its own rules. If the state acts accordingly, then its citizens have no incentive to go to the courts. However, dysfunctional state institutions and politicians, being guided by other goals than the welfare of their voters, can make this a task difficult to fulfil. Nevertheless, it is this author’s belief that the efficiency and economic arguments, which indeed are resource-related issues, should be analysed separately from the *principal* question of how judicial

²⁸ Galligan and Sandler, “Implementing Human Rights”, p. 52.

protection of individual rights and individual legal activism can contribute to our understanding of what channels and mechanisms are available for exercising democratic rights such as participation and control. First, the questions *if, why, and to what degree judicial review is desirable* should be answered. The need to make an economic cost-benefit analysis will arise sooner or later. However, before making that analysis, the pros and cons in terms of democracy, human rights, and governance should be investigated and reflected upon in order not to mix apples and oranges.²⁹

2.4 Sources

This study ranges over a broad spectrum, and the sources used vary distinctively in type between the different parts of the dissertation. Starting with the theoretical framework of the dissertation – this builds mainly on research by American and European constitutional and administrative law scholars. Still, the theoretical discussion on judicial review of political and administrative powers builds almost exclusively on the results and discussions of Anglo-Saxon researchers. This does not *per se* mean that it is not applicable to post-Socialist and civil law legal orders, or that it would not be of common interest. Quite the contrary, as already described above, the societal effect of judicial procedures and human rights litigation has for some time been a topic of discussion by scholars from civil law legal orders.³⁰

The analysis of judicial protection of individual rights in Russia is based on Russian laws, court decisions, and Russian legal doctrine, both commentaries and scholarly work. Concerning the laws, in most cases the official Russian version has been used. However, English translations, when available, have been consulted. References to the Russian laws are consequently made to the official Russian version published in *Sobranie Zakonodatel'sva* (hereafter SZ). However, in the text and in the footnotes the English translation of the name of the law will be used. Concerning decisions by the RF Constitutional Court, references are made to the official homepage of the Court, using both the date and the number of the decision. Ger van den Berg's compilation of the RF Constitutional Court's

²⁹ The author is aware of the common trend of shifting conflict resolutions from courts to different mediation solutions and that the reason for this is not only of an economic nature – it also includes important aspects such as rehabilitation, reconciliation, and trust.

³⁰ See for example, Mauro Cappelletti, "Vindicating the Public Interest Through the Courts: A Comparativist's Contribution", *Buffalo Law Review*, 643, 1975-1976, (643-690).

decisions has been of great help.³¹ In addition, ECtHR decisions and Recommendations issued by the CoE's Council of Ministers are used in order to examine the influence of Russian CoE membership on judicial protection of rights and the establishment of a support structure in Russia. Most information is gathered from the official homepage of the ECtHR and court decisions are referred to using the date of the decision and the application number. The rest of the study builds on secondary literature, news reports, reports and statistics provided by both the CoE and NGOs, mostly international. In addition, the author has conducted interviews.

2.5 Outline of the Dissertation

This dissertation is divided into four parts. The first Part presents the research question, methods used to answer it, and the theoretical approach of the dissertation. In addition, problems of post-Socialist legal reform are discussed. Kaarlo Tuori's multi-layered view of modern law is presented in order to illustrate the multidimensional difficulties of legal reform. It is suggested that individual legal activism, upheld by a vibrant support structure, together with international socialization, can stimulate a dynamic movement between the different levels of law as defined by Tuori. In addition, Part I provides a background on Russia; Chapter four offers a short background on Russian legal history, a description of the dissolution of the Soviet Union and its effect on the contemporary Russian state, and an overview of the Russian legal doctrine and the judiciary, focusing on civil- and public law.

In Part II the theoretical framework, presented in Part I, will be dealt with more extensively. In order to discuss how the study of judicial control of political and administrative powers can contribute to our knowledge and understanding of alternative channels for political participation and the exercise of democracy three different modes of governances will be examined. Thereafter judicial control of political and administrative powers will be further elaborated upon. Chapter Three ends with a discussion on judicial review and its critics. Criticism against judicial review is often based on the argument that it is counter-majoritarian and thus non-democratic. In order to put some perspective to this question Epp's support structure explanation and the concept of individual legal activism will be presented

³¹ Ger P. van den Berg, "Russia's Constitutional Court: A Decade of Legal Reforms", Part I, Summaries of Judicial Rulings, *Review of Central and East European Law*, Vol. 27, Nos. 2-3, 2001.

and discussed. The question whether individual legal activism can be seen as an alternative way of understanding political participation will be answered with a qualified yes. In “old” democracies it would be required that the possibility to invoke judicial review be democratized in the sense that the necessary means, such as knowledge and money, is equally accessible to all inhabitants of a society. In post-Socialist states the problem of weak institutions, low trust in institutions, and poor knowledge about rights and possibilities need to be considered in this context. It is suggested that a vibrant support structure can help to overcome these problems, both in “old” democracies and in post-Socialist states.

In Part III the theoretical framework presented in Part II is applied to Russia. It is concluded that Russia’s mode of governance is more authoritarian than democratic and that the traditional channels for control of political and administrative powers are becoming increasingly marginalized. After reaching that conclusion, Part III examines rights enforcement in the Russian legal order, whether Russia has a rights based administrative law, the strength and potential of the support structure, and what the prospects are for individual legal activism in Russia. Thereafter the question whether legal participation is an alternative to political participation is discussed. Part IV offers a brief summary and final conclusions and analysis.

3. Theoretical Approach

The purpose of this Chapter is to explain the theoretical framework that constitutes the starting point for defining the purpose and research questions of this study. It sets the stage and explains the context that has been decisive in developing the research design of this dissertation. In Part IV, we return to the framework explained here for final analysis and conclusion.

The purposes and research questions are of such a character that two theoretical approaches are required. The overall purpose - to investigate how and why judicial protection of individual rights and individual legal activism within the field of constitutional and administrative law can be seen as an alternative or complement to political participation and electoral control of political and administrative powers – warrants a theoretical approach to public law. The domestication of human rights has the potential to empower individuals in relation to the state, and constitutional and administrative law is vital for this process; hence, the starting point will be taken in public law. What is meant by a theoretical approach to public law will be discussed first in this Chapter.

The other issue to be dealt with in this Chapter is legal reform in post-Socialist countries in general, and judicial protection of individual rights in particular. The specifics of post-Socialist legal reforms require a particular theoretical approach to be distinguished from that just mentioned above. Legal reform in post-Socialist countries has been the subject of academic debate involving concepts such as legal transition, legal transfers, and adapting legal cultures. These concepts will be further discussed in this Chapter. Tuori's multi-layered view of modern law will contribute to clarifying the process of adapting legal cultures, since it allows us to consider both the legal structural framework (i.e. the legislative and institutional framework of a legal system) and various actors affected by, or exercising an influence on, the functioning of that framework.

3.1 A Theoretical Approach to Public Law

Before going into the specifics related to the study of post-Socialist legal reform, some comments are in order regarding the approach to public law that this study adopts. The present study takes its starting point in the individual, so that a micro-

perspective is adopted. It is a study within the field of public law if the definition of public law offered by Martin Loughlin is applied - "Public law deals with the legal arrangements which establish the institutions of the state and regulate the exercise of political power".³² Nevertheless, the research question is such that aspects of European Human Rights law and administrative procedural law have to be dealt with to a rather wide extent. In a sense the two latter fields of law are being studied and analyzed through a constitutional lens.³³ The impact of the human rights regime on national legal orders has increased since WWII, and due to the fall of the Soviet Union it has reached out to a wider geographical area. Thus, the study of public law cannot and should not be conducted in isolation from international human rights standards. The reason for including administrative procedural law might seem obvious. The realization of human rights stipulated in international conventions and national constitutions is being done primarily, but not exclusively, through national mechanisms.³⁴

Since this study focuses on the relationship between the state and the individual from a micro-perspective, then vertical as well as horizontal checks and balances are of interest.³⁵ This dissertation argues that constitutional and administrative adjudication is a mechanism for vertical control of state and administrative powers; moreover, that the importance of vertical control is constantly on the increase due to the expansion of state regulation and insufficiency of electoral control. Hence, the need to expand the study to include administrative procedural law.

The starting point is partly taken in the "rights argument", meaning that individual rights and freedoms constitute the foundation upon which the state and the

³² Martin Loughlin, *Public Law and Political Theory*, Oxford, Clarendon Press, 1992, p. 2. See also John Bell's definition of the function of public law: "Public law serves to define and control power in the hands of government or public authorities." John Bell, "Public Law in Europe: Caught between the National, the Sub-National and the European?" in *Epistemology and Methodology of Comparative Law*, ed. Mark van Hoecke, Oxford, Hart Publishing, 2004, p. 262.

³³ For an account of the historical connection between constitutional and administrative law, see Tuori, "Har förvaltningsrätten en framtid?", pp. 564-565. According to Tuori, the connection between democracy and the rule of law requires that the administrative legal doctrine consider not only the individual's judicial protection but also issues of concern to civil society and the political decision-makers. Taken together, this results in a demand for a re-constitutionalisation of administrative law.

³⁴ See, *Recommendation Rec(2004)6 of the Committee of Ministers to the Member States on the Improvement of Domestic Remedies, 12 May, 2004*, underlining that the rights and freedoms stipulated in the ECHR should be protected primarily at the national level, and emphasising the need to improve national remedies.

³⁵ By horizontal control is meant the control that various state organs exercise over each other. Vertical control on the other hand in this context refers to citizens' control of the state apparatus.

constitutional order rests. The choice of starting point might be considered ideological in the sense that it builds on the conception of society as “*the formation of a political order built on the foundation of the rights-bearing individuals*”.³⁶ However, my choice of starting point is based on the evident and increasing rights dialogue experienced in the world in the 20th Century.³⁷ It is based on liberal democracy and constitutionalism as moral, philosophical, and political ideas because most of the countries of the world today adhere, at least rhetorically and to a varying degree, to these values.³⁸ And even if these values are not realized, we will have to relate to them in one way or another.

For the purpose of this dissertation, constitutionalism is characterised by the recognition of basic rights, division of powers, and popular participation in the legislative process.³⁹ The proclamation of basic human rights implies establishing a

³⁶ Loughlin, *The Idea of Public Law*, p. 114. However, as also suggested by Loughlin and several others, a rights revolution has been taking place during the 20th Century, resulting in a shift in how we conceptualize the relationship between the state and its citizens by moving from a top-down to a bottom-up approach.

³⁷ *Ibid.*, p.126. It could be argued that several of the post-Socialist states, for example Russia, only pay lip-service to liberal democracy and constitutionalism and that the chosen starting point might lead our analysis astray since it does not reflect the empirical reality. However, the approach of this dissertation is such that although constitutions and political rhetoric constitute our starting point, none the less attention will be focused on the hindrances and difficulties in realizing them.

³⁸ Loughlin is critical of the fact that liberalism sometimes is, especially in the UK, used as a theoretical framework for analysing public law. He is critical of this development because it takes its starting point in a “*map*” that has been drawn before the conduct of the study - the conceptions of the state, the individual, and the law are determined before the study of the “*reality*”. Loughlin, *Public Law and Political Theory*, pp. 206, 243. This classic problem relates to the use of theoretical frameworks and the question whether these are anchored to the reality that they set out to study or whether they are just less useful abstract ideas. Theoretical models can be considered as ideal types that help us to systematize and analyze the information we have, or they are considered as straitjackets that hamper our possibility to see and understand things for what they are. Loughlin also calls for a theory of public law that accounts for the relationship between law and society in a way that corresponds to our experience, and that pays attention to the sociological aspects of law. *Ibid.*, pp. 243, 264.

³⁹ There are numerous definitions and understandings of constitutionalism. For example, András Sajó argues that constitutionalism is the result of a long tradition of rule of law and respect for the deeper values of law, that it is an intangible, but essential characteristic of legal culture, not depending on written law. András Sajó, *Limiting Government. An Introduction to Constitutionalism*, Budapest, Central European University Press, 1999, pp. 9-14. However, while this explains the existence of constitutionalism, it does not provide us with a definition of constitutionalism. As I understand it, constitutionalism as a concept in legal doctrine does not necessarily contain an element of legal culture and legal history. An alternative definition of constitutionalism is provided by János Kis. It refers to the *existing* legal order, its institutions, constitution, and other legislative acts, and their enforcement. Kis uses the term “constitutionalism” whenever majority rule is subject to liberal constraints. János Kis, *Constitutional Democracy*, Budapest, Central European University, 2003, p. 61. Still, Kis distinguishes between *Rechtsstaat* and constitutionalism. Kis’ point is that the constraints of a *Rechtsstaat* are only of formal procedural requirements, which

general concept of freedom, which will be guaranteed through the division of powers. The division of powers will render protection from misuse of state power by dividing the functions between the legislative, executive, and judicial powers. The protected party is to be the individual, so that state intervention represents a deviation, which must be justified. Intervention must be only on the basis of law and in the name of the law, thus laws rule.⁴⁰ Constitutional review, as an important part of constitutionalism, is one way to protect and enforce basic rights. The approach adopted in order to identify the purpose of the dissertation is theoretical in the sense that it aims to investigate and conceptualize the connection between judicial protection of individual rights on the one hand, and various modes of state governance, on the other. This attempt is inspired by Loughlin's theoretical work on public law. Loughlin takes his starting point in the inquiry into, and discussion of, the specifics of the distinctiveness of public law, stating that "*public law is simply a sophisticated form of political discourse; that controversies within the subject are simply extended political disputes*".⁴¹ By adopting this starting point, Loughlin moves away from the traditional view of public law. That is, as a body of law with unity and an internal anatomy of its own, based on legality and distinct from civil law on the one hand and from politics on the other because of its subject-matter. Still, he does not dispute the first point of view. What he does is to take the argument of distinctiveness one step further by *underlining* the political character of public law. Loughlin describes politics as rooted in the conflict that arises from the struggle of trying to create and realize "the good life". Secondly, politics is considered a set of practices within a state that is concerned with

says nothing about the content of the applicable rules. *Ibid.* p. 120. The definition of *Rechtsstaat* became formal after the reduction of the concept of law to positive law by the late constitutionalist school. Kaarlo Tuori, *Critical Legal Positivism*, Aldershot, Ashgate, 2002, pp. 22, 24. However, the concept of law in the German early constitutionalist school and its definition of *Rechtsstaat* were not reduced to positive law. The law included an ethical order existing independently of the state and including sacred individual rights, which set the boundaries for state action. When making a distinction between *Rechtsstaat* and constitutionalism, Kis is referring to the formal definition of *Rechtsstaat*. He argues that if what political philosophers call moral rights are incorporated into a constitution and if the state can be taken to actually recognize and respect the moral rights of individuals, then a doctrine of constitutionalism is being developed. In conclusion, the empirical existence of constitutionalism depends not so much on a legal history and legal culture showing evidence of respect for individual rights and freedoms, as a contemporary legal order based on and devoted to the moral rights of individuals in combination with an efficient enforcement of these rights. See also, Caroline Taube, *Constitutionalism in Estonia, Latvia and Lithuania. A Study in Comparative Constitutional Law*, Uppsala, Iustus, 2001, pp. 63-75.

⁴⁰ Rune Slagstad, "Liberal Constitutionalism and its Critics: Carl Schmitt and Max Weber", in *Constitutionalism and Democracy*, eds. Jon Elster and Rune Slagstad, Cambridge, Cambridge University Press, 1993, (103-130), pp. 104-106.

⁴¹ Loughlin, *Public Law and Political Theory*, p. 4.

enabling co-operation.⁴² According to Loughlin, the political character of public law allows us to articulate what is special about the law's claims. He also argues that this approach will ensure that the inquiry is embedded in the realities of the time and that the issue of public law can be expressed in the context of the development of society. Loughlin states that during the latter half of the 20th Century it became popular to refer to the connection between public law and politics. However, he is critical of the following:

- that the relationship is underdeveloped;
- that a reference to the connection *per se* is considered to be sufficient; and
- that the precise nature of this relationship is therefore not the subject of serious scrutiny.⁴³

Loughlin's work is an attempt to bridge this gap. What he does is to connect the language of public law with traditions of political thought. Moreover, Loughlin's approach to public law is a criticism of the positivistic tradition within public law.

In his *The Idea of Public Law*, Loughlin elaborates his criticism of legal positivism and its contribution to the marginalization of public law. He argues that, since positivists present and see law as a system of enacted rules, they focus on issues of competence at the expense of issues of authority. By doing so they suppress the political aspects of sovereignty⁴⁴ – an explanation as to why the essence of public law, i.e. its political nature, is not recognised.⁴⁵ Loughlin awards sovereignty both a political and a legal definition. The legal concept of sovereignty is related to competence and the authority of the sovereign to enact laws. The political concept, on the other hand, is related to “*the capacity to generate political power through the relationship between the state and the people.*” The two are related to each other and both are needed in order to understand the role of law for establishing and maintaining the state.⁴⁶ A state “*draws its power from a political relationship between state and citizens, [and]...competence and capacity are inextricably linked.*”⁴⁷

To Loughlin, the reason of public law is the reason of state. The reason of the state is a political reason that strives to secure that state *per se*. This reason is,

⁴² Constitutional law is considered the continuation of the political in the sense that it establishes the governing framework of the state. Loughlin, *The Idea of Public Law*, p. 52.

⁴³ Loughlin, *Public Law and Political Theory*, p. 24.

⁴⁴ Sovereignty as understood by Loughlin is “*..the foundational concept underpinning public law and it stands as a representation of the autonomy of the political.*” Loughlin, *The Idea of Public Law*, p. 93.

⁴⁵ *Ibid.*, pp. 91, 130.

⁴⁶ *Ibid.*, pp. 88, 91.

⁴⁷ *Ibid.*, p. 93.

according to Loughlin, realized by recognizing that the state's authority and legitimacy is strengthened by invoking self-limitation concerning its actions and that this is a precondition for upholding the survival and well-being of the state.⁴⁸ It is suggested that public law should have as its primary focus “*the examination of the manner in which the normative structures of law can contribute to the tasks of guidance, control, and evaluation in government.*”⁴⁹

Recalling that one of the purposes of this dissertation is to investigate and conceptualize the connection between judicial protection of individual rights (in the sphere of public law), on the one hand and various modes of state governance on the other, and the proposition of the thesis that judicial review can constitute an alternative or complement to electoral control, we can conclude that both of Loughlin's concepts of sovereignty are subject to analysis in this study. First, judicial review by definition affects enacted laws and hence indirectly has an impact on the legal concept of sovereignty, i.e. the competence to adopt laws. Secondly, since judicial review will be analysed in the context of various modes of state governance, we might be able to say something about its contribution to the political concept of sovereignty, as defined by Loughlin. Could judicial protection of individual rights have an impact on “*the capacity to generate political power through the relationship between the state and the people*” by contributing to the strengthening of state authority and legitimacy? Could judicial review, as a control mechanism of the competence to enact laws and to implement them by administrative acts (legal sovereignty), boost the legitimacy of the state (political sovereignty), especially if invoked by individuals?

Loughlin argues that a theoretical approach to public law should be interpretative, empirical, critical, and historical.⁵⁰ He argues that it must be interpretative since the distinction between “*law fact and value*” is hard to uphold. It should be empirical in the sense that it is “*rooted in an understanding of the realities of government and the functions which law is expected to perform in relation to the political system*”. The theoretical approach must be critical in the sense that interpretations are being subjected to scrutiny taking its starting point in “*empirical understandings of the*

⁴⁸ *Ibid.*, pp. 150-151.

⁴⁹ Loughlin, *Public Law and Political Theory*, p. 264.

⁵⁰ “*We need to lay bare the conceptual structures through which we come to describe and explain the subject, and to understand the relations and features entailed in these structures and the assumptions on which they are founded.*” *Ibid.* p. 36. Compare with the problem- and interest-oriented approach as defined by Peter Westberg. Peter Westberg, “*Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet*”, *Festskrift till Per Olof Bolding*, Stockholm, Juristförlaget, 1992 (421-446), pp. 422, 426. See also Hellner, *Metodproblem i rättsvetenskapen*, p. 81.

functions of government and law". The historical approach calls on us to consider the changing needs and characteristics of society. The cornerstones of the theoretical approach to public law here explained interact and reinforce each other.⁵¹

The approach in this dissertation is interpretative in that it tries to investigate the effect of the "rights revolution", as a political and legal movement, on the understanding of constitutional and administrative procedural law. It is empirical in the sense that it takes into consideration current political developments, such as the domestication of international human rights standards, increased intervention of administrative organs in peoples' lives, difficulties in exercising electoral control, and the "rights revolution" that affects and connects the political and the legal systems. In addition, the role played by law in various modes of governance will be discussed. It is critical in the sense that the traditional functions of political and legal channels for engaging in political questions and exercising control of political and administrative powers are discussed. Finally, the historical approach allows us to discuss how the traditional understanding of judicial review and democracy can be amended in order to fit the needs of today's society. *Is judicial review in combination with individual legal activism an alternative and/or complement to political participation and electoral control of political and administrative powers?*

In conclusion, the purpose and research questions of this dissertation have been developed and identified using Loughlin's theoretical approach to public law. The questions posed have been formulated taking their starting point in an empirical problem: as traditional methods of political participation are weakened, alternative ways for individual checks are emerging. Thus, the empirical problem has both a societal and legal aspect to it. The current study has been structured taking both into consideration.

3.2 Post-Socialist Legal Reform and Changing Concepts of Rights

*"Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective."*⁵²

This Section is about changing concepts of rights in post-Socialist societies. It will discuss law as a mechanism for societal change and how the values stipulated in

⁵¹ The main purpose of this approach is to reach a thorough understanding of the topic, i.e. public law. Loughlin, *Public Law and Political Theory*, p. 36.

⁵² Ruti G. Teitel, *Transitional Justice*, New York, Oxford University Press, 2000, p. 6.

the law can be realized. The starting point is that law can be seen as a symbol, as a manifestation of an ideology.⁵³ Of special interest here, is the impact in post-Socialist Russia of adopting a constitution and a legal framework in the spirit of liberal democracy and constitutionalism. Has the law, considered as a symbol of post-Soviet systemic change, changed the concepts of rights and their enforcement?

It has been argued, among others⁵⁴ by the American scholar and judge Thurman Arnold, that law can be considered a mechanism of social integration based on the interpretation of societal values, despite the diversity of individuals' beliefs and aspirations. Proclaiming symbols such as values, ideals, and ways of thinking about government and society, is a fundamental task of law through which it can contribute to integration of society. These symbols, expressed in legal language and typical for a liberal society, might include, e.g., freedom of contract, equality before the law, personal and political freedom.⁵⁵ But it can also be the right to work, housing, and labour, i. e. social and economic rights, as used to be the case for socialist societies in Central and Eastern Europe. Thus, law as a symbol is in this sense an abstract and basically an ideological idea - not necessarily solely of a partisan character. To realise it, efficient implementation mechanisms are required, for example an efficient judicial system enabling judicial protection of individual rights, or an efficient state welfare system that delivers social and economic welfare to its citizens. In this sense, law is an expression of ideology and values, which can be used to motivate and achieve societal change.

According to Roger Cotterrell, Arnold leaves out the consideration of *why* and *by whom* the symbols of law are being manipulated. The term "manipulation of law" is used, as I understand it, to illustrate that the use of law as a symbol aims to create an illusion of unity and coherence and that it thereby creates a consensus.⁵⁶ In this context I find it appropriate to add the question: *what factors* have an effect on the manipulation of law? Such factors might include, for example, domestic

⁵³ Anders Fogelklou, "Law as an Ornament of Power", in *Symbols of Power*, eds. Lars Erik Blomqvist and Claes Arvidsson, Stockholm, Almqvist & Wiksell International, 1987, (99-112).

⁵⁴ See also Martin Loughlin, *The Idea of Public Law*, p. 42.

⁵⁵ Roger Cotterrell, *The Sociology of Law*, London, Butterworths, 1992. p. 102. The point is originally made by Thurman Arnold in *The Symbols of Government*, New Haven, 1935.

⁵⁶ *Ibid.*, p. 103.

power struggles, international politics and socialization, economic globalisation, and reversed legitimacy⁵⁷.

One point to be made concerning legal reforms in post-Socialist societies is the difference between law as rhetoric and law as a system of regulating rules. *Law as rhetoric* includes the adoption of new laws, which can be regarded as an expression of the need of a political élite to show the *ability* to act as well as the urge to show political *ambitions*, the key words being ability and ambition. When Vladimir Putin came to power he had a need to show the ability to enact new laws, for example the Land Code, an ability which former president Boris Yeltsin lacked and which caused him severe difficulties. In addition, the new political élite in post-Socialist societies were eager to show their political ambitions. One way of winning international attention for one's ambitions was to endorse any institution or instrument used by Western societies.⁵⁸ On the other hand, *law as a system of regulating rules* is laws that are actually being either respected, or implemented and enforced. In post-Socialist societies, the gap between law as rhetoric and law as a system of regulating rules tends to be wide. This of course affects the impact that changes on the surface level of law can have on the legal culture.⁵⁹

It could be argued that the aim of post-Socialist legal reform is mainly concerned with changing concepts of rights from a collectivistic to an individualistic approach to rights. The subsequent questions then must be whose concepts and what rights are to be changed? Potential answers to these questions will be discussed using Kaarlo Tuori's theory of a multi-layered view of modern law, which will be explained below.⁶⁰ First, we will define what is meant by concepts of rights for the purpose of this dissertation, before moving on to describe the concept of rights in a Soviet and Western context.

⁵⁷ Reversed legitimacy means that the reference to liberal democracy and constitutionalism is a powerful tool in times of regime change since it sets a goal that justifies measures needed to obtain the change, and the goal *per se* is of such a distinct difference compared to the old regime that it in itself creates legitimacy.

⁵⁸ Radoslav Procházka, *Mission Accomplished. On founding Constitutional Adjudication in Central Europe*, Budapest, Central European University Press, 2002, p. 28.

⁵⁹ For an explanation of the surface level of law, see below Chapter 3.2.2.2.

⁶⁰ Kaarlo Tuori, "Towards a Multi-Layered View of Modern Law", in *Justice, Morality and Society. A Tribute to Aleksander Peczenik on the Occasion of his 60th birthday*, eds. Aulis Aarnio, Robert Alexy and Gunnar Bergholtz, Lund, Juristförlaget i Lund, 1997, (427-442).

3.2.1 Concept of Rights

The concept of rights is an often-debated topic in legal theory and doctrine.⁶¹ Questions arise frequently concerning who is the bearer of a right, who is the counterpart, i.e. the bearer of the duty, whether the right is a result of a legislative act, or something that is inherent in our human nature, and whether the right must be enforceable by legal means. According to natural law theories, human beings have an inherent right to life and freedom. This definition of rights won ground due to adoption of the American Declaration of Independence in 1776 and the French Revolution in 1789. Criticism of natural law has been put forward on the grounds that natural rights can only be considered as politics and rhetoric, and that 'real' rights are rights that are stipulated in positive law and that are actually implemented.⁶² For adherents of this criticism, the distinction between moral and legal rights should be upheld.

Individuals can have rights of different substance and towards different persons. Distinctions can be made between different types of rights, i.e. material rights as well as between different right-holders (natural or legal persons) and right-objects (persons, physical objects, or abstract legal entities such as shares).⁶³ Rights are generally divided into two categories:

- o Civil and political rights, also called first-generation rights, and
- o Social, economic and cultural rights - second-generation rights.

Civil and political rights are concerned with individual autonomy and freedom. On the other hand, economic, social, and cultural rights are pledged to individuals as a result of their situation, position, or role in society.⁶⁴ A third generation can be added, that is, solidarity rights such as the right to self-determination and the right to development. It should be noted that this categorisation has been subject to criticism mainly due to the difficulty of making a clear-cut distinction between the categories of rights. However, the categorisation is vital for an analysis of the role of the state. Civil rights focus mainly on freedom from state interference,

⁶¹ See for example *Rights*, a collection of essays on rights by, for example, H. L. A. Hart, Ronald Dworkin, John Rawls, ed. Carlos Nino, Aldershot, Dartmouth, 1992.

⁶² Sajó, *Limiting Government*, pp. 248-249.

⁶³ Joseph Raz, *The Concept of a Legal system. An Introduction to the Theory of Legal System*, New York, Oxford University Press, 1980, p. 176.

⁶⁴ Joop de Kort, "How Right are Economic and Social Rights? The Interaction between Law and Economics in Human Rights", in *Human Rights in Russia and Eastern Europe*, eds. Ferdinand Feldbrugge and William B. Simons, The Hague, Kluwer Law International, 2002, (133-146), p. 135.

while social, economic, and cultural rights claim state protection and assistance for their realisation.⁶⁵ For the purpose of this dissertation, a right vests in a right-holder as the result of the right being stipulated by law and capable of being invoked before a court of law. A discussion of the changing concept of rights in post-Socialist societies requires first an explanation of the background and how rights were defined in communist societies. We will take our starting point in the Soviet system.

3.2.1.1 Rights in Soviet- and Socialist Law

Soviet law, developed in the Soviet Union under Lenin and Stalin, was exported to Central and Eastern Europe under the name of socialist law.⁶⁶ The term *socialist legal systems*, used to categorize legal orders influenced by communism, can according to Michael Bogdan be given both a wide and a narrow definition. According to the wide definition, all systems that give priority to the collective good over the individual are social in content. A narrower definition refers to systems where the means of production are owned by the state and managed through central planning.⁶⁷ The repressive character of socialist legal systems had its basis *inter alia* in the planned and centralised economy that failed.⁶⁸ While this is an empirical explanation of the repressive character of the socialist legal system, it must be noted that according to the Soviet legal doctrine, *State and Law*, which was developed in the Soviet Union under Stalin, the coercive force of the state is clearly emphasised.⁶⁹

Several of the rights accounted for in *the International Covenant on Economic, Social and Cultural Rights* (“ICESCR”)⁷⁰ could be found in the USSR constitutions. The

⁶⁵ Asbjorn Eide and Allan Rosas, “Economic, Social and Cultural Rights: A Universal Challenge”, in *Economic, Social and Cultural Rights*, eds. Asbjorn Eide, Catarina Krause and Allan Rosas, Dordrecht, Martinus Nijhoff Publishers, 1995, pp. 16-17.

⁶⁶ Anders Fogelklou, “Introduction: from transition to integration”, in *Consolidating Legal Reform in Central- and Eastern Europe*, eds. Anders Fogelklou and Fredrik Sterzel, Uppsala, Iustus, 2003, (11-28), p. 12.

⁶⁷ Michael Bogdan, *Comparative Law*, Deventer, Kluwer Law and Taxation Publishers, 2000. p. 198.

⁶⁸ *Ibid.*, p. 206.

⁶⁹ Anders Fogelklou, “Continuity and Change in Soviet Legal Thought after Stalin: The Concept of Law”, *Nordic Journal of Soviet and East European Studies*, Vol. 3, Nos. 3-4, 1986, p. 7.

⁷⁰ In 1952 the General Assembly decided to divide the rights in *the Universal Declaration of Human Rights* (“UDHR”) into two separate international covenants, one on civil and political rights *the International Covenant on Civil and Political Rights* (“ICCPR”) and one on economic, social, and cultural rights, the ICESCR. This split shows the two separate groups of states that existed during the Cold War, and their political agenda (both internal and international) and how it decided the

Soviet state took full responsibility for these rights and it could also, at least nominally, be held responsible for delivering them to the people. However, the centrally planned economy could not ensure the economic growth needed in order to deliver these rights. The largest problems with social and economic rights are the fact that these require affirmative intervention from the state, a kind of intervention that requires stable state finances. In addition, it is difficult to establish a universal equal standard for economic and social rights. In the end it will be a domestic endeavour, which makes it harder to legitimise international intervention. However, throughout the Soviet period the law was not used to impart rights to citizens, rather it was a means of rationalising and legitimising repression, with the endeavour to make citizens abide by the state's ideological objectives.⁷¹ Thus, law, when not used as a political manifesto, was used in a repressive manner, especially so in the criminal area.

The Soviet state strove for total domination of the economy and society. This is probably also one of the explanations as to why the legal transition in the former Soviet republics has not been as successful as legal transitions in Southern Europe and Central and Eastern Europe. The degree of state control was greater in the Soviet Union than in Central and Eastern Europe, since the latter to some degree allowed private enterprise.⁷² The strong Soviet one party-state made the emergence of a vibrant civil society almost impossible.

According to Levent Gönenç, socialist societies could be described as societies strongly affected by statism. Statism means that the state declared itself responsible for almost all activities and services in society, for example housing production, education, and social security, i.e. what have been described above as social and economic rights. The people came to expect that the state would deliver at least social welfare and people understood the notion of a strong state as a state that could provide welfare. The constitution was a means of establishing a strong state, hence this notion of a strong state also had implications for the constitutional framework and how the people regarded it. Thus, the notion of statism had implications for the constitutional framework in that principles such

focus concerning concepts of rights. The two groups not only disagreed as to the importance of the two types of rights but also as to their implementation and supervision. The Western states underlined international supervision, whereas the Soviet Union stressed national realization. The Soviets were of the opinion that the international system should foster co-operation and not pass judgement over states. de Kort, "How Right are Economic and Social Rights?" p. 135.

⁷¹ Louise I. Shelley, "Post-Totalitarianism and Soviet Law", in *Totalitarian and Post-Totalitarian Law*, eds. Adam Podgorecki and Vittorio Olgiati, Aldershot, Dartmouth, 1996, (251-274), p. 251.

⁷² *Ibid.*, pp. 260-261.

as the separation of powers and the rule of law could not contribute to a strong enough state.⁷³ The separation of powers would make it difficult for the political leadership to act without constraints, which was not considered sufficiently effective. In totalitarian and authoritarian states, political efficiency tends to prevail over the normative content of legal norms when conflict occurs between the two, for example Stalinist legality emphasized expediency over justice. However, this was also the case in the Soviet Union in the 1960s and 1970s. Thus, not only totalitarian states tend to choose political efficiency over separation of powers.⁷⁴

It could be argued that during the Soviet time legality did exist. However, the rule of law as a concept is wider than legality. Legality implies that state power is exercised in accordance with currently applicable legislative acts. Rule of law implies a distinction between a law and a command, the former bearing the characteristic of generality, while the latter can take the form of individual measures. Rule by individual measures is termed rule by decree. A legal order which is only concerned with legalism and compliance with legislative acts and decrees, without considering for example basic rights, division of powers, and popular participation in the legislative process can also be termed rule *by* law.⁷⁵ The common denominator for rule by decree and rule by law is that it is mainly a one way process, excluding citizens from taking part in the creation of the laws as well as from exercising any control of state power when implementing the laws, quite the opposite to constitutionalism. One of the essential features of constitutionalism is that it allows individual citizens to control the exercise of state power and to protect their rights in relation to the state, for example by invoking constitutional review.

⁷³ Levent Gönenc, *Prospects for Constitutionalism in Post-Communist Countries*, The Hague, Kluwer Law International, 2002, p. 79.

⁷⁴ Fogelklou, "Continuity and Change in Soviet Legal Thought after Stalin", pp. 45-46. In this context, it is hard not to make a reference to contemporary Russia. Subsequent to Putin's coming to power, we can see an increasing focus on political efficiency and centralization of power. The principle of separation of powers is established in the 1993 CRF, Article 10 and in the 1990s, in most cases, the political élite did not openly violate this principle. However, taken together, the reforms introduced since 2000 concerning, for example, federal issues, and the establishment of the political party Yedinstva - which meant that the presidential control over the Duma increased - point in the direction of favouring political efficiency and stability over the separation of powers. As a result of the success of Yedinstva in the 1999 Duma elections, the Duma's majority was president-friendly, making sure that President Putin would get support for the legal changes he suggested. To be further discussed in Part III.

⁷⁵ Anders Fogelklou, "Principles of Rule of Law and Legal Development", in *Legal Assistance to Developing Countries. Swedish Perspectives on the Rule of Law*, ed. Per Sevastik, Stockholm, Norstedts Juridik/ Kluwer Law International, 1997, (32-61), pp. 37-38.

In conclusion, Soviet law, including the Soviet constitutions, was seen as an instrument of socialization. The aim was to create *homo sovieticus* and constitutions primarily had a rhetorical and symbolic purpose. The Marxist theory of rights did not reject human rights based on liberalism *per se*, although harsh criticism was voiced on the grounds that these rights were not realized. However, Soviet Marxist theory of rights was later developed so that it denied the essence and starting point of human rights, i.e. recognition of the inherent dignity of every human being. The following section will examine what rights are being diffused to post-Socialist societies after the fall of the Soviet Union.

3.2.1.2 Rights in the West

The purpose of this section does not go beyond contrasting the Soviet and socialist legal systems with European Continental and common law legal systems by highlighting the main difference. However, let us not forget that the West is in no way unified in terms of concepts of rights, democracy, and constitutionalism.⁷⁶ There is a distinction to be made between the Anglo-American world and Continental Europe on the surface level of law and on the level of legal culture.⁷⁷ Nevertheless, Tuori reaches the conclusion that one of the common features of Common law legal orders and the European Continental legal order is fundamental human rights principles.⁷⁸ It would stretch beyond the purpose of

⁷⁶ In 1948 the General Assembly of the United Nations adopted the UDHR as a command standard for all peoples and all nations. The Universal Declaration was recognised in the establishment of the European Community as well as by the USSR, and later Russia. The Preamble to the UDHR explicitly refers to the recognition of the inherent dignity of every human being as the foundation of freedom, justice and peace. The Preamble also refers to the four freedoms; freedom of speech and religious worship, and freedom from want and fear. Freedom from want is a group name for socio-economic rights, which was thoroughly underlined in the Soviet Union and other communist constitutions in accordance with Soviet Marxist theory of human rights. However, this group of rights can also be found in modern Western constitutions. Ferdinand Feldbrugge, "Human Rights in Russian Legal History", in *Human Rights in Russia and Eastern Europe*, eds. Ferdinand Feldbrugge and William B. Simons, The Hague, Kluwer Law International, 2002, (65-90), p. 66.

⁷⁷ The differences and consequences thereof have been further underlined by what happened on 11 September, 2001 and the ensuing wars in Afghanistan and Iraq.

⁷⁸ Still, some would argue that the democracies in Continental Europe are young in terms of modern language of human rights- and international treaties, i.e. young compared to the USA. Paul Berman makes this point in *Terror and Liberalism*. Berman makes a point of Lincoln's endeavour to fight for a United States of America and describes this in terms of a project with the aim of securing fundamental rights and freedoms for all. He further argues that the new human rights language in Europe is a product of the dissident movement in the former Soviet bloc and that this language gained forced after 1989. However, it remained rhetoric and never transformed itself into action. Paul Berman, *Terror and Liberalism*, New York, W.W. Norton, 2003. Berman's criticism of Europe is mainly directed towards the inability of Europe to stand united in order to safeguard liberal values and principles both inside and outside (in the Balkans) its

this study to engage in a discussion on various concepts of rights in the West. Thus, without having to come to an agreement, it could be argued that the common denominator is the limitation of state powers in relation to the individual. Feldbrugge concludes that the contemporary ideology of human rights rests on two pillars⁷⁹:

- A concept of the unique value of the human individual, which renders certain rights inalienable.
- The need to limit public power.

3.2.2 Different Approaches to Understanding and Conceptualising Legal Reform in post-Socialist Societies

3.2.2.1 Legal Transition, Legal Transfers, and Adapting Legal Cultures

In the mid-1980s, high-level U.S. officials talked about the “worldwide democratic revolution”. The fall of the Berlin Wall and the dissolution of the Soviet Union added additional strength to statements like this. In America, a new democracy-promoting community developed and this community had a need for an analytical framework in order to conceptualize and to respond to the new political challenges. The analytical model of democratic transition was hence embraced. Thomas Carothers has summarized this transition paradigm with five core assumptions:

1. Any country moving away from dictatorial rule can be considered to be in transition toward democracy.
2. Democratization is realized by a sequence of stages.
3. Elections are of determinative importance.
4. Underlying conditions, such as political history, legal culture, and the economic level are not of importance either for the transition path or the outcome.

borders. The purpose of this exposé is mainly to show that there is a gap between rights language and action in Western societies as well. The difference is perhaps best described in terms of a varying degree of focus on civic rights on the one hand, and material and welfare rights on the other. There is also a clear distinction concerning the view of how to best enforce these rights. In Europe it has traditionally been a question for the state, while in the USA the courts have played an important role.

⁷⁹ Feldbrugge, “Human Rights in Russian Legal History”, p. 75. See also Tuori, “Har förvaltningsrätten en framtid?”, p. 557.

5. State- and democracy-building occur side by side.⁸⁰

Carothers is critical of the transition paradigm on all five points. The most frequently proposed criticism of the transition paradigm has been for implying a normative direction of a move from a less democratic regime to a more democratic *dito*.⁸¹ As the Russian case proves, this is not necessarily the case. The Russian transition is in its most vital parts concluded. However, it could hardly be argued that Russia is moving towards consolidation of democracy.⁸² According to Carothers, there are dangers connected to sticking with the transition paradigm, since it may lead policy-makers and democratic assistance astray. Focus should rather be on the actual political and societal situation in the country in question.⁸³ I subscribe to the criticism levelled by Carothers and others that domestic conditions and the process of state-building have been neglected, to the detriment of the development of the post-Soviet states in particular.⁸⁴ Legal reform constitutes a vital part of state-building as well as of the establishment and consolidation of democracy. Therefore, this dissertation focuses on legal reforms as a part of the overall system change that accelerated after the fall of the Berlin Wall and the dissolution of the Soviet Union.

The analysis of legal reforms in post-Socialist societies benefits from drawing a distinction between legal transitions and legal transformations. *Legal transitions* can be given clear limits in substance and time. A transition means that we start off at one position, aiming to reach another at the end of our journey. The change, if any, is observable. Legal transition thus refers to the adoption of a new legislative framework, a framework that will both contribute to the establishment of new institutions and procedures as well as to the renewal of the substance of the law. *Legal transformation*, on the other hand, is a process of change, which is more or less constant - all societies are going through changes, more or less consciously.

⁸⁰ Thomas Carothers, "The End of the Transition Paradigm", *Journal of Democracy*, Vol. 13, No. 1, January 2002, pp. 6-8.

⁸¹ *Ibid.*, p. 7. See also Stefan Hedlund, Kristian Gerner, Niclas Lundström, *Hjärnridån*, Stockholm, Fischer & Co, 1995.

⁸² To be further discussed in Part III. Russia is rather moving in a direction toward a centralized authoritarian regime. See Robert W. Orttung, "Russia", *Nations in Transit 2004*, eds. Amanda Schnetzer *et. al.*, New York, Freedom House, 2004.

⁸³ Carothers, "The End of the Transition Paradigm", p. 6.

⁸⁴ See also Richard Rose and Neil Munro, *Elections without Order. Russia's Challenge to Vladimir Putin*. Rose and Munro conclude that Russia is experiencing democratization backwards, which means that free elections have been held, but a modern democratic state also requires a functioning legal system that allows it to become a rule of law state. The authors conclude that focus must be placed on governance and not only on elections. For a similar argument see Francis Fukuyama, *State Building. Governance and World Order in the 21st Century*, Ithaca, Cornell University Press, 2004.

Legal transformations can take off in different directions, not necessarily in what would be called, with a Western perspective, a positive development in the sense that the liberal values underlying the new legislative framework are enforced. For example, a new legislative framework is adopted but its substance is altered in the enforcement process so that the underlying values in the end will vanish.

I would argue that legal reform is *consolidated* when a consensus exists between the surface level of law and the legal culture within a legal system. Again, a consolidated legal reform does not necessarily intend that the values characteristic of the starting point will be the values that are being consolidated. In this context, legal consolidation refers to a stable *status quo* with a consensus concerning attitudes and activity within the legal system as a whole.

Legal reforms in Central and Eastern Europe have, due to the influence of the EU and the CoE, been dominated by the adoption and implementation of a legislative framework known to western states as liberal democracy. The process can be described in terms of *legal transfers*.⁸⁵ The outcome of legal transfers is likely to depend on several factors, one of them being the adaptation of legal cultures. In order to further discuss and problematize the complicated issue of legal reform, legal transfers, and adapting legal cultures, Tuori's model of the multilayered view of modern law will be explained. Tuori's theory allows us to discuss not only in terms of legislation and judicial decisions, which he defines as *the surface level of law*, but also in terms of *legal culture*, and *the deep structure of the law*. In conclusion, the role played by law in democratic transitions can hardly be overestimated - the crux of the matter being that the legal system is a tool for system change at the same time at it is experiencing reform itself.

3.2.2.2 Tuori's Multilayered View of Modern Law

The Surface Level of Modern Law

The surface level of law contains individual statutes, decrees, and other legal regulations. It also includes court decisions in individual cases and legal dogmatic works. Changes at this level of law can, according to Tuori, be viewed as the outcome of an ongoing discussion involving legislators, judges, and legal scholars. Changes can be rapid.⁸⁶

⁸⁵ Fogelklou, "Introduction: from transition to integration", p. 25.

⁸⁶ Tuori, "Towards a Multi-Layered View of Modern Law", p. 433.

The legal reform that most post-Socialist countries have been going through is in many ways impressive as to the changes obtained on the surface level of law. To start with, most of the countries have adopted completely new constitutions. However, some chose to dust off their old ones. Latvia is such an example. Others chose a more gradual change, for example Hungary and Poland.⁸⁷ In summary, all of the new constitutions are formulated in the spirit of constitutionalism, meaning that they contain a bill of rights, mechanisms for changing political leadership through free elections with frequent intervals, separation of powers, and popular participation in the legislative process.

In the introduction to this chapter, it was said that law could be seen as a symbol. Then some questions were raised in relation to law as a symbol, for example *by whom* the symbols of law are being manipulated, *why* symbols of law are being manipulated, and *what factors* have an effect on the ‘manipulation of law’. Suggested factors that could have an impact on the ‘manipulation of law’ were domestic power struggles, international politics, economic globalisation, and reversed legitimacy.

Let us start with some of the factors that had an effect on the ‘manipulation of law’ on the surface level in post-Socialist societies. It is clear that the process of legal reform initiated after the dissolution of the Soviet Union and the fall of the Berlin Wall was strongly influenced by Western ideals such as democracy, rule of law, and market economy. Secondly, let us speculate on the question why law is being manipulated. The reasons are several, some objective and observable, others subjective and therefore harder to detect. By adopting liberal constitutions, the new states were sending the message that they were to be considered as countries with which other states could have normal relations, and that they were trustworthy partners. The domestic message was equally clear. The repressive Soviet system was no more, at least not in rhetoric. In addition, “returning to Europe” was an important driving force for the Central European and the Baltic States. We do not need to go too deep into the reasons why law is being manipulated. In this context, it is sufficient to conclude that more or less liberal constitutions were adopted and that the surface level of law experienced far-going changes, due to *inter alia* the carrot and the stick of the international community. What we are interested in, at this stage, is the impact of this process in terms of changing concepts of rights, which leads us to the judiciary and its decisions, another part of the surface level of law according to Tuori.

⁸⁷ Poland adopted a new Constitution in a referendum on the 25th of May, 1997.

The judiciary interprets the law, and its decisions are final. Judicial decisions are the result of an initiative by a legal or private person, or a political body. Few courts have the right to initiate court procedures *ex officio*. This is in order to avoid courts getting involved in political struggles.⁸⁸ Thus, a certain degree of activism on the part of individuals and politicians is required in order for a court to apply and interpret the law.⁸⁹ It has been argued that the establishment of constitutional courts exercising constitutional review in post-Socialist countries can be seen as a de-communisation tool, meaning that the constitutional courts would serve as protectors of post-1989 achievements.⁹⁰ However, supporting constitutional review might also be considered as something that violated politicians' self-interests, since it might restrict the exercise of political power. Still, in terms of international recognition⁹¹ and political correctness, active politicians had more to win by establishing constitutional courts, than what they would have lost if they had rejected constitutional review.⁹² For example, external pressure was important for the establishment and continuing existence of the Constitutional Court of the Russian Federation. Thus, in this context the international community also played an important role for the legal transition that resulted in changes to the surface level of law. In general, the establishment of constitutional courts is one of the most important differences between Communist and post-communist constitutions.⁹³ Courts in general and constitutional courts in particular have the potential to make a constitution more than a paper product.

In conclusion, the activity of the judiciary will in some way, positive or negative, have an impact on the concept of rights of the general public, at the same time as the outcome of the activity of the judiciary is affected by the concept of rights of the legal experts interpreting the law. Thus, the surface level of law and the level of legal culture are closely related, but the interplay between the two is in no way

⁸⁸ The first constitutional court in the Russian Federation did have this right, which was one of the reasons for its suspension in 1993.

⁸⁹ Individual legal activism will be defined and further discussed below in Part II in the Chapter on Individual Legal Activism.

⁹⁰ Procházka, *Mission Accomplished*, p. 29.

⁹¹ The CoE made it a condition for Russia becoming a member of the Council that the role and authority of the Constitutional Court of the Russian Federation was in no way reduced.

⁹² For example, this was of great relevance for the rise of the Hungarian court. Procházka, *Mission Accomplished*, p. 30.

⁹³ Except for the Yugoslavian Communist system. In 1963, both federal and republican constitutional courts were established in Yugoslavia. However, their primary aim was to protect the division of powers between the different levels in the federation and to safeguard legality rather than to protect individual rights and freedoms.

given. Knowledge of and devotion to the respect of basic human rights are necessary, but not sufficient, preconditions for changing concepts of rights. In addition, the political climate and independence of the judiciary will have an impact on the role that the courts will be allowed to play in this matter. We now move on to what Tuori calls legal culture, in order to increase our understanding of the surface level of laws and legal culture, and discuss the connection between them.

Legal Culture

Legal culture as defined by Tuori consists of two types of legal understanding. One part of legal culture is the expert culture of legal professionals, which is expressed by sources of law, conflicts between norms, and legal interpretation, as methods used as the foundation for legal argumentation. In addition, the development of legal doctrines, legal concepts and principles, constitute parts of the legal culture of legal experts.⁹⁴ “*The legal culture of modern, positive law represents the memory of the narrow legal community, composed of professional lawyers.*”⁹⁵ This, according to Tuori, makes the legal culture of modern law open to influences from the surface level of law.⁹⁶ The other part of legal culture is the legal consciousness of the general population.

Expert Legal Culture

Tuori argues that the expert culture has obtained a high degree of sophistication and some degree of autonomy from the general legal culture.⁹⁷ Legal culture on the individual level is the practical knowledge of a lawyer. Still, on a general level legal culture can be described in terms of general doctrines and conceptual, normative, and methodical basics.⁹⁸ Changes are slower than compared to the surface level of law. *Methodical elements* include traditions concerning: sources of law, standards for resolving contradiction between legal norms, methods of interpretation, for example grammatical and systematic interpretation, the theological method, and so on.⁹⁹ The *normative element* refers to general principles

⁹⁴ Tuori, *Critical Legal Positivism*, pp. 161-183.

⁹⁵ *Ibid.*, p. 163.

⁹⁶ *Ibid.*

⁹⁷ Tuori, “Towards a Multi-Layered View of Modern Law”, p. 433.

⁹⁸ Tuori, *Critical Legal Positivism*, pp. 166, 169.

⁹⁹ *Ibid.*, p. 167.

such as the principle of legality, objectivity and *pacta sunt servanda*.¹⁰⁰ The *conceptual element* consists of distinctive legal concepts such as ‘administrative acts’ within administrative law.¹⁰¹

Concerning expert culture in post-Socialist societies, there is a difference between states belonging to the former Soviet Union - not including the Baltic States - and the Central European states, a difference which was visible and recognised even during Soviet times.¹⁰² The development of legal doctrine in, for example, contemporary Russia is still largely paraphrasing of legislative texts, as it was during Soviet times.¹⁰³ However, concerning Russian legal doctrine on state and law there seems to be an increase of legal analysis at the cost of paraphrasing legislative acts. It is also interesting to note that there is a degree of continuity in Russian legal doctrine, which will be illustrated by the following example: According to contemporary Russian federal law, a general right to both judicial and administrative review of administrative decisions is guaranteed.¹⁰⁴ With regard to the administrative appeal process, even in the 1970s criticism was put forward by Soviet legal scholars towards the system. The shortcomings pointed out were:

- departmental bias (since the official responsible for controlling the legality of an administrative act is part of the organization that took the original decision),
- methods of administrative review were considered inferior to methods of judicial review in terms of impartiality, openness etc., and
- administrative review was said to exceed the time limits for review established by law.¹⁰⁵

¹⁰⁰ *Ibid.*, p. 177.

¹⁰¹ *Ibid.*, p. 174.

¹⁰² There were differences when it comes to legislative acts. For example, some East European states had adopted laws on administrative procedure. And it happened that East European scholars wrote on the topic in Soviet law journals and that their books were translated into Russian. Soviet scholars did use East European examples in their analysis of, for example, Soviet administrative law. Donald D. Barry, “The Development of Soviet Administrative Procedure”, in *Soviet Law after Stalin*, Part III, eds. Donald D. Barry, Ferdinand J.M. Feldbrugge, George Ginsburgs and Peter B. Maggs, Leiden, Sijthoff & Noordhoff, 1979, pp. 11, 13.

¹⁰³ Anders Fogelklou, “Legal Transition and Legal Thinking in Eastern and Central Europe”, in *Festschrift till Åke Frändberg*, eds. Anders Fogelklou and Torben Spaak, Uppsala, IUSTUS, 2003, (97-120), p. 99.

¹⁰⁴ To be further examined in Part III.

¹⁰⁵ Donald D. Barry, “Administrative Justice and Judicial Review in Soviet Administrative Law”, in *Soviet Law after Stalin*, Part II, eds. Donald D. Barry, George Ginsburgs and Peter B. Maggs, Leiden, Sijthoff & Noordhoff, 1978, (241-270), p. 252.

What we can see is that when adopting *The Law of the Russian Federation on Appealing against Court Actions and Decisions Infringing the Rights and Freedoms of Citizens* (as amended 1995) the criticism put forward as early as in the 1920s, but especially in the 1970s, was considered. Today, both administrative and judicial review of administrative actions is possible in subsequent or parallel processes and the time limits have been strictly regulated. This goes to show that there is a continuity and ongoing discussion within Russian expert legal culture. Thus, we should be careful not to draw fast and easy conclusions concerning expert legal cultures. The influence of the political climate is probably stronger than any other factor for determining the degree of dynamics and movement between the surface level of law and the level of expert legal culture.

The Public's Legal Consciousness

Tuori does not mention the general legal culture of ordinary citizens after stating that it is a part of the legal culture. Legal consciousness of general citizens is difficult to study. One way to go about it would be through public opinion surveys and quantitative analysis. However, in this thesis I will draw on research made by political scientists in order to show tendencies only. The public's legal consciousness in Russia will be dealt with further below. What follows here is just a short exemplification.

Cross-national research on values and political change in post-Communist Europe,¹⁰⁶ shows that 92 percent of Russian respondents believed that if citizens felt that a law was unjust or harmful, they should be allowed to appeal through the courts, i.e., to invoke constitutional review.¹⁰⁷ These figures show that a large majority of Russian respondents value the right to appeal through the courts. However, it should be noticed that these figures say nothing about *the actual use* of this right. When asked about *the perceived effectiveness* of different protest methods, 29 percent of the Russian respondents thought that appealing through the courts would have a 'very big', or 'quite big' effect in enabling citizens to get a law changed. As a comparison, in Hungary 89 percent supported the right to appeal to

¹⁰⁶ The investigation is based upon eleven public opinion surveys in the former Soviet Union and Eastern and Central Europe carried out between the end of 1993 and the beginning of 1996. Members of the public (7,350), and members of parliament (504), were interviewed. William L. Miller, Stephen White, and Paul Heywood, *Values and Political Change in Postcommunist Europe*, Houndmills, MacMillan, 1998, pp. 1, 141.

¹⁰⁷ Other alternatives were: hold protest meetings (76 percent), call nation-wide strikes (35 percent), hold protest marches and demonstrations which block traffic for a few hours (31 percent), and occupy government buildings (8 percent). *Ibid.*, p. 148.

a court of law and 57 percent thought that it would be effective. In addition, the importance of constitutional review is highlighted by the fact that 77 percent of the Russian respondents thought that the RF Constitutional Court should be allowed to overrule the government, while only 27 percent were of the opinion that the law should *not* restrict a strong leader who has the trust of the people.¹⁰⁸

This author does not have any ambitions to establish causality or to draw any conclusion concerning the legal consciousness of ordinary citizens in post-Socialist societies. However, it can be assumed that an increased possibility for individuals to be able to have access to courts in order to invoke their rights is likely to affect the understanding of individual rights. By exercising individual legal activism, citizens may contribute to initiating a rights culture, if the political climate allows the court to act independently, and if the procedural and legal aid legislation are supportive of individual legal activism. Since focus in this Chapter is on changing concepts of rights, we are concerned not only with the concept of rights of legal experts and the general population, but also with the concept of rights in different types of law. Hence we will turn to what Tuori calls the deep structure of law.

The Deep Structure of Law

The deep structure of law represents the *longue durée* of the law¹⁰⁹ and it supports the description of modern law as a historical type of law. In order to describe what is meant by the deep structure of law, Tuori asks questions such as: Do legal orders with different legal cultures still have something in common, a common core? Is this common core something that is permanent in the sense that it remains intact even as changes occur at the level of legal culture? After making a journey through Western legal orders, Tuori reaches the conclusion that one common feature crossing the Anglo American Common Law legal orders and the Continental European legal order is, for example, fundamental human rights principles.¹¹⁰

The deep structure of modern law can be described in terms of its basic legal categories (conceptual frameworks), which affects legal regulation, argumentation,

¹⁰⁸ When asked the question who should have the final say concerning a law violating the constitution, the following two alternatives were given:

1. The government, because it represents the people, or
2. The court, because it is necessary to defend the constitution. *Ibid.*, p. 151.

¹⁰⁹ Tuori, *Critical Legal Positivism*, p. 184.

¹¹⁰ *Ibid.*, pp. 183, 196.

and decision-making, and the basic type of rationality manifested by the law. For example, natural law can be seen as an attempt to reconstruct the normative deep structure of the law, while conceptual legal dogmatics can be seen as an interpretation of the conceptual deep structure of law.¹¹¹ While the geographical borders regarding the surface level of law and legal culture are more or less easy to detect, the borders of the deep structure of law are harder to determine. According to Tuori, “*Integration at the level of deep structure represents globalisation of the law in a more fundamental sense than surface-level supra-national norm-giving or the kind of legal transplants which have been discussed in comparative legal culture.*”¹¹²

A distinction can be drawn between traditional and modern law and, within modern law, between liberal and socialist law.¹¹³ Traditional law was seen as a means of transmitting a community’s past to the future, focusing on customs and practices. Modern law is post-traditional law in the sense that laws are written down and organised in, for example, codes, so that the field occupied by customary law is being limited correspondingly. In addition, significant for modern law is the conscious aspiration to achieve social change through legislation.¹¹⁴ Traditional law conserves the customs and practices of whole communities, while the legal culture of modern, positive law is dominated by the memory of legal experts. Therefore, Tuori argues, the legal culture of modern law is more open to conscious influences from the surface level of law in a way that would not be possible with traditional law.¹¹⁵

In conclusion, changes at the surface level of law are swift and they are the results of a dialogue between legislatures, judges, and legal scholars. Changes on the level of the legal culture are slower. Changes in the deep structure are even slower. The deep structure refers to different historical types of law such as traditional and modern law.¹¹⁶ By using procedural and material rights stipulated on the surface level of law, a link between the surface level and the level of legal culture is established in the sense that actions accumulate experiences and legal facts, which are likely to have an effect, over time, on the legal culture. Actions contribute to the reproduction and alteration of the law at all its levels.¹¹⁷ This process can be

¹¹¹ *Ibid.*, p. 184.

¹¹² *Ibid.*, p. 185.

¹¹³ Tuori, “Towards a Multi-Layered View of Modern Law”, p. 434.

¹¹⁴ Tuori, *Critical Legal Positivism*, p. 162.

¹¹⁵ *Ibid.*, p. 163.

¹¹⁶ *Ibid.*, p. 192.

¹¹⁷ *Ibid.*, p. 196.

initiated by individuals, which thereby contribute to a potential for changing concepts of rights. Still, one could argue that a certain degree of awareness and legal knowledge is required in order for a process such as this to get started. This is where the support structure comes into the picture. The issue of how this takes place will be explained and discussed in Part II.

3.2.3 Discussion on Changing Concepts of Rights

“...co-operation and assistance programmes must delve ever deeper in each country’s civil society to ensure that democratic reforms do not constitute a passing phase in the life of states bent on settling down into a national routine”.¹¹⁸

To what degree has the penetration of liberal concepts of rights into post-Socialist societies been successful?¹¹⁹ Several actors and institutions play important roles in altering the understanding and evaluation of rights. Important actors are the expert legal élite (judges, lawyers, and legal scholars). In addition, NGOs are of great importance, since they can contribute with legal skills, knowledge, financial resources, and contacts. Institutions such as ombudsmen, the judiciary, and especially constitutional courts can also contribute to changing attitudes and values.

International organizations play an important role as bearers and disseminators of liberal concept and values. “*International socialization*” is an important task for international organizations such as the EU, NATO, and the CoE. Different organizations apply different strategies in this endeavour; they can be either

¹¹⁸ Diana Pinto underlines what is needed in order for the CoE to ensure that democratic principles are not only adopted in theory and on paper. Diana Pinto, “Assisting Central and Eastern Europe’s Transformation”, in *The Challenges of a Greater Europe. The Council of Europe and Democratic Security*, Strasbourg, Council of Europe Publishing, 1996, p. 51.

¹¹⁹ Even though the legal language and the concept of rights on the surface level of law have been altered in post-Socialist societies, it can be suspected that its citizens still think and argue in terms of economic and social rights. However, we should keep in mind that this order of priority is not always the result of the social and cultural heritage. It can also be closely related to an economic situation so difficult that nothing can be done in social and political terms before the situation has been improved. For a discussion on changing concepts of property rights see, Katlijn Malfliet, “Property Rights as Human Rights: A Post-Communist Paradigm?” in *Human Rights in Russia and Eastern Europe*, eds. Ferdinand Feldbrugge and William B. Simons, The Hague, Kluwer Law International, 2002, (163-186).

inclusive or exclusive, or a combination of the two. There is also a difference regarding the norms that are being socialized.¹²⁰

Still, one of the most important and so often forgotten actors is the individual, the citizen that is affected, positively or negatively, by the exercise of political and administrative powers. Hence, a need for a micro-perspective, or rather a bottom-up approach, when discussing changing concepts of rights. In order to illustrate what is meant by a micro-perspective, in this dissertation the term *individual legal activism* will be used. Here follows a short introduction to what in this dissertation is meant by Individual Legal Activism, Support Structure, and External Actors and International Socialization.

3.2.3.1 *Individual Legal Activism*¹²¹

For the purpose of this dissertation, individual legal activism is defined as the use of the judicial process by individuals, as distinct from legal activism on the part of courts. Actors involved in individual legal activism might include, for example, citizens, NGOs acting in the interest of individuals, and private companies. In order for individual legal activism to be successful, a vibrant support structure is needed, as showed by Charles E. Epp.¹²² The definition of individual legal activism and its prerequisites will be explained and discussed more thoroughly in Part II of the dissertation, as will the idea of support structures.

3.2.3.2 *Support Structure*

In 1961, the Supreme Court of the USA opened up the door for civil lawsuits in order to redress official abuses of individual rights in the *Monroe* case. This transformation, which led to increased protection of individual rights and the development of the U.S Constitution, is termed by Epp the *Rights Revolution*.¹²³

A ‘rights-friendly’ legal culture is not a necessary a precondition for a rights revolution, even though it might facilitate it, as both Tuori’s multi-layered view of modern law and Epp’s research imply, in the sense that a liberal-minded judge is

¹²⁰ Frank Schimmelfennig, “Introduction: The Impact of International Organizations on the Central and Eastern European States – Conceptual and Theoretical Issues”, in *Norms and Nannies. The Impact of International Organizations on the Central and East European States*, ed. Ronald H. Linden, Lanham, Rowman & Littlefield Publishers, 2002, (1-29), pp. 8-9.

¹²¹ Individual legal activism and the definition of a support structure will be further developed in Part II.

¹²² See further Epp, *The Rights Revolution*.

¹²³ Epp describes rights revolution as “*a sustained, developmental process that produced or expanded the new civil rights and liberties.*” *Ibid.*, p. 7.

probably more likely to consider the underlying values in an individual rights complaint. However, Epp underlines that “...cases do not arrive in supreme courts as if by magic.” And this is where individual legal activism comes in. A rights revolution depends to a certain degree on legal mobilization, which in its turn depends, above all, on resources such as rights-advocacy lawyers and organisations, sources of financing etc., what Epp calls *the support structure*. Epp builds on research showing that political pressure and organized support for rights litigation influence judicial attention to individual rights in America. However, Epp’s research distinguishes itself from earlier research since his emphasis is on the key role of material resources for civil rights litigation and difficulties in obtaining them. This is called *the support structure explanation* of rights revolutions.¹²⁴

This dissertation argues that the existence and effective use of support structures makes individual legal activism more likely. This in its turn can contribute to an increased dynamic between the surface level of law and the legal culture. In addition, transnational human rights advocacy groups can pressure political leaders to pay attention to and enforce international norms¹²⁵; hence the importance of both a vibrant support structure and legitimate external factors for international socialization, which will be dealt with in the following section.

3.2.3.3 External Factors and International Socialization

The liberal concepts of rights that are being diffused by international organisations are not new to post-Socialist societies, at least not at the theoretical level, and to a varying degree on a practical level.¹²⁶ Due to the Helsinki Agreement in 1975 they were slowly given political notice. The post-1989 period was therefore rather a period of drafting laws and making sure that the protection of rights as debated and stipulated in newly-adopted constitutions should actually be respected and enforced.¹²⁷ In Central Europe and the Baltic States, EU membership had a considerable impact on constitutional legal reform. In some cases, it may even

¹²⁴ *Ibid.*, p. 5.

¹²⁵ Pamela A. Jordan, “Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms”, *Human Rights Quarterly*, 25 (2003), (660-688), p. 665.

¹²⁶ See for example Emma Gilligan, *Defending Human Rights in Russia. Sergei Kovalyov, Dissident and Human Rights Commissioner, 1969-2003*, London, Routledge Curzon, 2004. It should be underlined that it was not new to the intelligentsia, but the wider public did not get acquainted with international human rights standards until after *glasnost* and *perestroika*.

¹²⁷ *Ibid.* and Procházka, *Mission Accomplished*, p. 22-23.

have legitimised it.¹²⁸ Orientation strategies based on institutional pragmatism and politics of identity legitimised the more pragmatic stance of EU integration strategies.¹²⁹ The CoE has also played an important role in democracy-building and legal reform in Central and Eastern Europe, including the Caucasus and the Balkans. In Central Europe and the Baltic States, membership in the CoE and ratification of the ECHR was a prerequisite for further negotiations on EU membership. The CoE and ECHR have also played an important role for states not likely to become members of the EU, in that membership provides some degree of democratic legitimacy for the new regimes and a feeling of belonging to the Western hemisphere.¹³⁰

The role played by the EU and the CoE can be described and analysed within the framework of "*international socialization*". Schimmelfennig defines "*international socialization*" as "*the process directed toward a state's adoption of the (constitutive) norms of an international community.*"¹³¹ In the following we will focus on the CoE, since one of the research questions of this dissertation is concerned with the impact of Russian membership of the CoE on the judicial protection of individual rights, the human rights movement, and individual legal activism in Russia.

The CoE adopts an intermediate position between an inclusive and exclusive strategy in its aim to socialize states.¹³² *The exclusive strategy* consists of socializing from the outside, meaning that certain conditions have to be fulfilled and the socialization process recognized as successful before the state in question can join the organization. Future membership is thought to enhance the socialization process. The CoE has a number of conditions that have to be met before joining, for example signing the ECHR, abolishing the death penalty, and holding democratic elections. By contrast, *the inclusive strategy* aims to socialize states from within by accepting them as members. When becoming a member, the state in question takes on the obligation to respect and learn community norms, hence community rules will be taught from the inside.¹³³ For the first time in history,

¹²⁸ *Ibid.*, p. 17.

¹²⁹ Karen E. Smith, "Western Actors and the Promotion of Democracy", in *Democratic Consolidation in Eastern Europe. Volume 2. International and Transnational Factors*. eds. Jan Zielonka and Alex Pravda, New York, Oxford University Press, 2001, (31-57).

¹³⁰ Pinto, "Assisting Central and Eastern Europe's Transformation", p. 49.

¹³¹ Schimmelfennig, "Introduction: The Impact of International Organizations..", p. 1.

¹³² At the outset the CoE showed its willingness to welcome the post-Socialist states to the "European family" at the same time as it stressed that membership could only be obtained if democratic standards for admission were met. Pinto, "Assisting Central and Eastern Europe's Transformation", p. 49.

¹³³ Schimmelfennig, "Introduction: The Impact of International Organizations..", p. 8.

Russia is, due to its membership in the CoE, subject to an external judicial sanctions mechanism. Besides judicial sanctions, political sanctions are possible by, for example, suspension of voting rights in the Parliamentary Assembly of the Council of Europe (“PACE”) and ultimate expulsion of a member state from the CoE.

What effects do international socialization have on domestic political systems and on the domestication of international human rights standards? Schimmelfenig suggests a classification of normative effects of international socialization, based on three concepts of norms:

1. formal,
2. behavioural and
3. communicative.

According to the **formal conception of norms**, the effects of international socialization will be noticed in the adoption of national laws, and establishment of institutions and procedures that contribute to the enforcement of international norms. (Compare with Tuori’s surface level of law). **The behavioural conception of norms** is concerned with the degree to which the behaviour of the state to be socialized is in congruence with the behaviour stipulated by the relevant international norm (compare with law as a system of regulating rules). Finally, **the communicative conception of norms** refers to the impact of international norms on the communication between domestic actors (compare with law as rhetoric). The order between the three conceptions of norms in the socialization process is not in any way given. However, research suggests that, under international pressure, the communicative effect is the first, only to be followed by the formal effect, while last, if ever, comes the behavioural effect.¹³⁴

As to the degree or depth of international socialization, that is “*the extent to which an international norm has been transposed into a state’s domestic political institutions and culture*”, Schimmelfenig proposes a categorization taking its starting point in internationalization as the development of an internal sanctioning system.¹³⁵ *Intrapersonal* sanctioning¹³⁶ is regarded as the highest level of internationalization. An intermediate level of sanctioning is realised by effective *intrasocietal*

¹³⁴ *Ibid.*, pp. 9-10.

¹³⁵ *Ibid.*, p. 10.

¹³⁶ Meaning that it is psychologically painful to violate an established norm and that norms are taken for granted and followed because there is no other viable way of doing things. *Ibid.*

sanctioning¹³⁷. International socialization is considered less successful if *international* sanctioning¹³⁸ is required to ensure compliance with international norms. The outcome of the internationalization process concerning judicial protection of individual rights in Russia will be further discussed and analyzed in Parts III and IV.

3.2.3.4 Conclusion

Changes in the surface level of law must be supplemented by for example educational projects and support structures in order to obtain changes in the legal culture at large. It should be complemented by support for the vibrant support structure that enables individual legal activism, since individual legal activism in its turn generates practical experience both for the legal élite and the population at large. Focusing on economic development and elections *per se* is not enough in trying to establish constitutionalism and democracy. Promotion of democracy in the former Soviet Union and the Balkan states, which are not likely to be offered EU or NATO membership in the near future, has not been as effective as in, for example, Central Europe. Focus has been on economic reform, holding elections (elections that have received criticism from the international community), and a strong leader in order to ensure stability. Civil society and other domestic democratic forces have not been given sufficient assistance.¹³⁹ It could therefore be argued that the bottom-up approach to democracy and rule of law should be reinforced. This approach requires that functioning institutions be established, in order to generate a positive result. Besides strengthening legal institutions, stimulating individual legal activism is one way to go. This in combination with external sanction mechanisms, such as the ECtHR in Strasbourg, could also make it an efficient way to manifest, disseminate, and facilitate the functioning of liberal values in everyday life in post-Socialist societies. It could also be a way to establish a link between the societal and institutional levels of the political and legal system.

¹³⁷ On this level, international norms are frequently challenged by domestic actors but effective domestic sanctioning mechanisms such as courts, elections, and the mass media can prevent challenges from turning into actual violations. *Ibid.*, p. 11.

¹³⁸ Intervention by international actors, alone or together with norm-supporting domestic actors, in domestic affairs. *Ibid.*

¹³⁹ Smith, "Western Actors and the Promotion of Democracy", p. 57.

3.2.4 Conclusion

The aim of this Chapter has been to describe and discuss legal reforms in post-Socialist societies concerning changing concepts of rights. Socialist, totalitarian, and liberal law all fall within Tuori's definition of modern law, which is characterized by the aim of achieving societal changes through written law. If constitutionalism is chosen, then international socialization, adequate support structures and educational reforms should overplay the impact of legal culture. That follows from Tuori's argument that it is easier to achieve changes in the surface level of law and the legal culture when we are concerned with modern law. This is explained by, e.g., a tradition of working with written law, the existence of legal doctrine, different legal methods, in contrast to traditional law, where law consists of accumulated customs and traditions.

Constitutions in both the pre-Communist and Communist period were elite projects aiming at modernization and reform. So are the post-Communist constitutions. These projects all resulted in changes in the surface level of law. The Communist projects did have an (negative) effect on the legal culture and legal consciousness of its citizens in the sense that trust in the legal systems is low. However, trust in legislative assemblies and political parties tends to be even lower. Could it also be argued that it has had an effect on the deep structure of law or, perhaps, that it is an effect of the same? Tuori describes the deep structure in terms of Braudel's *la longue durée*. That could mean that a Byzantine heritage and the fact of belonging to the sphere of Roman law could be used to illustrate the deep structure in different societies. However, this is not necessarily equivalent to the deep structure determining legal development in modern times in a specific society.¹⁴⁰ Thus, the level of deep structure of law appears to be more of a category with explanatory ambitions than an analytical tool for describing difficulties in and outcomes of post-Socialist legal transition.

¹⁴⁰ And this does not seem to be Tuori's intention either. Tuori underlines the constant interaction between the various levels of law. He is not deterministic in his approach to modern law as a historical type of law, since the character of modern law is described as a positivistic type of law that aims to initiate reforms from above. Sadurski's point that we should be wary of "explanatory determinism" when it comes explaining the existence of abstract review in Central and Eastern Europe seems valid also in this context. His point being that usual explanations "*may be better characterized as justifications for the maintenance of that particular system. They can therefore be seen more as legitimating the status quo than analyzing it dispassionately.*" Wojciech Sadurski, "Legitimacy and Reasons of Constitutional Review After Communism", in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, (163-187), p. 173.

The greatest *similarities* between Socialist and post-Socialist law are that law is still being used as a symbol. Moreover, it is an important part of political rhetoric at the same time as the protection of individual rights and freedoms is weak, especially so in the former Soviet Union and South-Eastern Europe. The greatest *differences* between Socialist and post-Socialist law are the stipulation of civil and political rights in constitutions, the establishment of constitutional courts¹⁴¹, the presence of international and local NGOs, and the possibility for external actors such as the ECtHR to sanction its judicially binding decisions. Taken together, this also enables individual legal activism. Although changes at the surface level of law can be the result of pragmatic, instrumental, and short-sighted considerations, the effect over time might be otherwise if conditions for individual legal activism exist and the process of international socialization continues. In this context, individual legal activism can function as the link between Tuori's different levels of law.

¹⁴¹ Except for the former Yugoslavia, in which constitutional courts were created in 1963 both on the federal and republican levels. Herbert Küpper, "Slovenia and its Law: A Post-Communist Success Story?", in *Consolidating Legal Reform in Central and Eastern Europe*, eds. Fredrik Sterzel and Anders Fogelklou, Uppsala, IUSTUS, 2003, (287-320).

4. Russia – An Introduction

The purpose of this Chapter is to provide the necessary background for further analysis in Part III. We will start by providing an overview of Russian legal history, focusing on the judicial system, constitutional and administrative law. Thereafter, the break-up of the Soviet Union and its influence on the subsequent Russian transformation will be touched upon. The Russian federal structure will be briefly explained. Special focus will be placed on the bill of rights, Russian legal doctrine, the Russian court system, and Russia's membership of the CoE. In addition, civil society in general, and the importance of the dissident human rights movement for post-Soviet legal reform will be discussed. The aim is to give a background sufficient to understand the problems and peculiarities of the contemporary Russian system.

4.1 Russian Legal History – A Short Background

4.1.1 Imperial Russia

Until 1775, adjudication in Russia was conducted by administrators and not by judges. The system of courts that was established in 1775 allowed for the free estates, i.e. gentry, merchants, and state peasants, to have their own structures of courts. The serfs were denied direct access to these courts - their justice was received through the gentry. The courts were not independent in relation to political authorities, including the governor, the Senate and the Tsar. In addition, "*the typical judge was uneducated in law, depended on his clerks to explain cases and accepted bribes.*"¹⁴² The courts did, at this time, apply an inquisitorial procedure. There were no oral hearings. The court relied on written documents prepared by the police or other administrators. There were very few lawyers available, since lawyers were considered to represent a potential threat to the political power.¹⁴³

¹⁴² Peter H. Solomon Jr., "Courts and their Reform in Russian History", in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997, (3-20), p. 6.

¹⁴³ *Ibid.*, pp. 6-7.

In 1864 a judicial reform was launched following the emancipation of the serfs in 1861. This was a time in which several reforms took place, all however more or less related to the Emancipation. For example, the gentry recognised that the protection of their rights required strong law and courts. There was also a relatively broad consensus that Russia's legal system was old and backward. It was in this context that a small group of enlightened jurists could promote reform.¹⁴⁴ As a result, a new hierarchy of courts was established. The courts were now to be open for all, including the serfs. Judges were awarded life tenure and the courts were to be separate from the executive. However, the independence of the courts was hardly obtained. Additionally, two new courts were established: peace courts and *volost* courts. The latter courts applied customary law.¹⁴⁵ Common for both these courts was the fact that they were accessible to ordinary people, they were relatively inexpensive, and they did not rely solely on written documentation. They dealt mostly with petty disputes. The 1864 judicial reform also included reforms of court procedure. The procedure came to be a mixture of inquisitorial and adversarial methods. Trial by jury was established.¹⁴⁶ The hearing was public and oral arguments could be heard. Taken together, this increased the need for lawyers.¹⁴⁷

Although the intention of the reform was not to challenge the powers of the Tsar, this to some extent was the result. Therefore, the powers of ordinary courts were limited by removing political offences from their jurisdiction. In addition, adjudicatory powers of administrative officials were expanded at the expense of the justices of peace courts. The political control of the judiciary was further strengthened by a law from 1885 empowering the Ministry of Justice to issue instructions concerning both decided and future cases. The law also made it easier to remove or transfer a judge. Still, the judicial reform of 1864 has been considered the most successful of the reforms that were initiated during the 1860s.¹⁴⁸

¹⁴⁴ *Ibid.*, pp. 7-8.

¹⁴⁵ On the specifics of *volost* courts, see Jane Burbank, "Legal Culture, Citizenship, and Peasant Jurisprudence: Perspectives from the Early Twentieth Century", in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997, (82-106).

¹⁴⁶ Girish N. Bhat, "The Consensual Dimension of Late Imperial Russian Criminal Procedure: The Example of Trial by Jury", in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997, (61-81).

¹⁴⁷ Solomon, "Courts and their Reform in Russian History", p. 7.

¹⁴⁸ *Ibid.*, p. 8.

A few words on the Procuracy - Peter the Great created the post of Procurator General in 1722. The functions of the Procuracy then were to supervise the activity of the Senate and to execute the orders of the Tsar. It was modelled on the Swedish Chancellor of Justice. Catherine II extended the supervision executed by the Procuracy to include the regional and local levels as well. The procurators served as the eyes of the Tsar, monitoring provincial governors and officials. Procuratorial supervision of the regional and local administration was eliminated in 1864. Subsequent to the reform, the responsibilities of the Procuracy were prosecution of criminal cases, supervision of legality in courts, and appealing civil and criminal court actions. Further, the responsibility of the Procuracy to combat crime was enhanced.¹⁴⁹

4.1.2 Soviet Russia

When the Bolsheviks came to power in 1917, they brought with them their view on the judiciary and lawyers. For example, the Procuracy was abolished in 1917 only to be re-established in 1922. The Procuracy was then invested with the power to supervise the legality of acts of administrative officials, agencies, and citizens.¹⁵⁰ The eyes of the Tsar had become the eyes of the State. The organization was centralized and hierarchical, as it remains today. During the Soviet time, Procurators supervised actions of administrative bodies in order to ensure their legality. However, the final decision as regards the legality of actions of administrative bodies lay with the Supreme Soviet. It is worth noticing that the Procuracy dealt only with the legality of administrative acts and actions, not with the merits of a case. The relationship between the Procuracy and the Communist Party of the Soviet Union (“CPSU”) was stronger than that between the courts and the CPSU, manifested by the fact that the Procuracy was entrusted with the responsibility to ensure ‘socialist legality’.¹⁵¹

¹⁴⁹ Gordon B. Smith, *Reforming the Russian Legal System*, Cambridge, Cambridge University Press, 1996, pp. 348-349.

¹⁵⁰ *Ibid.*, p. 350.

¹⁵¹ The concept was established in the 1930s. Oda defines it as “*strict observance of law* [as defined and stipulated by the Communist Party] *by state agencies, government officials and citizens.*” Hiroshi Oda, “The Emergence of *Pravovoe Gosudarstvo (Rechtstaat)* in Russia”, *Review of Central and East European Law*, Vol. 25, No. 3, 1999, (373-434), p. 409. The strongest argument of Lenin for the re-establishment of the Procuracy was the need of an agency that could ‘see that law is really uniformly interpreted throughout the Republic, notwithstanding differences in local conditions, and in spite of all local influences.’ The phenomenon could be compared, in regard to the enforcement of a reform initiated from above, to the role played by the Procuracy in contemporary Russia. Procurators are quite active in the process initiated by Putin, aiming at

Although law was accepted as a useful tool for governing, all laws were still considered *bourgeois* and hence a means for capitalists to oppress the working class. Laws and courts were therefore developed to better suit the new regime. Trial by jury was abandoned. In addition, the subordination of law to politics was further enhanced. Judges had to be approved by Party officials and their terms in office were limited, which made them more vulnerable to political influence. Financing of the courts came mainly from local budgets. It was also the rule rather than the exception that workers and representatives of the political élite were awarded special treatment to the detriment of others. The court system was supplemented by lay courts, for example comrade courts, rural lay courts, and *arbitrazh* panels for economic disputes. In conclusion, the instrumental use of law, the demand on judges to adhere to political commands, while maintaining a public face of independence severely hampered the judicial system and its functions. Another important feature of the Soviet system and its administration of justice, underlined by Solomon, was the preference for loyal cadres over experts. In addition, legal education for legal officials was not highly regarded up till the mid 1930s, when Stalin decided that it did matter. However, the plan to expand education for court officials was not realised until after WWII.¹⁵²

In the 1920s and 1930s, efforts were made to establish Soviet law and Soviet courts. However, there were also strong anti-law convictions in the Party. According to Solomon, these points of view contributed to enabling establishment and use of alternatives to the courts¹⁵³ and a simplification of legal procedures. Complaints could be filed with non-judicial bodies, while the police became one of the most important tools for Stalin's repression.¹⁵⁴

4.1.2.1 *Administrative Law in Soviet Russia*

Soviet jurists defined administrative law as “*a branch of Soviet Law representing the totality of legal norms which regulate social relation established in the process of state*

strengthening the Russian federal structure. They play a vital role in creating a ‘common legal space’ for the RF.

¹⁵² Solomon, “Courts and their Reform in Russian History”, pp. 11-12.

¹⁵³ For an elaborate description of these channels and analysis of the actual use of them, see Lisa Granik, “The Trials of the *Proletarka*: Sexual Harrassment Claims in the 1920s”, (131-167) and Golfo Alexopoulos, “Exposing Illegality and Oneself: Complaint and Risk in Stalin's Russia”, (168-189), in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997.

¹⁵⁴ Solomon, “Courts and their Reform in Russian History”, p. 12.

administration".¹⁵⁵ In Soviet administrative law, judicial review of administrative acts and decisions was the exception rather than the rule, although the academic debate on the pros and cons of such a system was vivid,¹⁵⁶ especially at the beginning of the 1920s. However, by the end of the decade the concept of administrative law was subject to harsh criticism. The concept was considered too *bourgeois*, and more suitable for an individualistic state than a socialist state. Checks and balances were not needed, since the individual in a socialist society did not have a value in itself. Therefore, guaranteeing individual rights was of secondary importance. The main arguments against judicial review of administrative actions were:

- since there was no contradiction between the worker and the government, there was no need for an independent check on the latter, and
- since the socialist state emphasized collectivism rather than individualism, there was no need to protect the rights of the individual against the state.¹⁵⁷

An informal and non-judicial approach was the principal mechanism used in order to review possible abuse of state authority in the Soviet Union.¹⁵⁸ In conclusion, between the late 1920s and the 1930s the term administrative law almost disappeared, both as a research topic and as a subject of training for law students, although administrative law as a concept experienced a revival in the late 1930s. However, administrative procedure was not given the same attention. Administrative procedure first became recognized as a separate area of consideration in the late 1950s.¹⁵⁹ A Soviet legal dictionary from 1956 stated that in the USSR administrative justice did not exist.¹⁶⁰ It was not until the 1970s that the concept of administrative justice again gained wider acceptance among legal scholars. According to Donald D. Barry, the concept of administrative justice was controversial and therefore was not often used by legal scholars. Still, references to judicial review of administrative actions increased in the 1970s. Barry sees this as an intentional attempt to avoid the term administrative justice in order to be

¹⁵⁵ Translated and quoted in Barry, "Administrative Justice and Judicial Review in Soviet Administrative Law", p. 241.

¹⁵⁶ *Ibid.*, p. 242.

¹⁵⁷ *Ibid.*, p. 245.

¹⁵⁸ *Ibid.*

¹⁵⁹ On the scope of administrative procedure see Barry, "The Development of Soviet Administrative Procedure", pp. 2, 13. There was no consensus in Soviet academia as to whether the concept should include both administrative decisions in individual cases and the adoption of general rules.

¹⁶⁰ Barry, "Administrative Justice and Judicial Review", p. 243.

able to debate the pros and cons of increased judicial review.¹⁶¹ According to a Russian legal dictionary from 1999, administrative justice refers to the delineation and regulation of state power and its implementation.

When discussing judicial review of administrative acts, we also have to touch briefly upon the concept of the administrative process in Soviet law. There has been one wide and one narrow conception of the term, according to Barry. According to the wide definition, the administrative process includes the totality of procedural rules by which administrative organs carry out their tasks. According to the narrow definition, only the procedure for applying measures of administrative compulsion is included in the concept of the administrative process.¹⁶² Advocates of the latter saw no need for a general judicial review, while advocates for the wider definition recommended codification of detailed administrative procedural legislation and a general possibility for judicial review. Legal scholars supporting the wider definition referred not only to the law-preserving activities of the administration (the narrow definition) but they also included the state's law and right-providing functions.

During the Soviet period, administrative law disputes as a rule were not subject to court review, as stated above. Therefore, Article 231 RSFSR Civil Procedural Code, and other rules that allowed for judicial review in specific cases, were considered an exception to the general rule. Various legal statutes contained legal provisions stipulating judicial review.¹⁶³ Judicial review was in some cases mandatory, while in others it was the option of the plaintiff. Both the substantive nature of the different decisions which could be reviewed and the wide variety of procedures for judicial review were subject to criticism by legal scholars in the 1970s. In particular, more uniformity as to the judicial review procedure was recommended.¹⁶⁴

As a result of the reforms initiated after Stalin's death, individuals could initiate administrative and judicial review of the legality of administrative actions by invoking *the USSR Edict on the Procedure for Considering Proposals, Applications, and*

¹⁶¹ *Ibid.*, p. 246.

¹⁶² *Ibid.*, p. 247.

¹⁶³ For a list of cases in which “a judicial assessment of the legality and validity of individual decisions of the state administration which involve the subject rights of citizens”, see *Ibid.*, p. 248 and footnotes 41 and 42. Reviewable administrative acts included, for example, complaints about errors in electoral rolls, taxes, and housing questions.

¹⁶⁴ *Ibid.*, p. 250.

Appeals of Citizens from 1968.¹⁶⁵ Administrative review by the level directly above that whose decisions were under question constituted the general rule, with judicial review (by a people's court) the exception to the general rule.¹⁶⁶ The Edict was neither frequently used by procurators nor highly regarded by Soviet citizens. However, Soviet jurists, aware of its ineffectiveness, praised the specific procedural provisions of the Edict.¹⁶⁷ Enactment of the Edict was followed by frequent discussions of the subject on both the academic and the political level. The 1977 USSR Constitution stipulated the right to file a complaint before a court of law against actions by state bodies and state officials, according to the procedure established by law.¹⁶⁸ However, the laws necessary to realise this right existed only for a limited number of administrative acts, for example mistakes in the calculation of taxes and fines, and mistakes in voters' lists.¹⁶⁹

In June 1987, *the Law on the Procedure of Appeal to the Courts against Illegal Actions of Officials Impinging Upon Citizens' Rights* was passed. According to the law, only illegal acts of individual officials could be appealed. Thus, collective decisions could not be appealed, which weakened its impact since collegial action was the norm in the Soviet Union.¹⁷⁰ Both the edict from 1968 and the 1987 law were applicable simultaneously, causing difficulty and confusion. Especially so if an individual initiated a claim in accordance with the edict from 1968, since the administrative review according to the procedure established in the edict would result in a collective decision.¹⁷¹

In 1989 a new law was adopted: *The Law of the USSR on the Procedure for Appealing to the Courts the Unlawful Actions of Organs of State Administration and Officials that infringe*

¹⁶⁵ Jane McGregor, "Mechanisms for Redress of Citizens' Grievances in Russia", in *Constitutional Reform and International Law in Central and Eastern Europe*, eds. Rein Mullerson, Malgosia Fitzmaurice, and Mads Andenas, The Hague, Kluwer Law International, 1998, p. 123.

¹⁶⁶ For example, labour and housing law. See Barry, "The Development of Soviet Administrative Procedure", foot note 60.

¹⁶⁷ For example regulations on open hearings, how to collect materials constituting the basis for the decision, and so on. Barry, "The Development of Soviet Administrative Procedure", pp. 14-17.

¹⁶⁸ Article 58: "*Action of officials performed in violation of the law, exceeding their authority, impinging on the rights of citizens may be appealed to a court in a manner prescribed by law*". Barry, "Administrative Justice and Judicial Review", p. 257.

¹⁶⁹ Henn-Jûri Uibopuu, "The Individual in Soviet Administrative Procedure", in *Soviet Law after Stalin*, Part III, eds. Donald. D. Barry, Ferdinand Feldbrugge, George Ginsburgs and Peter B. Maggs, Leyden, Sijthoff & Noordhoff, 1979, p. 29.

¹⁷⁰ Jane Henderson, "Improvements in Russian Courts: Citizens Appeals and Judges", *European Public Law*, Vol. 2, Issue 4, 1996, (508-513), p. 508.

¹⁷¹ McGregor, "Mechanisms for Redress of Citizens' Grievances in Russia", p. 125.

the Rights of Citizens. According to this law, appeals should be issued to the administrative hierarchy before the case could be taken to court. According to the Russian Constitutional Court Judge Tumanov, up till 1994 1500 to 2000 cases were considered per year, which is quite a small figure in relation to the number of Russian citizens.¹⁷² The obligation to appeal to the hierarchy of state-administration before being allowed to initiate proceedings before a court of law might have contributed to this.

In conclusion, as stated above Soviet law did not accept individual rights and freedoms. Law was mainly a tool to exercise power and to control Soviet citizens. It was repressive and selectively used. The situation was only partly altered by the legal reforms initiated by Khrushchev and Brezhnev.¹⁷³ Although post-Stalin Soviet Russia did move towards becoming less totalitarian, the Soviet legal system was never de-politicised, even if Gorbachev's coming to power set a spark to legal reform. Taken together, all these features of Soviet law, its legal culture often described as nihilistic¹⁷⁴, and its practice, have had a heavy impact on how Russians perceive their legal order today. This experience constitutes a giant challenge for contemporary Russia to overcome when conducting its legal reforms.

4.2 The Soviet Union – Characteristics and Dissolution

The Soviet system lacked any institutionalized separation of powers. During the reign of Stalin, the system was totalitarian. However, the post-Stalin Soviet Union did have some degree of informal pluralism, which is why it has been described as authoritarian rather than totalitarian. The Soviet Union was formally a federation consisting of fifteen republics. The official set of institutions was a number of (nominally) political decision-making bodies, i.e. the Soviets. The Soviets existed from the local to the federal level. At the top stood the Supreme Soviet, which was formally responsible for the policy-making of the whole of the Soviet Union. A vast bureaucratic body, ranging from the federal to the local level, and overseen by the Supreme Soviet, was established in order to enforce the command

¹⁷² *Ibid.*, p. 126.

¹⁷³ Anders Fogelklou, "På spaning efter rättsstaten: Det nya rättstänkandet i Sovjetunionen", *Retfaerd*, nr. 52, 13, årgång 1990, p. 5.

¹⁷⁴ *Ibid.*, pp. 5-6. However, public opinion surveys that draw a distinction between rule of law as principles on the one hand and actions on the other, show that Russians are not necessarily nihilistic concerning rule of law as a principle.

economy. Formally, the republics and the local bodies were ascribed a certain degree of autonomy. However, the centralized and authoritarian Soviet system limited the exercise of autonomy. The true source of power was the Communist Party, which controlled almost all political, legal, and civil service positions. Influential members of the Party were also members of the Supreme Soviet. A parallel command and control system was established. The Central Committee of the Party constituted the top of the federal structure of the Party. And the Central Committee in its turn was controlled by the Politburo, in which all the political decisions *de facto* were taken. The national élite was made up of members that had been appointed to their position, after approval from the Politburo and Secretariat of the Central Committee.¹⁷⁵

In the USSR, state administration was used by the Communist Party to enforce the state's policy, especially its economic policy. The administration was completely subordinated to the Party. The Party also controlled the recruiting of new civil servants. There was no independent recruitment procedure, neither did the civil servants have any labor laws to protect them. They could be fired at any time, totally at the discretion of the Communist Party.¹⁷⁶

The political and economic system of the Soviet System led to widespread corruption, while the unofficial political and economic connections grew constantly. In the process of privatization at the beginning of the 1990s, these ties came to play an important role. It enabled state-owned resources that were privatized to end up in the hands of the Soviet élite. In order to increase their wealth, they used political connections. Thus corruption and tax evasion became the order of the day.¹⁷⁷ This is how the stage for the new Russian State is set, resulting in a heritage of inequality, inefficiency, illegality, and poverty.¹⁷⁸

The fall of the Soviet Union made possible the Russian state-building process. The establishment of the new Russian state and the fall of the Soviet Union are, as we shall see, deeply intertwined. There are several explanations for the dissolution of the Soviet Union, for example the centrifugality of powers, a disastrous

¹⁷⁵ Amy Caiazza, *Mothers & Soldiers. Gender, Citizenship and Civil Society in Contemporary Russia*, New York, Routledge, 2002, pp. 20-22. See also, *Public Policy and Administration in the Soviet Union*, ed. Gordon B. Smith, New York, Praeger Publishers, 1980.

¹⁷⁶ Michel Lesage, "The Crisis of Public Administration in Russia", in *Administrative Transformation in Central and Eastern Europe. Towards Public Sector Reform in Post-Communist Societies*, ed. Joachim Jens Hesse, Oxford, Blackwell Publishers, 1993, p. 121.

¹⁷⁷ See, for example, Paul Klebnikov, *Godfather of the Kremlin. The Decline of Russia in the Age of Gangster Capitalism*, New York, Harcourt Inc., 2000.

¹⁷⁸ Caiazza, *Mothers & Soldiers*, p. 22.

economy, the inefficiency of the system, and declining super-power status.¹⁷⁹ Although several of the problems were inherent in the system and had been felt for some time, the centrifugality of powers made itself even more strongly felt through Mikhail Gorbachev's *glasnost* policies. At the end of the 1980s, the process that has been called the "parade of sovereignties" commenced.¹⁸⁰ This process created a situation - a result of the declarations of sovereignty - of the "war of laws", as Russia and other Union republics failed to recognize the central power's legislation. The central power responded with a declaration of invalidity of the republics' right to acknowledge the Union's legislation. The Baltic States moved to the forefront of the independence movement, but the most important factor in the dissolution of the Soviet Union was the Russian Republic itself.¹⁸¹ In addition to the power struggle between the center and the republics, the period between 1990-1991 is characterized by a power struggle between Gorbachev and Boris Yeltsin.¹⁸² This, among other things, contributed to raising the autonomous status of the republics of the Russian Federation. Both Yeltsin and Gorbachev were willing to grant them increased autonomy, trading autonomy for their support. In this way, they could be used as game pieces in the power struggle.¹⁸³

The attempted *coup d'état* in August 1991, intended to hinder a new Union treaty¹⁸⁴, resulted in a significant weakening of the Soviet Union. On 8th December 1991 the Presidents of Russia, Ukraine, and Belarus proclaimed the dissolution of the Soviet Union and founded the Commonwealth of Independent

¹⁷⁹ Geoffrey Hosking, *Russia and the Russians. A History*, Cambridge, Harvard University Press, 2003, p. 569.

¹⁸⁰ The first out with its declaration of sovereignty was Estonia in 1988. The Russian Republic's declaration of sovereignty was the seventh. Jeffrey Kahn, *Federalism, Democratization and the Rule of Law in Russia*, New York, Oxford University Press, 2002, pp. 103-105.

¹⁸¹ Hosking, *Russia and the Russians*, p. 586.

¹⁸² In October 1987 Yeltsin was dismissed from his post as party secretary in Moscow after having openly criticised Gorbachev for being too slow in his reforms. He later resigned from the Politburo. Yeltsin was elected president of Russia in June 1991. *Ibid.*

¹⁸³ Yeltsin encouraged the autonomous republics to take as much independence as they could handle, while Gorbachev ranked the autonomous republics with the Soviet Union's republics in a new proposal for the Union treaty. Kahn, *Federalism, Democratization and the Rule of Law in Russia*, p. 95.

¹⁸⁴ The proposed Union treaty was to delegate most powers to the republics, while the Union was to be in charge of military affairs, foreign policy and the currency. An outline of the treaty was approved by a referendum held throughout the Soviet Union. Hosking, *Russia and the Russians*, p. 588. The turnout was 80 percent, while 76.4 percent were in favour of keeping the Union but to reform it. Robert Service, *Russia: Experiment with a People*, Cambridge, Harvard University Press, 2003, pp. 96-97.

States ("CIS").¹⁸⁵ Actually, according to the 1977 USSR Constitution, secession of individual republics was allowed. However, the necessary mechanisms were missing. That was fixed by Gorbachev, who in April 1990, introduced a Law on Secession.¹⁸⁶ However, Yeltsin and his Ukrainian and Belarussian colleagues had no intention of considering this procedure. The Minsk Agreement of 8th December 1991 did not lead to the immediate *de facto* and *de jure* dissolution of the Soviet Union, as the three Eastern Slavic republics did not have the mandate unilaterally to terminate the Union. In addition, a number of republics continued as members of the Union after the 8th of December. The Union was finally dissolved on December 31, 1991 when its institutions and representatives ceased to be. At this point, the remaining republics of the Union except for Estonia, Latvia, Lithuania, and Georgia, had entered into the Minsk Agreement.¹⁸⁷ It is interesting to note that there was no popular support for the dissolution of the Soviet Union, nor was it conducted with respect for Soviet law. In many aspects it was a *coup d'état* directed by Yeltsin.¹⁸⁸

In conclusion, at least three fundamental characteristics of the Soviet system still have a relatively large impact on the functioning of the contemporary Russian state: the merging of political and economic power, a centralized but weak political system, and a federal system containing several national identities.¹⁸⁹ To this should be added a poorly functioning legal system.

¹⁸⁵ An English version of the Minsk Treaty can be found in Ferdinand Joseph Maria Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, Dordrecht, Nijhoff Publishers, 1993, p. 379. In the preamble to the Minsk Agreement these three eastern Slavic republics are described as the Soviet Union's founders, which is not entirely correct. The Soviet Union was founded by a Union Treaty from 1922. The Union Treaty also included the former Trans-Caucasian republic, from which were created the states of Georgia, Armenia and Azerbaijan. These did not participate in the meeting near Minsk. Neither did Kazakhstan. Consequently, the Minsk Agreement, being unilateral in nature, did not dissolve the Soviet Union in a legally proper manner. In addition, the Minsk Agreement was not ratified by the RSFSR's Congress of People's Deputies - which had the power to do so according to the constitution then valid - but rather by the RSFSR's Supreme Soviet. Anders Fogelklou and Anna Jonsson, "Russia – a fragile legal order", in *Consolidating Legal Reform in Central- and Eastern Europe*, eds. Anders Fogelklou and Fredrik Sterzel, Uppsala, IUSTUS, 2003, (233-268), p. 234.

¹⁸⁶ Service, *Russia: Experiment with a People*, p. 96.

¹⁸⁷ See the Alma Ata-Declaration, signed by Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine on December 21, 1991.

¹⁸⁸ When it became clear to Gorbachev that the Soviet Union would be dissolved due to the actions taken in Belovezha, Gorbachev proposed to Yeltsin that he himself would step down so that Yeltsin could become the Union president. Yeltsin utterly refused. Service, *Russia: Experiment with a People*, p. 98.

¹⁸⁹ Caiazza, *Mothers & Soldiers*, p. 20.

4.3 The New Russian State

The Russian Federation's origins began with the Declaration of the State of Sovereignty of Russia. This was proclaimed on June 12, 1990, achieving significance in public international law in December 1991 with the dissolution of the Soviet Union, which then ceased to be a public international law subject. At the same time, its Republics became the Union's lawful successors. Primarily, this meant the Russian Federation, and Russia obtained the place of the Soviet Union in the United Nations Security Council. Following dissolution of the Soviet Union, Russia changed its name from the Russian Soviet Federated Socialist Republic ("RSFSR") to the Russian Federation – Russia.¹⁹⁰ The international and multilateral treaties signed by the Soviet Union have, in general, been transferred to Russia and the other successor states.

From December 1991 to December 1993, the 1978 RSFSR Constitution with amendments was the constitution of the new Russian State. According to the old constitution, the Supreme Soviet had the supreme power and it would not take long before the president, Boris Yeltsin, and the speaker of the Parliament, Ruslan Khasbulatov, were engaged in a fierce power struggle. Initially, President Yeltsin obtained wide powers to conduct the economic reform that was considered necessary to achieve systemic change. However, as the reform caused severe poverty amongst the population, in combination with Yeltsin trying to centralise and consolidate the powers of the president, the tension between the Supreme Soviet and the president increased. In late September 1993, Yeltsin declared that he had issued a decree according to which the Supreme Soviet was to be dissolved and that a new parliamentary assembly was to be elected in mid-December. That election would, in its turn, be followed by presidential elections.¹⁹¹ On the same day as the election of the parliamentary assembly, a referendum for adoption of the new constitution was to take place. Preparations of the draft met with several difficulties. One of the main issues of controversy of the new constitution¹⁹², was the delineation of powers between the federal centre and the regions, on the one

¹⁹⁰ According to Article 1 (2) CRF, Russia and the Russian Federation are equivalent.

¹⁹¹ Hosking, *Russia and the Russians*, p. 592.

¹⁹² On the process of drafting the constitution, see Viktor Sheinis, "The Constitution", in *Between Dictatorship and Democracy. Russian Post-Communist Political Reform*, eds. Michael McFaul, Nikolai Petrov and Andrei Ryabov, Washington D.C., Carnegie Endowment for International Peace, 2004, (56-82), pp. 57-65.

hand, and the power struggle between the president and the parliament on the other.¹⁹³

The popular referendum on the new constitution, held on December 12, 1993, was in itself controversial and the results have been challenged.¹⁹⁴ In eight of the subjects of the Russian Federation, less than fifty percent supported the new constitution and in six subjects, one of them Tatarstan, the voting participation was less than fifty percent. Chechnya boycotted the popular referendum. All in all, some fifteen subjects of the federation did not approve the new constitution.¹⁹⁵ The political and legal effects of this, which were marked during the entirety of the 1990s, should not be underestimated. The majority of the republics in the Russian Federation did not recognize the federal law as the highest existing legal norm.¹⁹⁶ This has had implications for the working and efficiency of the federal system in general and the legal system in particular, as will be further elaborated in the following section.

4.3.1 The Federal Structure and Delineation of Powers

In this section the relationship and delineation of powers between the federal centre and the federal subjects will be explained. In the CRF the terms “subjects of the Russian Federation” and “the Russian Federation” are used to describe the two state levels of the Russian Federation. Vertical delimitation of powers in a federation can be accomplished in at least two ways: either the central power has the authority to adopt laws regarding matters explicitly stipulated in the constitution, or the centre has legislative powers on all matters not explicitly referred to the federal subjects.¹⁹⁷ The distinguishing factor is which level benefits from residual power; the central or the peripheral. The delineation of powers between the federal subjects and the federal centre in Russia is stipulated in

¹⁹³ *Ibid.*, p. 58.

¹⁹⁴ Fifty percent of the eligible voters were required to cast their votes in order for the referendum to be valid. The Central Election Commission issued a statement saying that 55 % of the eligible voters had participated in the referendum and that the proposal had been accepted by a simple majority. On March 3, 1994 *Izvestiya* published an analysis which maintained that more than 9 million voting slips had been falsified and that, consequently, on that basis only 49 million had participated in the election, which means that less than fifty percent had voted. Fogelklou and Jonsson, “Russia – A Fragile Legal System”, p 241.

¹⁹⁵ *Russia after the Cold War*, eds. Mike Bower and Cameron Ross, Longman, London, 2000, p. 91 and Service, *Russia: Experiment with a People*, pp. 105-106.

¹⁹⁶ Kahn, *Federalism, Democratization and the Rule of Law in Russia*, p. 174.

¹⁹⁷ Sajó, *Limiting Government*, p. 95.

Articles 71-73 CRF and in federal laws. The exclusive competence of the Russian Federation includes areas such as¹⁹⁸:

- adoption and amendment of the CRF and the adoption of federal laws,
- organization of the territory of the Russian Federation,
- regulation and protection of human and civil rights and freedoms including the rights of national minorities,
- regulation of Russian citizenship,
- establishment of a system of federal bodies of legislative, executive and judicial authority, including regulating their organization and work, setting up federal bodies of state authority,
- federal state property and its management,
- establishment of legal principles for a single market,
- the federal budget
- foreign policy and international relations, international treaties, issues of war and peace,
- external economic relations,
- defence and security,
- organization of courts, the procurators office, criminal, criminal-procedural and criminal-executive legislation, amnesties and pardons, civil, civil-procedural, and *arbitrazh*-procedural legislation, legal regulation of intellectual property,
- federal conflict of laws, and
- the federal government and civil service.

Article 72 CRF deals with the joint jurisdiction between federal subjects and the federal centre, enabling both federal and regional legislation on one specific issue. In areas of joint jurisdiction, federal law precedes regional law.¹⁹⁹ This means that

¹⁹⁸ See, Article 71 CRF.

¹⁹⁹ M.B. Baglai, *Konstitutsionnoye Pravo Rossiiskoy Federatsii*, Moscow, Norma, 2005, pp. 342-343. As a comparison: The US Constitution recognises only legislative powers for the federal centre on enumerated issues and when legislation is necessary for the execution of the enumerated powers. The list of issues that should be dealt with on the federal level has been considerably expanded (by case-law) in the USA due to a wide interpretation of what is referable to inter-state commerce. In Germany, according to the German Basic Law, if the federal centre has not passed a law on an issue that falls within the area of shared jurisdiction, then the member states have a right to do so. The federal centre has the right to enact laws that fall under joint jurisdiction if the

the federal centre decides the general and basic principles that are to guideline activities within the fields mentioned above. However, the federal subjects have been more active than the centre in the process of adopting laws that fall within the limits of Article 72 CFR. For example, the difficulties experienced by the President with the Duma during the 1990s when trying to adopt a new land code resulted in a situation where several of the federal subjects adopted their own laws on ownership of land, before the Duma adopted a federal law.²⁰⁰ The Duma has now adopted a land code. This is just one example of the difficulties arising out of Russia's weakly unified legal sphere.

Areas of joint jurisdiction include *inter alia*²⁰¹:

- Organisation and functioning of state bodies, for example ensuring that regional constitutions and laws are in congruence with the federal constitution.
- Protection of individual rights and freedom including social, cultural and minority rights.
- Protection of the environment, use of natural resources.
- Administrative law issues, as well as administration of the judiciary.

The latter is of special concern to this dissertation. Administrative law, administrative procedural law, labour-, family-, and housing law all fall under joint jurisdiction. Which is also the case for questions concerning the administration and personnel of the judiciary and law enforcement agencies, the notary and bar associations, as will be further developed below.²⁰² A functioning and effective state administration and judiciary is vital for establishing and upholding a stable state. Problems experienced in Russia in this regard are significant, especially within the state administration.

matter can be better handled at the central level, respecting the subsidiarity principle. Further, the federal centre does not have the right to take decisions on issues explicitly reserved for the member states or on issues that are not mentioned in the Basic Law. Sajó, *Limiting Government*, p. 96.

²⁰⁰ Brynulf Risnes, "Relations between Moscow and North Western Russia – The Legal Aspect", in *Centre-Periphery Relations in Russia. The case of the North-western Regions*, eds. Geir Honneland and Helge Blakkisrud, Aldershot, Ashgate, 2001, p. 42. See also Matthew Hyde, "Putin's Federal Reforms and their Implications for Presidential Power in Russia", *Europe-Asia Studies*, Vol. 53, No. 5, 2001, p. 731. One example is Samara Oblast. In a regional law from 1998, questions dealing with how to enable land transactions, for example evaluation of the object for transaction, were stipulated.

²⁰¹ For an exhaustive list, see Article 72 (1) CRF.

²⁰² On the judiciary, see Part I, 4.6, and on Bar associations see Part III.

There are no exclusive powers for the federal subjects stipulated in the CRF. In the process of adopting the CRF, in 1993, this was seen as a means to restrict the powers of the regions.²⁰³ However, the wording of Article 73 CRF deserves attention. According to this article “*Outside the Russian Federation’s scope of authority and the powers of the Russian Federation arising from the joint terms of reference of the Russian Federation and the members of the Russian Federation, the members of the Russian Federation shall enjoy full state power.*”²⁰⁴ Thus, federal subjects enjoy residual powers, although this conclusion is not as clear cut as it seems since the powers stipulated in Article 71 and 72 CRF are rather vaguely defined.

According to the CRF, the subjects of the federation are to be equal in their relationship to the federal centre.²⁰⁵ However, the Russian Federation has a *constitutionally fixed asymmetry*²⁰⁶. This means that the republics have a higher status than the other federal subjects, as they have a president, their own constitution, and an official state language in addition to Russian.²⁰⁷ In addition, it can be said that the Russian Federation is an *extra-constitutionally negotiated asymmetrical federation*²⁰⁸. This means that the relationships between the federal centre and the individual federal subjects have been regulated in bilateral treaties and agreements.²⁰⁹

As mentioned above, most of the republics did not support the 1993 CRF. Mintimer Shaimiev, the President of Tatarstan, went so far as to prohibit his administration from working with the preparations for the referendum in

²⁰³ Kathryn Stoner-Weiss, “Central Weakness and Provincial Autonomy: Observations on the Devolution Process in Russia”, *Post-Soviet Affairs*, Vol. 15, January-March 1999, (87-104), p. 89.

²⁰⁴ Translated in Smith, *Reforming the Russian Legal System*, p. 259.

²⁰⁵ Article 5 (4) CRF. That relationship is regulated by Articles 71, 72 and 73 CRF, the federal treaty, and other treaties regarding the division of power between the federal centre and the federal subjects, see Article 11 (3) CRF. For a discussion on the asymmetric federalism of the Russian Federation see, for example, *Contemporary Russian Politics*, ed. Archie Brown, Oxford, Oxford University Press, 2001, pp. 369-414, and Brynjulf Risnes, “Relations Between Moscow and the Regions of Northwestern Russia – The Legal Aspect”, pp. 35-60.

²⁰⁶ Alfred Stepan, “Russian Federalism in a Comparative Perspective”, *Post-Soviet Affairs*, Vol. 16/2, (April-June 2000).

²⁰⁷ Article 5 (2) CRF.

²⁰⁸ Stepan, “Russian Federalism in a Comparative Perspective”.

²⁰⁹ By 1998, 47 bilateral treaties (*dogovory*) had been entered into between the federal center and several of the subjects of the federation. In addition to these were also bilateral agreements (*soglashenia*). In the treaties, it was established that the general principles would be guiding as to cooperation while in the agreements, cooperation to be achieved was more clearly defined. The treaties and the agreements were entered into between the executive power on the federal and regional level. Between 1998 and 2001 no new treaties or agreements were signed. See Kahn, *Federalism, Democratization and the Rule of Law in Russia*, p. 237.

December 1993.²¹⁰ The tough stance taken by the regional leaders as to how the federal system be defined²¹¹ and the weak political and economic situation of the federal centre resulted in the signing of several bilateral treaties. First out was Tatarstan, to be followed by Kabardino-Balkaria and Bashkortostan. Most of the bilateral treaties violated the 1993 CRF. Additionally, the bilateral treaties were not ratified by the legislative assemblies, in general not published, and hence their constitutionality never established.²¹² Finally, the Russian Federation may be viewed as an *anti-constitutionally asymmetrical federation*²¹³, meaning that a large number of regional laws were in conflict with the federal constitution.²¹⁴ In June 2000, the then Procurator-General gave the regions one month to put their legislation in conformity with the CRF and federal law.²¹⁵

Throughout the 1990s, regional leaders strengthened their positions and powers *vis á vis* the federal centre. As a result, the federal centre has been unable to implement its policy in the regions, tax collection has been severely hampered, and regional laws have been in violation of the CRF and federal laws. Hence, the position of the federal centre has been further weakened in parallel with regional leaders being able to consolidate their powers. Since coming to power, one of President Putin's primary priorities has been to strengthen the federal power and its institutions. As an attempt to correct the situation, in 2000 President Putin issued a decree establishing seven federal administrative districts – each district to be controlled by a presidential representative answering directly and only to the President.²¹⁶ The representatives are charged with several tasks, including providing the President with reports on national security in the regions and with reports on the effectiveness of law enforcement agencies and their personnel in the federal subjects. In addition, the Federation Council²¹⁷ has been reformed in order to decrease the extent to which the Council can be used to forward regional

²¹⁰ Service, *Russia: Experiment with a People*, p. 262.

²¹¹ Top down or bottom up. The latter was originally advocated by President Yeltsin.

²¹² Service, *Russia: Experiment with a People*, pp. 262-263.

²¹³ Stepan, "Russian Federalism in a Comparative Perspective".

²¹⁴ One fifth of the regional laws which in 2000 were registered with the Justice Department were in conflict with the federal constitution.

²¹⁵ Service, *Russia: Experiment with a People*, p. 273.

²¹⁶ Presidential Decree No. 849, 13 May, 2000. Published in *Rossiiskaya Gazeta* 16 May, 2000. The number of presidential representatives in the federal subjects was decreased. For an overview of presidential representatives under Yeltsin, see Hyde, "Putin's Federal Reforms and their Implications for Presidential Power in Russia", pp. 719-743.

²¹⁷ The upper house of the Federal Assembly of the Russian Federation with 178 members, who are representatives of the federal subjects. See, Article 95 (1) CRF.

and personal interests. According to the new law, representatives to the Federation Council are appointed by regional executives and approved by legislative bodies. Unlike their predecessor they are to work full time for the Federation Council.²¹⁸ Early on, amendments to *the 1999 Federal Law on the General Principles of the Organisation of Legislative (representative) and Executive Organs of State Power in the Subjects of the Russian Federation*²¹⁹ were planned. In July 2000, amendments were made to the law that gave the federal centre the right to take action against regional leaders if they refuse to correct regional laws that are in violation with the CRF.²²⁰

In conclusion, between 1993-2003 the Russian State has encountered several difficulties as to the state-building process. The power struggle between the federal centre and the federal subjects has weakened the federal state both economically and politically. The agenda to correct this situation, set in motion by Putin when coming to power, was partly inherited from Yeltsin, who did not have either the economic or political power to realize it. The weakness of the Russian State has had far-reaching effects on the social, economic, legal and political situation and security of the Russian population.

4.4 Russian Legal Doctrine

The purpose of this Section is to provide an overview of Russian legal doctrine within constitutional and administrative law as it is put forward by Russian legal scholars. The aim is not to exhaustively account for all views and perspectives that are available within Russian legal doctrine, rather it should be seen as an exemplification. It should be noted that this section focuses on the formal structure of Russian law and how it is pictured in Russian legal doctrine, i.e., law in books. Law in Russian society does not always reflect the principles put forward in Russian legal doctrine.

²¹⁸ Regional executive and legislative heads used to be *ex officio* members of the Federation Council. The reform to change this was not highly considered by the members of the Federation Council at that time and the bill was vetoed. After the bill entered into force, the President created a State Council. Leaders of the most influential federal subjects in terms of size and economic strength became members of the State Council. The State Council was supposed to be a consultative body under the direct control of the President. Hyde, "Putin's Federal Reforms and their Implications for Presidential Power in Russia", pp. 729-731.

²¹⁹ SZ, 1999, no. 42, item 5005. For the amendments made, see SZ 2000, no. 31, item 3205, (No. 106-FZ, 29 July, 2000).

²²⁰ Hyde, "Putin's Federal Reforms and their Implications for Presidential Power in Russia", p. 732.

4.4.1 Constitutional Law²²¹

One of constitutional law's most important tasks, according to Baglai, is to balance individual freedom and state power.²²² Thus, the starting point and foundation for Russian constitutional legal theory and constitutional law, is the individual and its well being. Baglai defines *the subject* of constitutional law as matters relating to the protection of individuals' rights and freedoms in relation to the state on the one hand, and state institutions and state power on the other (including state bureaucracy and misuse of power by civil servants).²²³ *The objects* of Russian constitutional law are²²⁴:

- The individual, both citizens and non-citizens, and both individually and collectively, for example political parties and public organizations.
- The people (*narod*).
- The State, including, e.g., the federal centre, federal subjects, legislative assemblies, the courts.

4.4.2 Russian Administrative Law

Russian legal doctrine divides Russian administrative legislative acts into two groups. The first of these is concerned with the structure and common rules of state government in general – including what executive organs to establish and how, their conditions and competences. The second group of legislative acts is concerned with the realization of state power by executive bodies and specific ministries, hence it is more specific to its content.²²⁵ In conclusion, State activity that falls under the definition of administrative law, i.e., *the subject* of administrative law, is divided into three categories²²⁶:

1. A general part, which includes all norms that are concerned with the establishing, foundation, and general functioning of the executive.
2. Specific parts, which are concerned with concrete state bodies, spheres, and branches of administrative law, and their activities.

²²¹ Traditionally the Russian term has been State and Law (*gosudarstva u prava*).

²²² Baglai, *Konstitutsionnoye Pravo Rossiskoi Federatsii*, p. 3. See also J.K. Krasnov, *Gosudarstvennoye Pravo Rossii*, Moscow, Yurist, 2002, p. 18. Krasnov uses constitutional- and state law as synonyms.

²²³ Baglai, *Konstitutsionnoye Pravo Rossiskoi Federatsii*, pp. 4, 7.

²²⁴ *Ibid.*, pp. 12-13.

²²⁵ H.M Kunin, *Administrativnoye Pravo Rossii*, Moscow, Yurist, 2004, p. 59.

²²⁶ *Ibid.*, pp. 59-60.

3. Special branches, including for example administrative procedure, customs regulations, law enforcement activities. This branch is sometimes considered a separate and special topic of administrative law, and sometimes it is included in the above categories.

*The objects of Russian administrative law are*²²⁷:

1. Physical persons, Russian citizens, foreigners, stateless individuals, civil servants and others employed by the state or bodies of local-self government.
2. Governmental and non-governmental organizations and legal persons.

4.4.3 Legal Sources in Russian Law

Russian legal sources may be both of written and non-written character and are made up of:²²⁸

- normative acts²²⁹,
- general principles of law,
- natural law,
- customary law²³⁰
- case law, and
- rules established in international law.

According to Baglai, Russian constitutional law sources are constituted by two fundamental categories:

- natural law, (meaning that all individuals are to be awarded rights and freedoms that attach to every human being from birth), and
- positive law.²³¹

The natural law approach to constitutional law was first laid down in the Declaration on Human Rights and Freedoms, adopted September 5, 1991. This approach was confirmed by Article 17 (2) in the 1993 CRF according to which human rights and freedoms are inalienable and attach to every person from birth.

²²⁷ *Ibid.*, p. 68.

²²⁸ Baglai, *Konstitutsionnoye Pravo Rossiskoi Federatsii*, p. 17. Legal doctrine is not a formal source of law in Russia. Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, p. 25.

²²⁹ Including statutes, normative acts by the executive, federal assembly, local self-government bodies, and various constitutional control organs. Krasnov, *Gosudarstvennyoe Pravo Rossii*, p. 45.

²³⁰ Especially in commercial cases, see Article, 5 Russian Civil Code.

²³¹ Baglai, *Konstitutsionnoye Pravo Rossiskoi Federatsii*, p. 19.

In addition, Article 2 CRF proclaims that the individual's rights and freedoms are the supreme value in the Russian legal system. These rights and freedoms, according to Article 18, have direct effect and provide guidance with respect to the meaning, content, and application of laws as well as with respect to the activities of the legislative and executive bodies. This natural law approach to constitutional law is to constitute the very basis for the legal awareness of individuals, legislatures, civil servants, courts, and in the process of adopting positive law. Although courts, according to the CRF, are to apply positive law²³², during the 1990s the RF Constitutional Court referred to general principles of law on several occasions.²³³ Legislative acts are valid only if adopted with respect to the procedure established by, for example, the CRF.²³⁴

The CRF is the highest legal norm throughout the whole territory of the Russian Federation.²³⁵ Thereafter follow statutes (*zakony*), which may take the form of either federal constitutional laws or federal laws. Matters that fall under the jurisdiction of the federal centre are as a main rule regulated by federal constitutional law and federal law. Federal constitutional laws are part of constitutional and administrative law legal sources. So are federal laws that regulate issues of individual rights and freedoms, and the structure and exercise of state power.²³⁶ Federal law may not contradict federal constitutional law.²³⁷ No clear guidelines exist as to what issues should be regulated by federal constitutional law.²³⁸ For example, the following are to be regulated by federal constitutional law: martial law, state of emergency and the powers, procedure for formation and functions of the Constitutional Court of the Russian Federation, the RF Supreme Court, and the Supreme *Abitrazh* Court.²³⁹ However, it seems

²³² See Article 120 (2) CRF, referring to statutes (*zakon*), not law (*pravo*).

²³³ Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, pp. 23-24.

²³⁴ Baglai, *Konstitutsionnoye Pravo Rossiskoi Federatsii*, p. 20.

²³⁵ Article 4 (2) CRF. This means that although federal subjects have the right to adopt their own constitutions or fundamental charters, these may not be in contradiction with the CRF. See also, Boris Strashun, "Constitution as the Main Source of Law", in *Interpretation and Direct Application of the Constitution*, Vilnius, 2002, (184-191), p. 184.

²³⁶ See, Baglai, *Konstitutsionnoye Pravo Rossiskoi Federatsii*, pp. 13-14 for a description of norms with a constitutional character, and Kunin, *Administrativnoye Pravo Rossii*, p. 61.

²³⁷ See, Article 76 (3) CRF.

²³⁸ Baglai, *Konstitutsionnoye Pravo Rossiskoi Federatsii*, p. 22. See Article 108 (1) CRF, according to which federal constitutional laws must be adopted when required by the constitution.

²³⁹ See Articles 56, 87, 128 (3) CRF.

unclear whether federal constitutional law should only be used when so stipulated by the CRF.²⁴⁰

The difference between federal constitutional law and federal law lies in legislative procedures. Federal constitutional laws are adopted by three-quarters of the total number of deputies of the Federation Council and two thirds of the total members of the State Duma. Thereafter the President has to sign the law, which is to be promulgated within fourteen days.²⁴¹ The President has no veto right concerning federal constitutional laws.²⁴² Federal laws are adopted by the Federal Assembly and in these cases the President does have a veto right.²⁴³

Laws adopted by legislative assemblies of federal subjects also form part of the sources of Russian constitutional and administrative law.²⁴⁴ In cases of joint jurisdiction between the federal centre and the federal subjects, matters are regulated by federal law and normative acts by the federal subject. The latter may not contradict federal constitutional- and federal laws. Within their sphere of residual jurisdiction, federal subjects adopt laws and other normative acts, and in case of conflict between a federal law and a regional normative act, the latter will prevail.²⁴⁵

Treaties and agreements entered into by Russian state organs also constitute part of Russian constitutional and administrative legal sources.²⁴⁶ These include treaties and agreements with other sovereign states, that have been ratified through the adoption of a federal law²⁴⁷, but also those between the federal centre and its subjects on the one hand, and those between two or more federal subjects, on the

²⁴⁰ Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, p. 12.

²⁴¹ Article 108 (2) CRF.

²⁴² The RF Constitutional Court has ruled that amendments cannot be vetoed by the President. See, ruling of the RF Constitutional Court "On the Case of the Interpretation of Article 136 Constitution Russian Federation", 31 October, 1995, No. 12-P. Available at the official homepage of the RF Constitutional Court, http://ks.rfnet.ru/pos/p12_95.html, (2005-01-12). The Court ruled that amendment to the CRF need not be signed by the President, hence the President has no veto right in cases of constitutional amendments.

²⁴³ See Articles 105-106 CRF. For a more detailed description of the process see Part III, Chapter 2.

²⁴⁴ Baglai, *Konstitutsionnoye Pravo Rossiskoi Federatsii*, p. 23, and Kunin, *Administrativnoye Pravo Rossii*, p. 61. See also, B.A Kryazhkov, *Konstitutsionnoye Subyektov Pravo Rossiskoi Federatsii*, Moscow, Gorodets-Izdat, 2002.

²⁴⁵ Article 76 (4) CRF.

²⁴⁶ *Problemy Teorii Gosudarstva i Pravo*, ed. M. H. Marchenko, Moscow, Yurist, 2002, pp. 523-524 and Kunin, *Administrativnoye Pravo Rossii*, p. 60.

²⁴⁷ See *the Federal Law on International Treaties of the Russian Federation*, SZ 1995, no. 29, item, 2757, (No. 101-FZ, July 15, 1995).

other. Should an international treaty establish rules with which Russian federal law is not in congruence, then the international treaty will prevail if it has been ratified by the Federal Assembly.²⁴⁸ Baglai underlines the importance of Russian membership of the CoE in this context. All CoE treaties entered into by the Russian Federation will form part of the Russian legal system as a source of constitutional law. Laws adopted after the entry into force of an international treaty in the Russian legal order cannot change or contradict the international treaty. In addition, general principles and rules of international law constitute an integral part of the Russian legal order.²⁴⁹

The president may, within the presidential mandate under the CRF²⁵⁰, issue decrees (*ukaz*) and instructions (*rasporяzhenie*). Presidential decrees and instructions can be of both normative and non-normative character and they have legal force within the whole territory of the Russian Federation. They must not contradict the CRF or federal law.²⁵¹ Normative decrees function as temporary statutes until the Federal Assembly has adopted a law.

Resolutions (*postanovleniya*) adopted by the Duma and the Federation Council on the one hand, and by state bodies of the federal subjects on the other, are also legal sources of Russian constitutional and administrative law, as are normative acts adopted by bodies of local self-government.²⁵² These, together with normative acts issued by state agencies, are called sub-statutory acts and will be overtaken by a statute.²⁵³

The question whether case law forms part of Russian legal sources is debated and unclear, except for decisions rendered by the ECtHR, which are binding on all Russian courts. In addition, decisions of the RF Constitutional Court have legal force²⁵⁴ and are interpreted as providing the legal position (*pravovoy positsii*) of the CRF. The RF Constitutional Court acts as a negative legislator in the sense that it can declare unconstitutional laws null and void.²⁵⁵ The matter is slightly different

²⁴⁸ The CRF is exempted. See Article 22 *the Federal law on International Treaties of the Russian Federation*. The RF Constitutional Court exercises abstract review *a priori* in these cases.

²⁴⁹ Baglai, *Konstitutsionnye Pravo Rossiskoi Federatsii*, p. 24 and Article 15 (4) CRF.

²⁵⁰ See Articles 80-89 CRF.

²⁵¹ Article 90 CRF. *Problemy Teorii Gosudarstva i Pravo*, p. 521.

²⁵² *Ibid.*, p. 521 and Kunin, *Administrativnoye Pravo Rossii*, p. 61.

²⁵³ Baglai, *Konstitutsionnye Pravo Rossiskoi Federatsii*.

²⁵⁴ See Article 125 (6) CRF.

²⁵⁵ See Article 6 (1) *Federal Constitutional Law on the Constitutional Court of the Russian Federation*, SZ 1994, no. 13, item 1447 (as amended December 15, 2001). Hereafter *the Federal Constitutional Law on the Constitutional Court*. To be discussed in Part III.

concerning Supreme Court decisions. The question as to whether decisions of the Supreme Court are sources of law is frequently a subject for debate in Russian legal doctrine. A distinction is drawn between a court invalidating normative acts²⁵⁶ and court decisions in individual cases. Declaring a normative act invalid is considered a source of law in the sense that such a decision can be applied to another case by analogy. In addition, decisions in individual cases have a great impact on the development of law. Still, whether they are sources of law or not is frequently debated.²⁵⁷ In addition, and as will be further discussed below, the Plenum of the Supreme Court of the Russian Federation issues resolutions (*postanovleniia plenuma*), stating explanations (*raz'yasneniia*) on both substantive and procedural law. The purpose of these explanations is to instruct the lower courts on how to apply the law. Even if it could be debated whether the Plenum's explanations are sources of law *de jure*, they beyond doubt act as a source of law *de facto*.

4.4.4 Hierarchy of Legal Norms

According to Article 5 (3) *Federal Constitutional Law on the Judicial System of the RF*²⁵⁸, in cases of conflict a court shall decide the case in accordance with the legislative act having the greatest legal force. The hierarchy of legal norms in Russian legal doctrine puts the CRF at the top²⁵⁹, closely followed by federal constitutional laws. These constitute the very foundation of Russian constitutional and administrative law.²⁶⁰ Thereafter follow international treaties to which the Russian Federation is a contracting party, *inter alia* the ECHR, and general principles and norms of

²⁵⁶ Article 253 CPC. To be discussed in Part III.

²⁵⁷ For a compilation of the debate in English see, Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, p. 19.

²⁵⁸ SZ 1997, No. 1, item 1 (as amended 4 July, 2003).

²⁵⁹ The primacy of the CRF in the hierarchy of legal norms is underlined by the complicated procedure for changing or amending the CRF. See, Chapter 9 CRF. Chapters 3-8 can be amended or revised using the procedure for adoption of federal constitutional laws, with the additional requirement that two thirds of the federal subjects approve the amendment. See Article 136 CRF. The process for amending Chapters 1, 2 and 9 CRF is more complex. First, three-fifths of the total number of each chamber of the Federal Assembly must support the suggested amendment. However, the Federal Assembly will not revise the amendment. A constitutional assembly is to be established solely for that purpose. The constitutional assembly can adopt the amendment if two-thirds of its total members vote in favour of the amendment. If not, then the draft will be submitted to a nation-wide vote. The amendment is adopted if more than half of the voters have voted for it, provided that the voter turn-out is higher than 50 percent of registered voters. See Article 135 CRF.

²⁶⁰ Kunin, *Administrativnoye Pravo Rossii*, p. 60.

international law.²⁶¹ After federal constitutional laws come federal statutes: Federal codes, such as the Civil, Administrative, and Criminal Code stand higher than ordinary federal statutes.²⁶² Besides, federal laws that lay down fundamental principles concerning, for example, the delineation of powers between federal and regional state bodies and general principles for organising the activity of legislative and executive regional bodies are of great importance.

After federal statutes follow, in the hierarchy of legal norms, presidential decrees, and normative acts adopted by the Federal Assembly. These must be in congruence with the CRF, federal constitutional laws, and federal laws. Additionally, resolutions and directives issued by the federal government can be revoked by the president, should they contravene the CRF, federal laws, and presidential decrees.²⁶³ Thereafter follow normative acts, such as *prikaz*, *instruktsiya*, and *postanovleniya*, adopted by federal and regional executive organs. These can be confirmed and approved by presidential decrees, and sub-statutory normative acts adopted by the Federal Assembly, and federal and regional legislative bodies.²⁶⁴ Last in the hierarchy of legal norms we find normative acts adopted by bodies of local self-government.²⁶⁵

Regional constitutions, charters and laws, as well as other normative regional acts adopted by higher regional state bodies must also be in congruence with the CRF, federal constitutional law and federal statutes if they do not fall within the exclusive competence of the federal subjects. Still, even if within the exclusive competence of the subject, it must be in congruence with the CRF and generally recognised principles and norms of international law.²⁶⁶

4.5 The Bill of Rights in the 1993 CRF

The move away from Soviet law with a focus on collective rights and prioritizing the state before its citizens has been gradual, starting with the RSFSR Declaration of Sovereignty on June 12, 1990. On November 22, 1991, the Supreme Soviet of

²⁶¹ It seems to be unclear whether international treaties of the Russian Federation precedes federal constitutional laws. See Strashun, "Constitution as the Main Source of Law", p. 186.

²⁶² Kunin, *Administrativnoye Pravo Rossii*, p. 61. This does not mean that the mentioned codes always prevail over separate laws. However general principles laid down in codes, especially the Civil Code, play an important role in interpretation of unregulated or unclear situations. See, Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, pp. 12-14.

²⁶³ Article 115 (3) CRF.

²⁶⁴ Kunin, *Administrativnoye Pravo Rossii*, p. 62.

²⁶⁵ *Ibid.*, p. 61.

²⁶⁶ Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, p. 45.

the Russian Federation adopted the *United Nations Declaration of the Rights and Freedoms of the Individual and Citizen*.²⁶⁷

Chapter One CRF lays down the fundamental principles of the RF, and Chapter Two the rights and freedoms of individuals and citizens. These Chapters, together with Chapter Nine, cannot be revised by the Federal Assembly. In order to revise these Chapters, a Constitutional Assembly has to be convened, in accordance with federal constitutional law. Three fifths of the total number of members in the Federation Council and in the Duma must agree on putting together the Assembly. Thereafter, the Constitutional Assembly can either confirm the CRF or draft a new constitution. If the latter is chosen, then the draft is to be adopted if recognized by two-thirds of the total number of members of the Assembly. It can also be adopted by a referendum.²⁶⁸

The 1993 CRF catalogue of rights is extensive, and is formulated so as to be in congruence with international standards. Article 2 CRF proclaims that the individual's rights and freedoms are the supreme value in the Russian legal system and that it is the duty of the state to protect them. The rights and freedoms of the individual are "inalienable".²⁶⁹ Rights based on public international law form part of the domestic Russian legal system. The basis for this is that international conventions form part of the Russian legal system, while the constitution itself expressly states that universal rights - other than those prescribed in the CRF - also enjoy protection.²⁷⁰ The rights and freedoms should, according to Article 18, have direct effect and they should provide guidance with respect to the meaning, content, and application of laws as well as with respect to the activities of the legislative and executive bodies.

The CRF takes its starting point in the protection of the individual's physical, personal, and spiritual freedom and integrity. The principle of equality is laid down in the CRF, as is protection against discrimination. The right to life and state responsibility to protect the dignity of a person is explicitly referred to, as is the right to freedom, private life, and freedom of movement. According to the CRF, every person has the right to determine their nationality and to use their native language. Freedom of religion and freedom of speech are protected by the CRF. Censorship is forbidden and the freedom of the mass media is to be guaranteed.

²⁶⁷ *Ibid.*, p. 233.

²⁶⁸ See Article 135 CRF.

²⁶⁹ Article 17 (2) CRF.

²⁷⁰ Article 55 (1) CRF.

The CRF mentions both positive and negative freedom of association. Several articles regulate the right to take part in public affairs. Economic rights, such as the right to property and the right to conduct economic affairs is protected by the CRF. The right to work and social benefits are extensive in the CRF – even too extensive in the sense that it seems difficult for the Russian State to fulfill such protection for all its citizens. It includes the right to work, pensions, housing, and medical care. Thereafter follow rights to a sustainable environment, education, and cultural and artistic freedom. Judicial protection in both criminal and civil cases is stipulated, as is the state’s responsibility to pay damages in case of illegal governmental actions causing harm. Retroactive effect of rules that are burdensome for individuals is forbidden, according to the CRF. The Chapter concludes with a duty to pay taxes, together with military service, and regulations concerning political asylum. In conclusion, the CRF stipulates that the enumeration of rights should not be understood as a denial or derogation from universally recognized individual rights and freedoms. Moreover, that these rights and freedoms may be restricted by federal law only to the extent needed in order to protect, e.g., the foundation of the constitutional system, health, morals, state security, and the protection of others’ rights.²⁷¹

4.6 The Russian Judiciary

This Section examines the Russian court system. Judicial power is regulated in the CRF's seventh chapter as well as in federal constitutional laws.²⁷² The judiciary falls within the federal centre's exclusive competence, with financing from the federal budget.²⁷³ The court system is uniform, centralized, and consists of courts of general jurisdiction, *arbitrazh* courts and the federal Constitutional Court, constitutional courts of the federal subjects, and justices of the peace. One of the peculiarities of the Russian court system is that it has retained the *arbitrazh* courts. These were the successor to the *arbitrazh* authority, *gosarbitrazh*, which was tasked with resolving conflicts between state corporations within the framework of the planned economy. The *arbitrazh* courts are true courts, whose job it is to resolve commercial conflicts between legal entities, and conflicts between legal entities

²⁷¹ For a more detailed overview see Fogelklou and Jonsson, “Russia – a fragile legal order”, pp. 242, 256-259.

²⁷² *Federal Constitutional Law on the Constitutional Court*, SZ 1994, No. 13, item 1447 (as amended December 15, 2001), *Federal Constitutional Law on the Arbitrazh Courts*, SZ 1995, No. 19, item 1709 (as amended 4 July, 2003), and *Federal Constitutional Law on the Judicial System*, SZ 1997, No. 1, item 1 (as amended 4 July, 2003).

²⁷³ Article 124 CRF.

and state agencies.²⁷⁴ Both courts of general jurisdiction and *arbitrazh* courts are tasked with trying administrative law cases.²⁷⁵ Thus far, the Russian judicial system has no particular administrative courts, but preparations are being made for their establishment in the near future. Although a draft has been prepared, several practical and financial issues remain to be resolved.²⁷⁶ The following provides an overview of the structure and procedure of Russian courts. The work of the Prosecutor General and the procurators is also regulated in the seventh chapter of the CRF. An overview of the Procuracy appears at the end of this Chapter.²⁷⁷ As further discussed below, the Procuracy plays an important role in judicial procedure in administrative law cases.

4.6.1 Court Structure

The establishment of judicial power falls within the exclusive competence of the Russian Federation.²⁷⁸ The legal basis for the Russian judiciary is Chapter Seven CRF, and *the Federal Constitutional Law on the Judicial System*.²⁷⁹ The Russian court system is centralised and unitary.²⁸⁰

The 1993 CRF provides for three kinds of federal courts: the Constitutional Court of the Russian Federation, federal courts of general jurisdiction, and federal *arbitrazh* courts. In addition, there are courts of the federal subjects of the Russian Federation: constitutional or charter courts of each subject, and justices of the peace. Constitutional (charter) courts of the federal subjects and justices of the

²⁷⁴ Article 27 the 2002 *Arbitrazh* Procedure Code, SZ No. 30, item 3012 (24 July, 2002).

²⁷⁵ According to the 2002 *Arbitrazh* Procedure Code, Article 29, normative and non-normative acts of state agencies that infringe rights and legal interests of an entrepreneur can be challenged before an *arbitrazh* court. The 2002 CPC will be examined below in Part III.

²⁷⁶ A draft was presented to the State Duma in 2003. However, at the beginning of 2005 it had only been through one reading. Several institutions have an interest in this question. The overall responsibility for reform lies with the Presidential Administration, which is also in charge of wider administrative reform. One of the problems encountered is delineating jurisdiction between courts of general jurisdiction, the *arbitrazh* courts, and the future administrative courts. Author's conversation with representatives of the Ministry of Justice of the Russian Federation in Moscow, 2004-12-16.

²⁷⁷ Considering that contemporary Russian procedural law has left behind a tradition of inquisitorial process and close co-operation between the courts and the Procuracy, it is remarkable that the powers of the Procuracy are being fixed in the same chapter as that of the courts.

²⁷⁸ According to Article 71 (d) CRF.

²⁷⁹ The Judicial system of Russia should be established by the CRF and by federal constitutional law, Article 118 (3) 1993 CRF. The federal constitutional law entered into force on the 1 of January 1997. See footnote 273 above.

²⁸⁰ Except for the constitutional (charter) courts of the federal subjects and Justices of Peace Courts. *Sudebnaya Sistema Rossii*, Moscow, Dela, 2000, p. 55-56. See further below.

peace are established and administered by the federal subjects of the Russian Federation, in accordance with delegations made in federal laws. Taken together, all these courts constitute a unified judicial system.²⁸¹ Decisions of justices of the peace are subject to review in the federal court system. The Supreme Court of the Russian Federation is the superior judicial instance with respect to justices of the peace, district and regional courts, and military courts.²⁸² Regarding review of decisions by constitutional (charter) courts of the federal subjects, see section 4.6.5. Only courts are empowered to employ judicial power, by means of constitutional, civil, administrative, and criminal procedure.²⁸³ All court proceedings should be open. Closed sessions are permitted only when stipulated by federal law. Court procedure should be carried out on the basis of contentiousness and equality of the parties, and should involve participation of jurors when provided for by federal law.²⁸⁴ During 1993-1995, nine federal subjects introduced trial by jury in criminal procedure. Since 1996, two of these subjects have withdrawn the possibility of jury trial due to high expense.²⁸⁵ In 1999 the RF Constitutional Court held that the death penalty cannot be pronounced as long as there is no law that prescribes national jury trials.²⁸⁶ According to the RF Constitutional Court, if the death penalty could be pronounced in these federal subjects but not in others, then this would violate the principle of equal treatment. In December 2001, a new criminal procedure code was passed, according to which jury courts should be established throughout the country.²⁸⁷ Since there is now legislation to the effect that jury trial is to be set up in the entirety of the country, it follows that the death penalty can no longer be considered as violating the CRF.²⁸⁸ The fact remains that jury trials require significant economic and human resources for implementation throughout Russia and that this will probably be a process that will go on for a long time. Since criminal procedure does not fall within the scope of this study, trial by jury and its effects on the legal consciousness of the public will not be discussed further.

²⁸¹ William. E. Butler, *Russian Law*, 1 ed., Oxford, Oxford University Press, 1999, p. 154.

²⁸² Article 19 (4) *Federal Constitutional Law on the Judicial System*.

²⁸³ According to Article 118 (1), (2) CRF.

²⁸⁴ According to Article 123 (4) CRF.

²⁸⁵ Peter H. Solomon, Jr. and Todd S. Fogelson, *Courts and Transition in Russia. The Challenge of Judicial Reform*. Boulder, Colorado, Westview Press, 2000, p. 132.

²⁸⁶ Decision of the RF Constitutional Court from December 2, 1999, No. 3-P. Available at the official home page of the RF Constitutional Court, http://ks.rfnet.ru/pos/p3_99.html (2005-01-05).

²⁸⁷ The Criminal Procedure Code, SZ 2001, No. 52 (Part 1), Item 4921, Article 29 (1).

²⁸⁸ Russia has not ratified Protocol no. 6 to the ECHR.

4.6.2 Financing

Financing of the courts may only come from the federal budget and it must be sufficient to ensure full and independent delivery of justice in accordance with federal law.²⁸⁹ The financing of federal courts should be carried out on the basis of specifications authorized by federal law and it should be mentioned as a separate item in the federal budget.²⁹⁰ Further, the size of budgetary funds allocated to financing of courts in the current financial year or subject to allocation for the next fiscal year, can be reduced only with the consent of the All-Russia Congress of Judges or the Council of Judges of the Russian Federation.

Article 124 CRF was in 1998 under consideration by the RF Constitutional Court. The Supreme Court filed a complaint with the RF Constitutional Court asking the latter to review the constitutionality of Article 102 of *the Federal Law on the State Budget of 1998*. In the opinion of the Supreme Court (the applicant), Article 102 enabled the Russian Government independently to reduce the volume of financing of the federal budget to the judicial system. The applicant claimed that this Article was in contradiction with Articles 10, 76 (3) and 124 CRF. The RF Constitutional Court decided that Article 102 (1), admitting reduction of financing of the judicial system, contradicted Article 124 CRF, according to which financing of courts must be enough to make possible full and independent realization of justice. The challenged article also contradicted Article 33 (5) of *the Federal Constitutional Law on the Judicial System*, according to which the size of the budgetary funds allocated for the financing of courts in the current financial year or subject to allocation for the next year, can be reduced only with the consent of the All-Russia Congress of Judges or the Council of Judges of the Russian Federation. The purpose of these Articles is to exclude unreasonable reduction of financing for the courts. The RF Constitutional Court declared Article 102 (1) of *the Federal Law on the Federal Budget for 1998* unconstitutional in so far as the Article independently allowed the Government to cut down expenses in the federal budget for the judicial system without taking into account the constitutional guarantees of its financing. The Government should have provided financing of courts from the federal budget for 1998 according to the requirements of Article

²⁸⁹ According to Article 124 CRF.

²⁹⁰ According to Article 33 *Federal Constitutional Law On the Judicial System*.

124 CRF and in light of Article 33 of *the Federal Constitutional Law on the Judicial System*.²⁹¹

The importance of the decision discussed here should not be underestimated from a rule-of-law point of view. Financial independence is vital. Establishing an independent judiciary requires predictable and non-discretionary financial decisions to enable the judiciary to plan its activity in the long-term perspective. Further, federal financing is necessary to enable the lower level courts to act independently from regional actors.²⁹² During the 1990s, the Government's debts to the Judiciary continued to increase.²⁹³ However, the development has changed and the financial situation for the Russian judiciary is improving since Putin's accession to power.²⁹⁴

4.6.3 Judges

According to the *Law on the Status of Judges in the Russian Federation*, judges should be independent and subordinate only to the CRF and federal law.²⁹⁵ The CRF states implicitly that a court that finds that acts or decisions by a state body violate the law must decide in line with the law. As obvious as it might seem, we must keep in mind the historical domination of power and force over law in Russia and the Soviet Union.²⁹⁶

The President, according to the procedure established by federal law, appoints judges to all federal courts except for the Supreme Courts and the RF Constitutional Court.²⁹⁷ The Federation Council, upon the recommendation of

²⁹¹ Decision of the Constitutional Court of the Russian Federation on the Constitutionality of Article 102 (1) Federal Law on the Federal Budget for 1998. July 17 1998, No. 23-P. Available at http://ks.rfnet.ru/pos/p23_98.html, (2001-08-28).

²⁹² That is why the Legal Department of the Supreme Court is paying salaries to the Justices of Peace.

²⁹³ Anders Fogelklou, "Constitutional Order in Russia at the Threshold of the New Century. Prospects and Threats", *Working Papers*, 60, Department of East European Studies, Uppsala University, December 2000, p. 7.

²⁹⁴ The amount awarded to the Judiciary in the federal budget is increasing every year. In 2005, approximately 1 billion USD (38 billion Rubles) were put aside for the judiciary. Salaries of judges are also increasing. The President promised at the end of 2004 to further increase salaries of judges by two to three times at the beginning of the 2005, according to representatives of the Legal Department of the Federal Supreme Court.

²⁹⁵ Article 120 (1) 1993 CRF, and *the Federal Law on the Status of Judges in the Russian Federation*, (as amended 15 December, 2001). SZ 2001, no. 51, item 4834.

²⁹⁶ See for example Richard Pipes, *Property and Freedom*, New York, Vintage Books, 1999.

²⁹⁷ Article 128 (2) CRF. However, the process is more complicated than that. The candidate will be examined and recommended by a regional Judicial Qualification Commission (hereafter JQC). The JQC will forward the recommendation for consideration by the Chairman of the Federal

the President, appoints Judges of the RF Constitutional Court²⁹⁸, the Supreme Court, and the Supreme *Arbitrazh* Court.²⁹⁹

Citizens of the Russian Federation that have attained the age of 25, have a higher legal education, and not less than five years professional experience in the legal sphere are eligible to become judges.³⁰⁰ Federal law can stipulate additional requirements. Judges used to be appointed for life. However, due to an amendment made to *the Federal Law on the Status of Judges*, an age limit of 65 for federal judges, except for judges in the RF Constitutional Court, has been adopted. In addition, tenure as chairman of all courts except the RF Constitutional Court is limited to two consecutive six-year terms.³⁰¹ The first tenure for all judges, except for judges in the highest courts, is three years. Thereafter the judge can be appointed to the same position until retirement.³⁰² Judges are not removable. The powers of a judge may be terminated or suspended only in accordance with the procedure and on the grounds established by law.³⁰³ Further, judges are inviolable and may be brought to criminal liability only in accordance with the procedure established by federal law.³⁰⁴

Judges of the RF Constitutional Court were initially appointed for life³⁰⁵; subsequently, the law prescribed a term of twelve years. According to amendments made in 2001, the term is now fifteen years. This term cannot be renewed. On the other hand, the age of retirement has been raised to 70 and the new pension age will be effective as of 2005.³⁰⁶

In conclusion, a framework for establishment of an independent judiciary and an independent cadre of judges has been adopted on the surface level of law. Still,

Supreme Court and the chairman will, after obtaining consent from the legislative region in which the judge will serve, present the candidate to the President. Solomon and Foglesong, *Courts and Transition in Russia*, p. 67.

²⁹⁸ The term of Constitutional Court judges is 15 years.

²⁹⁹ Article 128 (1), (2) CRF.

³⁰⁰ Article 119 CRF.

³⁰¹ "Constitution Watch, Russia", *East European Constitutional Review*, Vol. 11. No. 1/2, Winter/Spring, 2002, p. 42.

³⁰² Article 11 (2) *Federal Law on the Status of Judges*.

³⁰³ Article 121 CRF.

³⁰⁴ Article 122 CRF. According to the old law On the Status of Judges, administrative, criminal and disciplinary actions could not be taken against Russian judges. However, the law was amended in November 2001, making it possible to try a judge. A Procurator General can initiate proceedings following a decision by the Supreme Court judges.

³⁰⁵ Ten of the judges sitting in 2002 were appointed in 1991.

³⁰⁶ Article 12 *Federal Constitutional Law on the RF Constitutional Court*.

there are several factors contributing to a potential for exerting influence on judges in their professional activity, for example low salaries, even though judges are among the highest-paid state officials in Russia. In addition, the initial probationary three years before obtaining life tenure does create a degree of uncertainty for judges. Especially, since the JQC does not have to state its reasons for not awarding a judge lifetime tenure after three years.³⁰⁷ Thus, although the risk of external pressure is clear, internal (vertical) control should not be underestimated.³⁰⁸

4.6.4 The Constitutional Court of the Russian Federation

In July 1991 the Russian Supreme Soviet passed a law on the Constitutional Court of the Russian Federation. According to this law, judges of the Constitutional Court were to be appointed for life and the Constitutional Court was empowered to review all acts of state bodies. Both state bodies and individuals had standing before the Court, and the Court had the right to initiate constitutional review *ex officio*. However, the Court did not have the authority to consider political questions unless required by a matter of law.³⁰⁹

Due to excessive political activity on the part of the Constitutional Court, the President suspended the Constitutional Court on the 7th of October 1993.³¹⁰ The main reason for the suspension was that the Court had become involved in the

³⁰⁷ Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, p. 58.

³⁰⁸ Todd Foglesong, "The Dynamics of Judicial (In)Dependence in Russia", in *Judicial Independence in the Age of Democracy. Critical Perspectives from around the World*. eds. Peter H. Russell and David M. O'Brien, Charlottesville, The University Press of Virginia, 2001, (62-88), p. 83-84. See also Part I, Chapter 4.5.6.3-4.5.6.5, below.

³⁰⁹ Problems that could arise can be illustrated by the Communist Party-Case: In November 1991, as a result of the failed August 1991 coup Yeltsin banned the CPSU and the RSFSR by issuing a decree, pending a judicial investigation into the responsibility of the Communist Party for the coup. The Communist Party appealed the decision to ban the Party to the Constitutional Court. The Court decided that it was a legal question that could be addressed since the Court, according to the Constitution, had the power to consider the constitutionality of political parties. (Due to a package of amendments to the Constitution, issued by the anti-Communist faction of the parliament, expanding the jurisdiction of the Constitutional Court.) The anti-Communist faction filed a counter-petition challenging the constitutionality of the Communist Party. Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, The University of Chicago Press, 2000, p. 128. Clearly, this case was of great political importance. The Court upheld Yeltsin's decree, arguing that it was in line with the powers of the President, and furthermore that the decree was necessary in order to enforce the amendment made to the constitution in 1990, according to which the Communist Party had lost its monopoly of state power. According to the decision of the Constitutional Court, the President had the right to ban the Communist Party's central structure, and he was entitled to seize Party property that had actually belonged to the state.

³¹⁰ Presidential Decree no. 1612, SZ 1993, No. 41, item 3921.

struggle between the Parliament and President Yeltsin. The fact that the Court could *ex officio* initiate constitutional review, and that it used this right, was an important reason for suspending the Court.³¹¹ After adoption of the CRF in December 1993, the President declared the Law on the Constitutional Court from 1991 null and void. A new law on the Constitutional Court was adopted and President Yeltsin explicitly stated that the RF Constitutional Court should abstain from getting involved in political disputes and instead focus on enforcing legal requirements of the CRF. The present Constitutional Court has adopted a more restrictive stance.³¹²

The present Constitutional Court of the Russian Federation is based on the 1993 CRF and *the Federal Constitutional Law on the Constitutional Court*. The RF Constitutional Court consists of 19 judges.³¹³ The Federation Council, the upper chamber of the Federal Assembly, appoints judges of the Federal Constitutional Court upon the recommendation of the President.³¹⁴

4.6.5 Constitutional (Charter) Courts of the Federal Subjects

The constitutional (charter) courts of the federal subjects are empowered to consider cases within the competence of the federal subjects, as designated by Articles 72 and 73 CRF. They consider the *conformity* of legislative acts of federal subjects, normative acts of state bodies of federal subjects and of local self-government agencies, to the constitutions or founding charters of the federal subjects.³¹⁵ Further, constitutional (charter) courts of the federal subjects *interpret* constitutions and charters of the federal subjects. Federal subjects themselves are responsible for financing the constitutional (charter) courts. Fifty-six of the then 89 federal subjects established regional constitutional courts in their constitutions/charters. Twenty of them passed statutes on regional constitutional

³¹¹ An overview of the Constitutional Court and its Chairman Zorkin between 1991-1993 is given by Robert B. Ahdieh, in *Russia's Constitutional Revolution. Legal Consciousness and the Transition to Democracy*, University Park, Pennsylvania State University Press, 1997, pp. 78-90.

³¹² Lee Epstein, Jack Knight and Olga Shevtsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government", *Law and Society Review*, Vol. 35, No. 1, 2001, and Anna Jonsson, "The Constitutional Court of the Russian Federation and Individual Legal Activism", *Uppsala University Yearbook of East European Law 2003*, ed. Kaj Hobér, London, Wildy, Simmonds & Hill Publishing, 2004, pp. 91-121.

³¹³ According to Article 125 (1) CRF.

³¹⁴ Articles 83 (1f), 102 (1g) CRF.

³¹⁵ *Sudebnaya sistema Rossii*, p. 56. Article 27 (1) *Federal Constitutional Law on the Judicial System*.

courts, and seventeen established courts. Two failed, so that today there are fifteen working regional constitutional (charter) courts.³¹⁶

The regional constitutional courts on the one hand, and the RF Constitutional Court and federal courts of ordinary jurisdiction on the other, are administratively independent from each other. However, the RF Constitutional Court has the exclusive jurisdiction to exercise constitutional review in order to ensure the inviolability of the CRF.³¹⁷ From that follows that regional laws can be subject to judicial review by the RF Constitutional Court and, in specific cases, by federal courts of general jurisdiction³¹⁸ when a question concerning the compatibility of regional law with the CRF and federal law arises.

The jurisdiction of the regional constitutional (charter) courts is established in Article 27 (1) of the *Federal Constitutional Law on the Judicial System*.³¹⁹ In 1997 the RF Constitutional Court ruled that the list in Article 27 (1) was exhaustive and that it could not be broadened by the federal subjects themselves.³²⁰ Notwithstanding, in 2003 the RF Constitutional Court ruled that regional constitutional (charter) courts may widen their jurisdiction as long as it does not impinge on the jurisdiction of federal courts, hence overruling its 1997 decision.³²¹ Further, in 2000 the RF Constitutional Court ruled that ordinary courts do have the power to declare regional laws non-enforceable.³²² In conclusion, as long as

³¹⁶ Alexei Trochev, "Less Democracy, More Courts: A Puzzle of Judicial Review in Russia", *Law & Society Review*, Vol. 38, no. 3, September 2004, p. 514.

³¹⁷ According to the Russian Ministry of Justice, in 2000, out of approximately 50 000 laws adopted by regional authorities, one-third violate the constitution. *Russian Regional Report*, Vol. 5, No. 14, 12 April 2000, East West Institute.

³¹⁸ See Article 27 (2) and 251 (1) Civil Procedural Code (hereafter CPC). *SZ* 2002, No. 46, item 4532 (as amended 30 June, 2003).

³¹⁹ According to Article 27 (4) *Federal Constitutional Law on the Judicial System*, decisions of a regional constitutional (charter) court that are adopted *within the limits of its powers* may not be reviewed by another court.

³²⁰ The matter concerned federal laws on impeachment of mayors. The Parliament of Buriatia claimed that the impeachment of mayors was part of the right to local self-government, that it should be regulated by regional law, and that issues related to it should be considered by the regional constitutional (charter) court. The RF Constitutional Court ruled that the federal centre is entitled to exercise control of local organs so that their activity is in conformity with the CRF. Entrusting regional constitutional (charter) courts to examine the matter is therefore not in conformity with the *Federal Constitutional Law on the Judicial System*. RF Constitutional Court Decision, October 16, 1997 in "Russia's Constitutional Court: A Decade of Legal Reforms", Part 1, Summaries of Judicial Rulings, *Review of Central and East European Law*, vol. 27, No. 2/3, 2001. Available in full text at http://ks.rfnet.ru/pos/p14_97.html.

³²¹ Trochev, "Less Democracy, More Courts: A Puzzle of Judicial Review in Russia", p. 538.

³²² The question was whether Procurators could address courts of ordinary jurisdictions in order to contest the legality of regional laws. The RF Constitutional Court ruled that procurators may address ordinary courts concerning the legality of regional laws and that ordinary courts can

the delineation of powers between the federal centre and its federal subjects is vaguely defined, the predictability of what rulings of regional constitutional (charter) courts can be reconsidered and overruled by the RF Constitutional Court and/or the Supreme Court of the Russian Federation will continue to be weak.

In practice, the federal subjects of the Russian Federation have benefited from residual powers wider than stipulated by the CRF. Thus, the largest problem has been a legal vacuum on the federal level, in combination with an increasing activity at the regional level by adopting new laws, which contributes to making it even more difficult to achieve a unified legal framework for the Russian Federation.³²³ The centralizing policies initiated by President Putin have resulted in an increased number of judicial review cases brought before courts or ordinary jurisdiction, while the case load of regional constitutional (charter) courts has decreased.³²⁴ This may burden the caseload of the ordinary courts to the disadvantage of cases more directly related to violations of individual rights and freedoms. But on the other hand it may also lead to increased stability, legal security, and predictability, which could have (positive) implications for the protection of rights of individuals in the long run.³²⁵

4.6.6 Courts of General Jurisdiction

4.6.6.1 Structure

Courts of general jurisdiction hear *inter alia* cases related to disputes concerning civil, criminal, family, and labour legal relationships when at least one party is a private person.³²⁶ Courts of general jurisdiction also consider cases related to

declare that the regional law should no longer be applied, since one important task of the ordinary courts is to ensure the supremacy of federal law in law-applying activities. RF Constitutional Court Decision, April 11, 2000 in “Russia’s Constitutional Court: A Decade of Legal Reforms”, Available in full text at http://ks.rfnet.ru/pos/p6_00.html.

³²³ Risnes, “Relations Between Moscow and the Regions of Northwestern Russia – The Legal Aspect”, pp. 44- 45.

³²⁴ Trochev, “Less Democracy, More Courts: A Puzzle of Judicial Review in Russia”, p. 538.

³²⁵ In a few cases there are signs of Putin’s centralising reforms contributing to the protection of civil and political rights in the regions, where civic movements and NGOs co-operate with federal prosecutors to challenge violations in regional law of rights such as minority rights and the right to public demonstrations, etc., the protection of which is stipulated by federal law. Gordon M. Hahn, “Long Arm of Putin’s Reform Reaching Russia’s Regions”, *The Russian Journal*, June 14-20, 2002, Vol. 5, No. 22.

³²⁶ For an exhaustive list see, Article 22 (1) CPC.

administrative legal relationships, provided that one of the parties is a private person.³²⁷

Courts of general jurisdiction are³²⁸:

- justices of the peace³²⁹,
- district courts,
- supreme courts of the republics of the RF, territory/*krai* (regional) courts, courts of cities of federal importance³³⁰, i.e. city courts, autonomous region courts, autonomous area courts, (hereafter regional courts)
- the Supreme Court of the Russian Federation.

The following sections focus on the Peace Courts and the federal Supreme Court, since these are the courts that individuals are most affected by, although for various reasons. Peace Courts are a first instance in small cases, while the federal Supreme Court is the control instance of the execution of justice in the country. The other levels of the court structure will be examined when discussing the appeal procedure below.

4.6.6.2 Peace Courts³³¹

At the beginning of the 1990s, the Ministry of Justice initiated a reform aiming at the establishment of Peace Courts. The Supreme Court actively supported this reform and in 1998 the draft was adopted into law.³³² The intention of the reform was to increase access to justice by establishing Peace Courts in small cities that did not house district courts.³³³ In addition, the procedure has been simplified.

³²⁷ Articles 22 and 245 CPC.

³²⁸ Military courts are included in the section of courts of general jurisdiction and consider cases at first, second, and third instance. The Supreme Court of the RF is the final instance.

³²⁹ According to Article 4 (2) *Federal Constitutional Law on the Judicial System*, Peace Courts are courts of general jurisdiction.

³³⁰ Moscow and St. Petersburg.

³³¹ Concerning the translation from Russian to English: peace courts and justice of the peace are frequently appearing translations. The term justice of the peace leads us to think of the British model. However, a distinction needs to be made, since in Russia justices of the peace are legally educated and trained professionals, which is not the case in the UK.

³³² V. V. Dmidov and V. M. Zykov, *Kommentarii k Zakonodatel'stvy o Mirovykh cydax*, Moscow, Yurist, 2001. p. 8. *The Federal law on Justice of the Peace Courts in the Russian Federation*, SZ 1998, No. 51, item 6270, (No 188-F3, 17 December 1998).

³³³ According to representatives of the Legal Department of the Supreme Court of the Russian Federation, 5 500 justices of the Peace had began to work in the end of 2004. According to the Department's estimates, there was one justice of the Peace per 22 000 inhabitants at the end of

But most importantly, the reform is expected to ease the heavy caseload of the district courts.³³⁴ Taken together this will, hopefully, bring justice closer to the individual.

The establishment of courts of law and civil-procedural law falls within the exclusive competence of the Russian Federation.³³⁵ However, the responsibility for realizing the reform on the Peace Courts is shared between the Russian Federation and its federal subjects as a result of a delegation in Article 28 of *the Federal Constitutional Law on the Judicial System*. Nevertheless, the Peace Courts are still part of the unified and federal judicial system.³³⁶

Judges

In order to be eligible to become a Justice of the Peace, the candidate must have higher education in law, working experience, and practicing law at least five years. In addition, a recommendation of the qualification commission is required.³³⁷ Additional requirements can be stipulated in regional laws.³³⁸ Thus, justices of the Russian Peace Courts are professional judges, benefiting from membership in the judicial community.

Justices of the Peace are either appointed to the position by a legislative or representative body of the federal subject, or elected by the inhabitants of the court district in question.³³⁹ The procedure for the appointment/election of Justices of the Peace is stipulated in regional laws.³⁴⁰ In practice, a representative

2004. The goal is to have one justice of the Peace per 10 000 inhabitants. Author's conversation with representatives in Moscow 2004-12-17.

³³⁴ Solomon and Foglesong, *Courts and Transition in Russia*, p. 128.

³³⁵ According to Article 71 n) CRF.

³³⁶ According to Article 1 (1) *Federal Law on Justice of the Peace Courts*.

³³⁷ As a comparison, in England and Wales, Justices of the Peace courts (magistrates' courts) deal with, for example, criminal matters, certain civil law matters such as family law, and granting of licenses necessary to open up business. Lay magistrates who have not been legally trained can hear cases. Legally trained clerks advise magistrates. In England and Wales there are ten times as many Magistrates as there are professional judges. *Judicial Organisation in Europe*, Strasbourg, Council of Europe Publishing, 2000. p. 99.

³³⁸ Article 5 (3) *Federal law on the Institutions of the Judicial Community of the Russian Federation*, SZ 2002, no.11, item 1022, (March 14, 2002, No. 30-FZ), and Solomon, and Foglesong, *Courts and Transition in Russia*, pp. 128-129.

³³⁹ Article 6 *Federal law on the Institutions of the Judicial Community of the Russian Federation*. As of today no federal subject appoints justices of peace by election. The justices are usually appointed by the regional legislature. Peter H. Solomon Jr., "The New Justices of Peace in the Russian Federation: A Cornerstone of Judicial Reform?", *Demokratizatsiya*, vol. 11, No. 3, Summer 2003, p. 387.

³⁴⁰ See also Article 13 (4) *Constitutional Federal Law on the Judicial System*.

of the chairman of the regional court appoints Justices of the Peace Courts. In cases of a candidate being dismissed, the decision is to be scrutinized by the JQC.³⁴¹

Tenure is to be regulated by regional law. However, it is not to exceed five years.³⁴² Tenure can be terminated beforehand when stipulated by *the Federal Law on Status of Judges in the Russian Federation*.³⁴³ The decision to dismiss a judge is taken by the regional court's qualification committee and this can be appealed to the Higher Qualification Collegium of the Russian Federation.³⁴⁴ Protection of the independence of judges, their security and social protection is regulated by *the Federal Law on Status of Judges in the Russian Federation*. Regional laws can stipulate material and social protection in addition to the federal law.³⁴⁵

Financing

Financing the Peace Courts is the joint liability of regional and local authorities on the one hand, and the federal government on the other. The latter is responsible for payment of judges' salaries³⁴⁶, while the regional and local authorities are responsible for staff and administrative support. The number of Peace Courts in each federal subject is stipulated by federal law³⁴⁷ and the federal subjects will adopt regional laws on the selection of judges. At the beginning of 2003, all federal subjects, except for Chechnya, had adopted necessary laws for the appointment of judges. A small minority had not established peace courts at all, and some had not appointed all their judges.³⁴⁸

Jurisdiction

Within the limits of their competence, Peace Courts consider civil, criminal, and administrative cases as a court of first instance.³⁴⁹ Federal and regional law

³⁴¹ Dmidov and Zykov, *Kommentarii k Zakonodatel'stvy o Mirovyx Cydax*, p. 29.

³⁴² Article 7 (1) *Federal law on Justice of Peace Courts*.

³⁴³ Articles 13 and 14.

³⁴⁴ Dmidov and Zykov, *Kommentarii k Zakonodatel'stvy o Mirovyx Cydax*, p. 32.

³⁴⁵ See, Article 2 *Federal law on Justice of the Peace Courts*.

³⁴⁶ The Legal Department of the Supreme Court of the Russian Federation is responsible for paying judges' salaries.

³⁴⁷ *Federal Law on the General Numbers of Justices of the Peace Courts and Peace Court in the Subjects of the Russian Federation*, SZ 2000, No. 1, item 1, (No. 218-FZ, 29 December, 1999).

³⁴⁸ Solomon, "The New Justices of Peace in the Russian Federation: A Cornerstone of Judicial Reform?", p. 386.

³⁴⁹ According to Article 28 *Federal Constitutional Law on the Judicial System*.

establishes the powers and the procedure for the activity of the Peace Courts.³⁵⁰ The jurisdiction of the Peace Courts is limited to, for example, crimes with a maximum sentence of three years imprisonment³⁵¹, and issues of family law, such as divorce not involving children. Further, all administrative offences fall under the jurisdiction of the Peace Courts.³⁵² According to Supreme Court Chief Justice Lebedev, the Peace Court reform has so far been successful. In 2003, approximately 80 percent of administrative cases were handled by Peace Courts.³⁵³

4.6.6.3 *The Supreme Court of the Russian Federation*

The Supreme Court of the Russian Federation is the highest judicial body in the Russian Federation with regard to civil, criminal, and administrative cases, and all other cases that fall within the jurisdiction of the courts of general jurisdiction. The powers, procedure for formation, and the activity of the Supreme Court, are established by federal constitutional law.³⁵⁴ The Federation Council, on the recommendation of the President, appoints judges of the Supreme Court of the Russian Federation. The Supreme Court of the Russian Federation exercises control over lower courts, including military and specialized federal courts.³⁵⁵

The Supreme Court of the Russian Federation is divided into four separate chambers (collegiums): criminal, civil, military, and the cassation chamber. In addition, the Supreme Court has a *Presidium* and *Plenum*.³⁵⁶

The **Presidium** considers rulings by the Supreme Court cassation chamber and reviews, by judicial supervision, decisions by any other court of the Russian Federation. The Chairman of the Supreme Court and the Chairman's deputies can

³⁵⁰ See Article 23 CPC.

³⁵¹ Due to the entry into force of the Criminal Procedural Code in 2002, the jurisdiction of the peace courts was extended to include *inter alia* crimes with a maximum sentence of three years. The 1998 *Federal law on Justice of the Peace Courts*, only granted jurisdiction in cases of maximum criminal sentence of two years. Solomon, "The New Justices of Peace in the Russian Federation: A Cornerstone of Judicial Reform?", p. 389.

³⁵² Article 3, *Federal law on Justice of Peace Courts*. Consideration of administrative offences commenced first in 2002 when the Federal Code of Administrative Violations entered into effect. Solomon, "The New Justices of Peace in the Russian Federation: A Cornerstone of Judicial Reform?", p. 388.

³⁵³ "Top Russian judge praises work of juries and magistrates", *BBC Monitoring Former Soviet Union*, cited in Jane Henderson, "The Failure of Judicial Reform? The Plight of Administrative Justice in the Russian Federation", Unpublished paper presented at the conference *Russia in a Common European Legal Space*, ILPP, NUPI, Oslo 26 November, 2004.

³⁵⁴ According to Article 128 (3) CRF and Article 19 (6) *Federal Constitutional Law on the Judicial System*.

³⁵⁵ According to Article 19 (2) *Federal Constitutional Law on the Judicial System*.

by their own initiative scrutinise all cases heard by a court of law in Russia, and if considered necessary, file a protest to the Presidium. The fact that a dissatisfied litigant can obtain an audience with judges who are members of the Presidium, and that they can file a protest directly to the Presidium allows these particular judges great possibilities to influence the development of judicial practice in the Russian Federation.³⁵⁷

In addition, the **Plenum** of the Supreme Court issues Explanations (*raz'iasneniie*) regarding questions of judicial practice.³⁵⁸ Guidance and clarifications as to how judges should apply the law are issued by the *Plenum* of the Supreme Court, on the basis of studies and discussions, and after review of the latest practice and statistics within a certain area of law.³⁵⁹ The issuing of Explanations is a heritage from the Soviet period when these were considered policy statements. Initially, the Ministry of Justice initiated such explanations, while in the 1980s the Supreme Court of the USSR became more autonomous in issuing them.³⁶⁰ In contemporary Russia, explanations of this kind are not formally binding on lower courts. However, appellate courts reverse lower court rulings that contradict issued Explanations. Moreover, because a judge's career is strongly affected by the number of their verdicts reversed or modified on appeal ('stability of sentences'), the influence of the Supreme Court's Plenum Resolutions will continue to be strong. Besides, they are frequently cited by the courts when deciding cases.³⁶¹ Thus, these Explanations do have a *de facto* binding effect. Judges with the fewest number of decisions reversed on appeal possess the best chances of being promoted. Promotion equals higher salary and transfer from the countryside to a larger city³⁶² - great incentives for judges to make sure that their decisions are in congruence with higher instance guidelines. This practice has been criticised by

³⁵⁶ Article 54 of the 1981 *RSFSR Law on the Court Structure*, (as amended 1999).

³⁵⁷ Solomon and Foglesong, *Courts and Transition in Russia*, pp. 52-53. In addition, the Presidium assists lower courts. It also assembles and studies statistics and practices of the courts. See, the official homepage of the Supreme Court of the Russian Federation. <http://www.supcourt.ru/index.php?Key1=English%20version&Key2=English%20version&Value2=http://www.supcourt.ru/en/index.htm> (2004-11-24).

³⁵⁸ Article 126 CRF and Article 19 (5) *Federal Constitutional Law on the Judicial System*. Sometimes also referred to as clarifications.

³⁵⁹ The official home page of the Supreme Court of the Russian Federation. <http://www.supcourt.ru/index.php?Key1=English%20version&Key2=English%20version&Value2=http://www.supcourt.ru/en/index.htm> (2004-11-24). See also, Solomon and Foglesong, *Courts and Transition in Russia*, p. 53.

³⁶⁰ *Ibid.*, footnote 17, p. 63.

³⁶¹ Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, p. 21.

³⁶² Solomon and Foglesong, *Courts and Transition in Russia*, p. 49.

the CoE while others, for example Russian judges, find that the practice of issuing Explanations benefits and encourages uniformity in the administration of justice. A survey of district court judges shows that 89.8 percent of the judges asked were of the opinion that Explanations issued by the RF Supreme Court improved judicial practice, while 11 percent considered this practice to infringe on judicial independence.³⁶³

The practice of issuing Explanations might in the long run make difficult the establishment of independent judges. Further, it is important to consider its implications for the development of case law and the use of international law in legal reasoning. The discussion raises several questions and there are several pros and cons to this matter. One argument for the practice of issuing Explanations is that it might also encourage and help regional judges to pay proper attention to the ECHR and international principles of law, enabling them to act independently from local interests (to be discussed below). The argument that issuing Explanations should *not* contribute to the establishment of an independent judiciary is based on the idea that the judicial power is not independent in relation to the political power.

Jurisdiction of the Supreme Court of the Russian Federation

The Supreme Court of the Russian Federation is a cassation instance in relation to other courts of general jurisdiction. It is also a supervision instance (*peresmotr v poriadke nadzora*). Additionally, the Supreme Court acts as a court of first instance in cases provided for by federal law.³⁶⁴ These cases include petitions against³⁶⁵:

- Non-normative acts³⁶⁶ of the President of the Russian Federation, the two chambers of the Federal Assembly, and the Government of the Russian Federation.
- Normative acts of the President of the Russian Federation, the federal Government, as well as other federal ministries and agencies, which affect rights, freedoms, and legal interests of citizens and organizations.
- Decisions to terminate a judge's tenure in advance.
- Decisions to dissolve or to restrict activities of a political party, a national (all Russian) or international public organization, and to dissolve

³⁶³ *Ibid.*, pp. 54, 208.

³⁶⁴ According to *the Federal Constitutional Law on the Judicial System*, Article 19 (3).

³⁶⁵ Article 27 CPC.

³⁶⁶ Acts on individual matters.

centralized religious organizations with regional affiliation in at least two federal subjects.

- o Decisions, as well as deviations from decisions, by the Central Election Commission of the Russian Federation, except for decisions by lower Election Commissions that have entered into force, and referendum commissions.

A further function of the Court under Article 27 CPC is to settle disputes between federal state bodies and regional state bodies, and disputes between regional state bodies, when the question has been referred to the Supreme Court by the federal President in accordance with Article 85 CRF.³⁶⁷ Additional questions can be referred to the Supreme Court as a court of first instance, by federal law.³⁶⁸

The Supreme Court of the Russian Federation supervises the legality of sub-statutory acts.³⁶⁹ In these cases, the Supreme Court can declare the act inapplicable (*nedeystvuyushchie*).³⁷⁰ A court having established that an act of a state agency or any other agency is not in conformity with the law must decide the case according to the law.³⁷¹ The Supreme Court has been active, considering cases in which normative and non-normative acts of ministries and governmental agencies affect rights of individuals.³⁷²

4.6.6.4. The Appeal Procedure in Civil and Administrative Cases

The appeal process is regulated in Articles 320-335 CPC. Rulings of justices of the peace can be appealed to district courts (*appellatsia*) by a party to the case or by another person involved in the matter.³⁷³ The case will be heard anew. All first

³⁶⁷ According to Article 85 CRF, the President may use conciliation procedures in order to settle disputes between federal and regional state bodies, or between two regional state bodies. Should this fail, the President may refer the question to a court of law. In addition, the federal President has the right to suspend acts of regional executive bodies if these acts contradict the CRF, federal laws, and international obligations of the Russian Federation, or if they violate rights and freedoms of individuals, until the matter has been decided by a court of law.

³⁶⁸ See, Article 27 (2) CPC.

³⁶⁹ For a explanation of sub-statutory acts see Part I, Chapter 4.4.3.

³⁷⁰ To be further discussed in Part III. On the effects of such a decision, see Article 253 CPC.

³⁷¹ According to Article 120 (2) CRF.

³⁷² Peter Krug, "The Russian Federation Supreme Court and Constitutional Practice in the Courts of General Jurisdiction: Recent Developments", *Review of Central and East European Law*, Vol. 26, No. 2, 2000, (129-146), p. 135, footnote 19. See also, Ilian G. Cashu and Mitchell A. Orenstein, "The Pensioners' Court Campaign: Making Law Matter in Russia", *East European Constitutional Review*, Vol. 10, No. 4, Fall 2001, (67-71).

³⁷³ See also Article 3 (2), *Federal Law on the Justices of the Peace Courts*.

instance court decisions except decisions by justices of the peace can be subject to cassational appeal (*kassatsia*).³⁷⁴ The parties to a case and individuals otherwise participating in the case can file for cassational appeal. Further, a Procurator or his deputy has the right to initiate a cassation procedure by filing a protest against a court decision. The appeal or the protest should be lodged within ten days³⁷⁵ from the final decision.³⁷⁶

Regional courts, with regard to decisions of district courts, and the Supreme Court of the Russian Federation, with regard to decisions of regional courts, fulfil the function of cassation instance. Cassational review of decisions by the RF Supreme Court as the first instance was not possible until 1999. Up till then the Presidium of the RF Supreme Court functioned as a supervision instance. According to a decision by the RF Constitutional Court, this procedure was not in congruence with the CRF and ECHR.³⁷⁷ The RF Constitutional Court therefore adopted a decision stipulating that cassational appeals against decisions by the RF Supreme Court as first instance must be enabled. This decision resulted in a law on the establishment of the Cassation Chamber of the RF Supreme Court acting as a cassation instance in these cases.³⁷⁸

A cassation instance considers (*rassmotret*) the decision of the court of first instance. New evidence can be examined if the cassation instance reaches the conclusion that the evidence could not have been presented before the first instance and if new facts can be established. The procedure in the cassation instance is defined in Articles 336-375 CPC. By its ruling, the court of cassation instance can³⁷⁹:

- leave the decision unchanged and dismiss the appeal,
- revoke the decision completely or in part and send the case back to the court of first instance³⁸⁰,

³⁷⁴ According to Article 336 CPC.

³⁷⁵ Ten days is a relatively short period. In Sweden the time-limit for filing a complaint over a decision by the first instance is three weeks, RB 50:1, and 51:1, FörvProCL 6a§.

³⁷⁶ According to Article 338 CPC.

³⁷⁷ RF Constitutional Court Decision from 6 July 1998, No. 21-P.

³⁷⁸ SZ 1999 No. 1, item 5.

³⁷⁹ According to Article 361 CPC.

³⁸⁰ This will be done for example if legally relevant circumstances have been incorrectly established, or if there has been a violation or misuse of the material law or norms of procedural law, see Article 363-364 CPC.

- change or revoke the decision completely or in part, and deliver a new decision, without submitting the case for reconsideration by the court of first instance
- revoke the decision completely or in part, and close the case.

If a decision of a first instance court has been revoked and submitted for reconsideration, directions (*ukazaniia*) given by the higher instance are mandatory to the first instance. However, these directions should not affect assessment of the validity and value of evidence.³⁸¹ The possibility of the cassation instance to render a decision of its own without submitting the case for reconsideration means that the intermediate courts act as both cassation and appellate instances. This is the result of a reform from 1996, the aim of which was to save time and increase efficiency.³⁸²

4.6.6.5 *Judicial Supervision*

The procedure of reopening final decisions was established in Soviet law and frequently used during the Soviet era. The procedure was used to correct judicial mistakes and ensure a uniform interpretation of the law. The codes of both criminal and civil procedure contained chapters stipulating the right for the Procurator-General, and the Chairman of the Supreme Court or a regional court, to invoke a review of decisions that had entered into force by filing a protest. A review was to be initiated either on their initiative, or at the request of an interested party. The result of a review could also have negative consequences for the parties to a case.³⁸³ There were no limits as to how many times and when a procedure for judicial supervision could be initiated.

In contemporary Russia, if an appeal or protest has not been launched and a decision therefore has entered into legal force, the decision can still be subject to review (*peresmotr*) by a higher court. In these cases, the Presidium of the court functions as a supervisory instance (*nadzornoy instantsii*) according to a special procedure called judicial supervision (*nadzor*).³⁸⁴ The Presidium consists of the five

³⁸¹ Elena Aleksandrovna Vinogradova, "Procedural Law in Russia. Judicial Procedures of Resolving Disputes in the Economic Field", in *Legal Foundations of Russian Economy*, eds. Juha Tolonen and Boris Topornin, Helsinki, Kikimora Publications, 2000, (205-270), p. 235.

³⁸² Solomon and Fogelson, *Courts and Transition in Russia*, p. 123.

³⁸³ M. Ferschtman, "Reopening of Judicial Procedures in Russia: The Way to Implement the Future Decisions of the ECHR Supervisory Organs?", in *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal order*, eds. T. Barkhauysen, M. van Emmerik, and P. H. van Kempen, The Hague, Nijhoff, 1999, pp. 124-126.

³⁸⁴ Article 376-391 CPC.

or seven most important judges of the court.³⁸⁵ Court decisions and rulings (except for decisions and rulings of the Presidium of the Supreme Court) that have entered into legal force can be made subject to judicial supervision, within one year from entry into force.³⁸⁶

According to the old CPC, this procedure could only be initiated by officials exhaustively defined in Article 320 of the old CPC.³⁸⁷ The officials were the General Procurator of the Russian Federation and his deputies, regional Procurators and their deputies, the Chairman of the RF Supreme Court and his deputies, and the chairmen of regional courts and their deputies. According to the 2002 CPC, parties to a case and other persons whose rights and legal interests have been violated by a court decision may initiate judicial supervision. In addition, procurators have the right to initiate judicial supervision by filing a representation (*predstavlenie*) if they have participated in the case.³⁸⁸ This right is extensively regulated in Article 377 CPC. Article 377 also stipulates in what court a request for judicial supervision should be filed. In general, the Presidium of the highest regional courts, the chambers of civil or military issues of the federal Supreme Court or the Presidium of the Supreme Court act as supervisory instances. Complaints against decisions by the RF Supreme Court's chambers of civil or military matters can be issued to the Presidium of the federal Supreme Court by a procurator, if such decisions violate the unified jurisprudence of the court.³⁸⁹

Judicial supervision can be invoked within one year from the decision entering into legal force.³⁹⁰ It is initiated by a complaint (*zhaloba*) and can be combined with suspension of the protested ruling. The application has to pass three stages before the matter is heard on the merits. To start with, the supervision instance examines the correctness of the application.³⁹¹ Thereafter, the Court will file an order of *certiorari* if there are doubts as to the legality of the court decision in question.³⁹² The time for filing an order of *certiorari* should not exceed one month for all

³⁸⁵ Foglesong, "The Dynamics of Judicial (In)Dependence in Russia", p. 65.

³⁸⁶ According to Article 376 (1) (2) CPC.

³⁸⁷ See, the Supreme Court's Plenum's Resolution No. 2, 20 January, 2003, on *Questions Related to the Adoption and Entering into Force of the New CPC*, which states that the right of officials to invoke a cassation- or supervisory procedure by issuing a protest is no longer valid.

³⁸⁸ See Article 376 (3) CPC.

³⁸⁹ According to Article 377 (3) CPC.

³⁹⁰ See Article 376 (2) CPC.

³⁹¹ Article 380 CPC.

³⁹² Article 381 (2) 1) CPC.

supervisory instances, except for the federal Supreme Court which has a time limit of two months.³⁹³ Following the order of *certiorari*, the court will decide whether the case should be heard on its merits by a supervisory instance.³⁹⁴ If so, the court will consider the interpretation of material and procedural law, with regard to the merits of the case, within the limits of the appeal if not otherwise as required by the interest of law.³⁹⁵

Decisions subject to judicial supervision can be revoked if relevant material law has been incorrectly applied or interpreted, or serious violations of procedural law have resulted in unlawful decisions.³⁹⁶ The ruling issued by the supervisory instance enters into force immediately³⁹⁷, and the supervisory instance is empowered to³⁹⁸:

- leave a ruling unchanged and dismiss the appeal,
- revoke the ruling completely or in part, in combination with sending the case for reconsideration to the first, second, or supervisory instance,
- revoke the ruling completely or in part and drop legal proceedings, or refuse to consider the case,
- leave in force parts the court decision that was passed before,
- revoke or change the decision of the first, second, or supervisory instance, and deliver a new decision without sending the case back for reconsideration in case of failure in application and interpretation of material law.

The supervisory procedure in the old CPC was criticised by the CoE on two grounds. Firstly, because it could put one of the parties in a more disadvantaged position than stipulated in the court's final decision, and secondly because there was no limitation on the number of occasions for reopening a case.³⁹⁹ Thus, it was not in congruence with the principle of legal certainty.⁴⁰⁰ In a state based on the rule of law, predictability is one of the most important principles. However,

³⁹³ Article 381 (1) CPC.

³⁹⁴ Articles 382-384 CPC.

³⁹⁵ Article 387 CPC.

³⁹⁶ According to Article 390 CPC.

³⁹⁷ Article 391 CPC.

³⁹⁸ According to Article 390 CPC.

³⁹⁹ Ferschtman, "Reopening of Judicial Procedures in Russia", pp. 131-132.

⁴⁰⁰ See also the ECtHRs decision in the case *Ryabykh v. Russia*, July, 24, 2003, (*Application no. 52854/99*).

reopening of cases is *per se* not unfamiliar to other legal orders. However, every party to a case that can be (negatively) affected by a decision to reopen the case should be well informed, or have the possibility to inform himself, under which conditions a decision can be subject to reconsideration after it has entered into legal force. Legislative acts stipulating this possibility should be exhaustive and clear as to when and how this is possible, in order to avoid arbitrary use. In this sense the new CPC has improved the situation. As described above, the 2002 CPC stipulates a one-year time limit and concerned parties must always be notified if a supervision procedure is prepared. In addition, the supervision procedure is, as a main rule, to be invoked by a party to a case, hence not by a state official, for example a judge or a procurator. There is one exception though – the President of the federal Supreme Court or his deputies can initiate a supervisory procedure in order to ensure unified judicial practice and legality.⁴⁰¹

4.6.6.6 Summary

Russian courts of general jurisdiction have four levels. The first level, consisting of Peace Courts, is relatively newly established and it remains to be seen in what way this reform will contribute to the establishment of access to justice and an efficient judicial system in Russia. The ambition of the reform has been to bring justice closer to the citizen. Thus far, federal officials are positive towards the reform. However, its continued success depends on additional financial resources.

The Supreme Court of the Russian Federation issues Explanations on how to interpret and apply the law. In addition, it functions as a cassation and supervision instance, as well as first instance when provided for by law. The Supreme Court exercises judicial review of sub-statutory and non-normative acts, while the constitutionality of all other normative acts is to be considered by the RF Constitutional Court.

As we have seen, a higher court can function as both cassation and appeal instance, as well as a supervision instance. The *Judiciary Board* of a court exercises cassation and appeal activity in regard to court rulings that have not yet entered into force, while judicial supervision of rulings that have obtained legal force is conducted by the *Presidium* of a court. This process will result in the case being heard anew on its merits. It is difficult to state with certainty what the actual effects of the supervision procedure in general, and the reopening of cases that

⁴⁰¹ See further, Article 389 CPC. Parties to a case, including a Procurator can also initiate a review on the same grounds, according to Article 377 (3) CPC.

have been subject to consideration by the court in Strasbourg in particular, will be. One conclusion could be that the impact of the ECHR and its material content on the Russian legal system will be greater due to the decision of the RF Constitutional Court in the *Kulnev* case.⁴⁰² Another conclusion could be that the system might be more vulnerable to political pressure. Let us conclude by saying that if the supervisory instance acts independently from pressure exerted by external political or private forces (external in regard to the legal order), then its activity can contribute to increase the legitimacy and uniformity of the Russian judicial procedure, if kept strictly within the limits of the legal order.

4.6.7 The Procuracy

4.6.7.1 Structure of the Procuracy

The legal foundation for the activity and powers of the Procuracy is established by the CRF, *the Federal Law on the Procuracy of the Russian Federation*, other federal laws, and international treaties of the Russian Federation.⁴⁰³ *The Federal Law on the Procuracy* stipulates that any activity or function not provided for by federal law may not be placed upon the Procuracy.⁴⁰⁴ This means that the President, or for example the Federation Council, cannot unilaterally extend the powers of the Procuracy. Likewise, the creation of procuracy agencies outside the unified system is not accepted.⁴⁰⁵

The system of Procuracy consists of the General Procuracy of the Russian Federation, procuracies of the federal subjects, military and other specialized procuracies, and procuracies of cities and districts. According to the CRF, the Procuracy is to be independent from the Federal Assembly, the Government, and the judicial power. The Procuracy of the Russian Federation constitutes a unified centralised system led by the Procurator General. The *raison d'être* for a centralised Procuracy is to preserve the integrity and stability of the Russian Federation.

⁴⁰² RF Constitutional Court decision from February 2, 1996, no. 4-P. According to the RF Constitutional Court, a decision by an inter-state organ, in this case the ECtHR, can lead to a review of the case by the Russian Supreme Court, according to the RF Constitutional Court's interpretation of Article 46 CRF. Thus, according to Article 46 (3), a decision by an inter-state organ obliges the Supreme Court to reopen the case and consider it in accordance with the decision of the inter-state organ. The *Kulnev* case is published in *Rossiiskaya Gazeta*, no. 31, 1996-02-15. It is also available at http://ks.rfnet.ru/postan/p4_96.htm (2005-02-21).

⁴⁰³ Article 129 CRF.

⁴⁰⁴ Article 3 *The Federal Law on the Procuracy of the Russian Federation*, SZ 1995, No. 47, item 4472, No. 168-F3, (as amended 30 June, 2003).

⁴⁰⁵ Article 11 (3) *Federal Law on the Procuracy*.

The Procurator General, who heads the General Procuracy, is appointed for a term of five years⁴⁰⁶ by the Federation Council on the recommendation of the President.⁴⁰⁷ If the Federation Council does not accept the President's candidate, then the president should submit a new candidacy within thirty days.⁴⁰⁸ The Procurator General in turn appoints procurators of the federal subjects, with the consent of the regional legislative assemblies.⁴⁰⁹ Procuracies of the federal subjects are appointed for a term of five years. The Procurator General deals with the formation, reorganization, and abolition of procuracy agencies, as well as determining their status and competence.⁴¹⁰ Thus, all procurators are subordinated and accountable to the Procurator General.⁴¹¹ The procedure and grounds for relieving a procurator before the end of his term are stipulated by the CRF⁴¹², *the Federal Law on the Procuracy of the Russian Federation* and *the Labor Code of the Russian Federation*.⁴¹³

Procurators and their investigators are not allowed to be members of representative or other state and local self-government agencies. Likewise, they may not be members of, or take part in the activity of, associations pursuing political purposes. Procurators are not allowed to combine their principal activity with any other position, paid or unpaid, except for teaching, scholarly and creative activity.⁴¹⁴

The Procuracy should exercise its powers independently from state agencies and agencies of local self-government. It is financed by the federal centre. However, regional procuracies depend on regional authorities to provide material resources such as housing, computers, and cars. The Procuracy should operate openly, if not otherwise provided for by law, and it has an obligation to inform all state bodies of the Russian Federation, all bodies of local self-government, as well as all

⁴⁰⁶ Articles 12 (5) and 14 (1) *Federal Law on the Procuracy*.

⁴⁰⁷ Article 12 (1) *Federal Law on the Procuracy*, and Articles 83 (f) and 102 (h) CRF.

⁴⁰⁸ According to Article 12 (2) *Federal Law on the Procuracy*. In 1994 the Federation Council rejected the President's proposal three times and Yeltsin eventually abandoned his candidate. *Contemporary Russian Politics*, ed. Archie Brown, Oxford University Press, 2001. p. 41.

⁴⁰⁹ According to Article 13 (1) *Federal Law on the Procuracy*.

⁴¹⁰ For more details on the administrative powers of the Procurator General see, Article 17 *Federal Law on the Procuracy*.

⁴¹¹ Articles 4 (1), 13 and 17-19 *Federal Law on the Procuracy*.

⁴¹² Articles 83 (f) and 102 (h) CRF.

⁴¹³ Articles 12 (6) *Federal Law on the Procuracy*.

⁴¹⁴ Article 4 (3)-(5) *Federal Law on the Procuracy*.

citizens of the Russian Federation about the state of legality.⁴¹⁵ The legislative basis of the organisations of the Procuracy provides for a self-sufficient and independent organisation. Still, the Procuracy of the Russian Federation is a highly politicised body.⁴¹⁶ The role to be played by the Procuracy for the judicial protection of individual rights and freedom will be further explained and discussed in Part III.

4.6.7.2 Power of the Procuracy

The Procuracy is entrusted with the task of ensuring the supremacy of the law; unity and effectiveness of the law; protection of individual rights and freedoms, and legal interests of the state and society. In order to fulfill this task, procurators should *inter alia* supervise the execution of laws, and implementation of individual rights and freedoms by federal and regional state agencies.⁴¹⁷ The Procuracy has three areas of activity: supervision of legality, criminal prosecution, and participation in civil proceedings. The Procuracy's role for providing legal aid will be further examined below in Part III. Suffice to state here that citizens turn to the Procuracy with their complaints. This is especially the case concerning social rights.⁴¹⁸

4.7 Russia and the Council of Europe

Membership of the CoE has been highly desirable for several of the post-Soviet states. It has been an important foreign policy goal for regimes and a potential life line for several actors within civil society. For the Central European and Baltic States it has been a prerequisite for EU-membership. The ECHR and the ECtHR are relatively effective organs for the protection of human rights in Europe. One of the most important contributions of the CoE and its organs is the fact that the protection of individual rights is made a matter not only for domestic policies and national legal orders. External legal sanction mechanisms, which can be invoked by both individuals and other contracting states, are available to remedy violations

⁴¹⁵ Articles 4 (2) and 12 (7) *Federal Law on the Procuracy*. According to the latter Article, the Procurator General once a year presents a report to the Federal Assembly and the President on the state of legality and the legal order as well as on the work of the Procuracy.

⁴¹⁶ On a discussion whether procurators are taken hostage by the political élite in Russia and its effects, see Gordon B. Smith, "Of Politicians, Puppets, Prostitutes and Prosecutors: Political Influences on the Procuracy". Paper presented at the ICCEES VI World Congress, Tampere, Finland, July 29-August 3, 2000. Smith reaches the conclusion that the Russian Procuracy is highly politicized.

⁴¹⁷ Article 1 (2) *Federal Law on the Procuracy*.

⁴¹⁸ Burnham, Maggs and Danilenko, *Law and Legal System of the Russian Federation*, p. 140.

of the ECHR. This is a unique development in post-WW2 Europe with considerable impact on the domestication of rights.

The Russian parliament was granted special guest status with the Parliamentary Assembly on January 14, 1992 and on May 7, 1992 Russia applied for membership. The Parliamentary Assembly was asked to give an opinion on Russia's membership. The procedure was interrupted in February 1995 due to the war in Chechnya, but was reinstated in September the same year based on the belief that Russia was committed to a political solution and investigation of human rights violations.⁴¹⁹ In its opinion, the Assembly concluded that political, economic, and legal reforms were moving ahead in Russia. There were shortcomings, but there was also progress towards general awareness of the rule of law, according to the Assembly. Highly optimistically, the Assembly concluded that respect for the rule of law could be included in this positive development. Continued progress was assured by President Yeltsin, the Prime Minister, the President of the Federation Council, and the Duma speaker. Based on these assurances and undertakings to reform the legal system, the Assembly assessed Russia as willing and able to fulfill the requirements of CoE membership.

The Assembly stressed that particular support should be awarded to *inter alia* NGOs in the field of human rights. In their opinion it was concluded that the intent to sign and ratify several of the CoE conventions and protocols was a common understanding between Russia and the Assembly. Among other things, it was stated that Russia intended “to sign within one year and ratify within three years from the time of accession Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty in time of peace, and to put into place a moratorium on executions with effect from the day of accession”.⁴²⁰ The Assembly recommended the Council of Ministers to invite Russia to become a member of the CoE. Protocol No. 6 has thus far not been ratified by the Russian State Duma, although there is a moratorium.

In 1996 Russia became a member of the CoE by signing *the Statute of the Council of Europe*. By signing, Russia committed itself to maintain a democratic system, to accept the principle of rule of law, and to ensure the enjoyment of human rights and fundamental freedoms for all within its jurisdiction. Signing the ECHR was an

⁴¹⁹ Opinion No. 193 (1996)1 on Russia's Request for Membership of the Council of Europe.

Available at

<http://assembly.coe.int/Mainf.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta96/EOP193.htm>, 2004-09-20.

⁴²⁰ *Ibid.*

additional condition that had to be fulfilled. The conditions for membership were formulated in *Opinion 193 (1996)1 of the Parliamentary Assembly of the Council of Europe* as mentioned above. The Opinion contained instructions for Russia as to the changes that had to be adopted in order for the Russian Federation to fulfil the standards of the CoE. Substantial cultural and institutional differences were the reasons for these instructions.

The decision to adopt the Russian Federation as a member of the CoE was not without controversy, especially since reports regarding conformity of the Russian legal system with the standards of the CoE showed a negative result. In addition, the war in Chechnya was one of the reasons for doubts as regards Russia's membership. However, political motives prevailed over legal considerations and Russia was accepted as a member, based on the argument that it was better to include Russia in the European family while she was still in transition to democracy and the rule of law, thereby enhancing the positive influence of European standards.⁴²¹ Thus, membership was granted in exchange for the fulfilment of political demands such as settling the war in Chechnya in a peaceful manner, and ratifying the ECHR within one year after its signature. On May 5, 1998 Russia ratified the ECHR.

The influence of the ECHR and the ECtHR can be exemplified by a statement of Justice Minister Yurii Chaika on 1 November 2001 that his agency is obligated to do "*everything possible*" to ensure that the criminal justice system protects the rights of prisoners, because if Moscow doesn't, "*then the Council of Europe will take up the issue*". He further said that that possibility makes it a question of "*the prestige*" of the state. Chaika added that the government had allocated 350 million roubles (\$12 million) for the reconstruction of prisons and interrogation facilities in 2000 alone.⁴²² It is common knowledge that the facilities for pre-trial detention in the Russian Federation are in an unacceptable condition and that something needs to be done fast. The *Kalashnikov case*⁴²³ testifies to the horrors that can be met in a Russian prison.

Decisions taken by the ECtHR against Russia will be further discussed below. At this stage, it is worth noting that despite skepticism among the judiciary and politicians in Russia as to the influence of the ECHR and the ECtHR on the

⁴²¹ Anders Fogelklou, "Russia and the European Council", *Rättspolitisk debatt*, 1996, pp. 8-9.

⁴²² RFE/RL Security Watch Vol. 2, No. 43, 6 November 2001.

⁴²³ *Kalashnikov v. Russia*, 15 July, 2002, (*Application no. 47095/99*).

Russian legal order,⁴²⁴ the RF Constitutional Court has on several occasions referred to the ECHR and the case law of the ECtHR in its rulings. In addition, a Plenum Resolution of the Russian Supreme Court from October 10, 2003 reflects the increasing role of courts of general jurisdiction in implementing international law in the Russian legal system. These matters will be dealt with more thoroughly in Part III.

4.8 Civil Society in Russia – To Be or Not to Be?

4.8.1 Introduction

The purpose of this Section is to provide a general overview of the (lack of) civil society traditions in the Soviet Union. This background will constitute the starting point for a discussion on the existence and preconditions of the human rights movement in contemporary Russia to be conducted in Part III. When referring to civil society in this dissertation, the definition by Christopher Marsh and Nikolas K. Gvosdev will be used. Their working definition of civil society is “*..that of a relatively autonomous realm that may exist between state institutions and the private sphere*”.⁴²⁵ Although this definition is wide and there are more precise definitions, it fulfills its purpose for this dissertation.

The specific function of civil society that we are concerned with is civil society’s abilities to strengthen democracy vertically⁴²⁶ by aggregating its members’ preferences and putting these forward in order to influence government policy. This function is traditionally realized by engaging in co-operation with the state and political parties, especially during elections.⁴²⁷ However, one of the arguments put forward in this dissertation is that judicial channels can complement traditional political channels, and thereby contribute to strengthening democracy vertically. Hence, focus will be on human rights organizations that aim to secure human rights and freedoms through litigation. The role played by actors within

⁴²⁴ Author’s conversation with representatives of the Ministry of Justice of the Russian Federation in Moscow, 2004-12-16.

⁴²⁵ *Civil Society and the Search for Justice in Russia*, eds. Christopher Marsh and Nikolas K. Gvosdev, Lanham, Lexington Books, 2002, p. 2.

⁴²⁶ As opposed to horizontally, which means that engagement and membership build up trust between its members, thereby creating “social capital”, which is then considered to spill over to affect trust in state institutions. Michael McFaul and Elina Treyger, “Civil Society”, in *Between Dictatorship and Democracy. Russian Post-Communist Political Reform*, eds. Michael McFaul, Nikolai Petrov and Andrei Ryabov, Washington D.C., Carnegie Endowment for International Peace, 2004, p. 140.

⁴²⁷ *Ibid.*

civil society is in both contexts to establish a link between the public and the political power in order to present the preferences of its members and to exercise control of political and administrative power. The aim is to monitor state activity in order to achieve accountability, gain redress, and to spread information, thereby contributing to transparency. The preconditions for and the status of the human rights movement in Russia 1993-2003 will be discussed in Part III. Here follows a short historical background as to how the Soviet Union dealt with non-state organisations.

4.8.2 Dissident Movements in the Soviet Union

Official and non-official “civil organisations” existed under the Soviet regime, although non-state organizations were illegal.⁴²⁸ The official organisations claimed to represent social interests, but what they actually did was to help the state to control society. These organisations were given names that resembled civic organizations but they were run and controlled by the Communist Party in a top-down fashion.⁴²⁹ Regarding the existence of non-official organizations - there did exist underground networks such as *samizdat* literature, dissident activities, and émigré organisations, although to a varying degree as to their activity and outreach.⁴³⁰ Dissident organizations, described mainly as élite affairs⁴³¹, were suppressed. Some of their members were put in jail and otherwise harassed. As we shall see, several of the networks created in the post-Stalin Soviet Union prepared the ground for post-Soviet Russian civil society. They were able to surface due to *glasnost* policies at the end of the 1980s. However, these reforms failed to establish a link between the state and society through which non-state organizations could exert an influence on the state. In addition, these organizations did not have enough resources to act independently and autonomously in relation to the state. This changed, however, and at the beginning of the 1990s thousands of organizations were registered and there seemed to be a strong embryo of a functioning civil society. Civil society was mobilised, often by Yeltsin, in order to fight the Soviet system and it did play an important role in the fall of the Soviet Union. After the fall, focus was shifted to economic reforms and non-state

⁴²⁸ *Ibid.*, pp. 142-143.

⁴²⁹ Caiazza, *Mothers & Soldiers*, p. 28.

⁴³⁰ *Ibid.*, p. 3.

⁴³¹ McFaul and Treyger, “Civil Society”, p. 144.

organizations became marginalized in every-day politics. However, as suggested by McFaul and Treyger, this does not amount to suppressing civil society.⁴³²

4.8.3 Human Rights Movement

The embryo civil society that existed in the post-Stalin Soviet Union was composed of a variety of movements. The human rights movement was only one of many, but probably the most famous. Its figurehead was the well-known physicist Andrei Sakharov. At first, the Russian human rights movement was rather fragmented, but through informal networks it came to be united and more strategic. This process began in the middle of the 1960s.⁴³³ Human rights became the slogan of the movement when it fought for the right of its members and of others who had been mistreated by the regime. Open letters and appeals were not only addressed to the Soviet regime, but also to the international community. The movement was committed to non-violence, truth, and honesty, and to working within the Soviet legal system and its laws. Thus, reform was sought through the rule of law and the protection of individual rights and freedoms - not by revolution.⁴³⁴

In the 1980s, Kovalyov concluded that the movement had been divided into two “fractions”; the Legalists (*zakonniki*) and the Politicals (*politiki*). The *Legalists* were primarily concerned with the integrity and rights of individuals, demanding that the state should respect its own laws. Legal justice and freedom of expression became their slogan and the group tried to work together with the state in dialog, not in fierce opposition to it. The two groups differed as to both aim and what motivated action. The *Legalists* mainly defended human rights and did not care so much about the mode of governance as long as individuals’ rights were not violated. The *Politicals* were more explicitly for the fall of the Soviet regime and their actions were radical. They did not have either the will, tolerance, or patience to engage in a dialog with a regime that so violently crushed its citizens’ human rights.⁴³⁵ The *Legalists* believed that political reform could come from the top as a

⁴³² *Ibid.*, pp. 145, 149.

⁴³³ In 1966 Yuli Daneil and Andrei Sinyavsky were put on trial for their fictional characters. The strong reaction of the Human Rights Movement was, besides the need to react to the contempt for the cultural and scientific elite, the fear that the trials formed part of an attempt to rehabilitate Stalin by conservative forces in the Party. Gilligan, *Defending Human Rights in Russia*, p. s. 21.

⁴³⁴ *Ibid.*, p. 22.

⁴³⁵ *Ibid.*, pp. 10, 31-32. Gilligan explains the difference in approach with personal experience. The leaders of the *Politicals* had themselves been subject to degrading treatment and had spend time in jail, while the leader of the *Legalists* did not have that experience. Before joining the movement

result of constant pressure and dialog between the human rights movement and the Soviet regime. However, it is highly questionable whether a dialog was imminent. Rather, it was a one-way communication. Members of the movement expressed their opinions and were arrested. Those that still could, continued to work with *samizdat* texts, especially the *Chronicle of Current Events*. And by doing so they began to spread registered information of human rights violations throughout the Soviet Union.⁴³⁶

The movement experienced hard times in the 1970s and at the beginning of the 1980s. Several of its active members were sentenced to prison and internal exile. At the beginning of the 1980s, both Sakharov and Kovalyov were in exile. When Gorbachev came to power, fear was no longer a dominating factor, as it had been in the 1960s and 70s. Gorbachev's *Glasnost* policies enabled a greater outreach for *samizdat* literature. Information on the malfunctioning of the system in combination with the political will to reform re-energised the human rights movement. Still, the issue of cooperation with the government again caused internal unrest for the movement, this time over the release of political prisoners⁴³⁷ and support for Gorbachev. Some argued that proximity to power would destroy the movement, that it would become a part of the system and hence lose its legitimacy. On the other hand, Kovalyov, as a representative for the *Legalists*, underlined the values of cooperation and consensus and it was his belief that the movement could at the same time encourage and pressure the government in order to achieve their goal, i.e. a Rule of law state.⁴³⁸ The *Legalists* came to work relatively closely to the regime and they played an important role in drafting *inter alia* the 1993 CRF, the law on state of emergency, and the criminal law. At the beginning of the 1990s, the human rights movement moved from external to internal opposition. The latter turned out to be a disappointment in terms of influence.

they had professional careers, often in science, they were convinced gradualists and relatively cautious. However, as it turned out, even the legalists would become more radical in their actions.

⁴³⁶ *Ibid.*, p. 12.

⁴³⁷ Between 1968-1986 2, 468 individuals were convicted for anti-Soviet propaganda and disseminating information discrediting the Soviet political and social system. At the beginning of 1987, 288 individuals were still in prison. The pardoning of political prisoners was selective, which caused some activists to doubt the true intent to reform the system. Starting 1987, political prisoners were released on condition that they sign a statement stating that they would not take part in any anti-Soviet activity in the future. Kovalyov, Sakharov and Bonner supported this policy and thereby subjected themselves to harsh internal criticism. *Ibid.*, pp. 68-70.

⁴³⁸ *Ibid.*, p. 70.

Until 1999 activists were free to travel and to develop connections with other activists. But in 1999, due to changes in the overall political climate, but above all due to the second war in Chechnya, which was launched that year, the grip tightened. Activists began to live in fear.⁴³⁹ Thus, besides a few exceptions, such as women's rights organisations and organisations providing social services, activists in contemporary Russia, especially those who criticize the state, are increasingly exposed to a harsh state policy.⁴⁴⁰ Since coming to power, President Putin has restricted the power, reach, and efficiency of civil society. The Putin administration has increasingly curbed NGO activities in some areas, whereas NGOs are co-opted in others.⁴⁴¹ Russian contemporary human rights organizations have been influenced and sometimes founded by, activists that were active during Soviet times. In conclusion, long time activists have travelled from being dissidents to become insiders only to return to being dissidents.

⁴³⁹ Sarah E. Mendelson, "Russian's Rights Imperilled. Has Anybody Noticed?", *International Security*, vol. 26, no. 4 (Spring 2002), (39-69), p. 61.

⁴⁴⁰ Orttung, "Russia", *Nations in Transit* 2004.

⁴⁴¹ McFaul and Treyer, "Civil Society", p. 159.

5. Conclusion

Part I has provided a description of the dissertation's research design, and an introduction and background to the theoretical framework and key concepts of the dissertation. It has pointed out particularities of the Soviet system and post-Socialist legal reform and given a short introduction to Russia in general and to the Russian judiciary and civil society in particular. In Part II the theoretical framework will be further developed. The aim is to examine the relationship between various modes of governances on the one hand, and judicial review in combination with individual legal activism, on the other and thereafter to discuss legal participation as an alternative or complement to political participation.

PART TWO

THEORETICAL FRAMEWORK

1. Introduction

The purpose of Part II is to provide an overall analysis and discussion of constitutional and administrative law concepts and institutions of relevance for individual legal activism. In particular, focus will be on the connection between constitutional and administrative law, and its impact on administrative law adjudication. The ECHR and the ECtHR will also be dealt with, given their influence on national legal orders in general and on the connection between constitutional and administrative law in particular. Initially, different modes of governance will be examined and discussed in the light of the principal-agent relationship. This approach is chosen in order to illustrate the connection between the micro and macro level of legal and political systems in terms of power-sharing models, and judicial-technical solutions, focusing on control mechanisms available to the individual in relation to the state's administrative apparatus. Solutions and models of special interest are those with the function of controlling public activities and public officials. In addition, this Part includes a discussion on Charles R. Epp's theory on Rights Revolutions. The purpose of including the ECHR and ECtHR and the theory on rights revolutions is to illustrate and stimulate a discussion on factors that might contribute to a connection between the micro and macro level of the legal system on the one hand, and an interaction between the political and the legal system on the other.

The present study is mainly concerned with decision-making within the public sector and the possibility for individuals, alone or in groups, to exercise control over this activity in order to protect their rights. The kind of control referred to is judicial and it is, in most cases, exercised *ex post facto*.¹ It can also be described as being external in the sense that it is invoked by an element which is not a part of the separation of powers and functions on the horizontal level. Separation of powers and functions provides *internal* checks and balances.

¹ For example, in the French legal order abstract constitutional review can be invoked before the law in question has been promulgated. Thus, focus will *not* be on abstract review *a priori* since private individuals can very seldom invoke it.

1.1. Why Focus on Judicial Control of Political and Administrative Powers?

As pointed out by several scholars, legislative assemblies are losing power in terms of control and influence, especially concerning control of the government and the administrative apparatus.² There are several explanations as to why this is the case. Explanations include, e.g.:

- the rise of the welfare state that turns into a bureaucratic state,³
- the process of globalization and Europeanization,⁴ and
- the increase of powers of governments and administrative bodies.

Martin Loughlin argues that “...everywhere and without exception [the] executive exercises a greater power than any reading of constitutional texts would suggest [and that] presents a conundrum”.⁵ As a result and in the long run the sovereignty and powers of parliament might be decreased, contributing to what has been called a “democratic deficit”.⁶ Additionally, the increasing size of bureaucracies has made it almost impossible to exercise direct control through electoral and legislative processes, contributing to a lack of democratic accountability.⁷ Therefore, the importance of individual control and accountability of political and administrative powers, via *inter alia* judicial channels, is likely to increase. It is in this context that we should regard, evaluate, and further elaborate the thesis that the right to contest decisions

² See for example M.J.C. Vile, *Constitutionalism and the Separation of Powers*, Indianapolis, Liberty Fund, 2nd ed. 1998, pp. 11-12.

³ Cappelletti, *The Judicial Process in Comparative Perspective*, p. 14. When making the statement that welfare states are turning into bureaucratic states, with the potential of becoming police states, Cappelletti is referring to the growth of the legislature and its effect on the executive. The latter is of special concern since the executive will have to “enforce, substantiate, monitor and supplement” the policy goals set by the legislature.

⁴ Regarding the effect of European law on national administrative law, see *The Europeanisation of Administrative Law. Transforming National Decision-making Procedures*, ed. Karl-Heinz Ladeur, Dartmouth, Ashgate, 2002.

⁵ Loughlin, *The Idea of Public Law*, p. 47. See also, Jürgen Habermas, *Diskurs, rätt och demokrati. Politisk-filosofiska texter i urval av Erik Oddvar Eriksen och Anders Molander*, Göteborg, Daidalos, 1995, pp. 113-114.

⁶ The term “democratic deficit” has most often been used to describe problems with the European Parliament and the influence that individual citizens have on the EU. In the context of this dissertation, the term is used to describe potential developments for national parliaments and how it affects individuals’ influence and control over them.

⁷ When describing what Vile terms “*the Administrative State*”, Vile maintains that the Administrative State “*is only marginally under the control of its political leaders at any point in time*”. Here, he is referring especially to rules governing economic and social life. Vile, *Constitutionalism and the Separation of Powers*, p. 399.

and actions of public bodies and civil servants before a court of law can function as a complement or alternative to the electoral process, in order to demand accountability of governmental actions.⁸ This, despite the fact that control and accountability is more commonly striven for through free elections at frequent intervals.⁹ However, when these traditional channels fail, for whatever reason, effective measures of control and influence must exist to safeguard the rights of individuals and to prevent abuse of power on the part of both political actors and the administrative machine. As stated by Vile, measures of control can only be effective when we have acquired knowledge about which organ fulfils what function and how the different organs, supposed to control each other, are *de facto* and *de jure* related to each other.¹⁰

In conclusion, Cappelletti has characterized the symptoms of what he calls a “*deep crisis of our contemporary world*” as “*two parallel developments of major dimensions*”. The two parallel developments are:

1. the “*gigantism*” of legislatures, which play an ever-increasing role by adopting a wide range of laws (due to *inter alia* the growth of the welfare state) that interfere with larger and larger areas of activities, and
2. as a result of 1., the “*gigantism*” of the administrative branch.¹¹

These developments, according to Cappelletti, create challenges, fragmentations of, and new roles for, the judiciary, such as growth of judicial review of legislation and administrative action.¹² This sets the starting point and the *raison d'être* for focusing on judicial control of political and administrative powers and individual legal activism.

⁸ Cappelletti, *The Judicial Process in Comparative Perspective*, pp. 44-45.

⁹ Birkinshaw, “Decision-Making and Its Control in the Administrative Process – An Overview”, pp. 152-153.

¹⁰ Vile, *Constitutionalism and the Separation of Powers*, pp. 400-401.

¹¹ Cappelletti, *The Judicial Process in Comparative Perspective*, p. 18.

¹² *Ibid.*, p. 19.

2. Different Modes of Governance

2.1 Introduction

This Chapter describes different modes of state governance¹³ in terms of separation of powers¹⁴ and functions¹⁵, on the one hand, and principal-agent relationships on the other. The purpose is to examine the number and characteristics of channels available to citizens to exercise control of political and administrative powers in various modes of governance. The number and characteristics of the channels available depends on what model of governance can be ascribed to a certain state. The overall purpose of this Chapter is to set the playing field for the coming discussion on political and legal participation. The discussion on various modes of governance builds on research by political and

¹³ The term *mode of governance* is used to describe and discuss various forms of institutional and structural designs of political systems, including state administration, and their underlying values, the latter manifested by the character of the relationship between the state and the individual.

¹⁴ Division of powers and separation of functions are two vital preconditions for democratic rule. Although the doctrine of separation of powers does have a long history and has been subjected to harsh criticism, it often reappears in various forms. Vile reaches the conclusion that few writers dealing with constitutional theory actually define what they mean by separation of powers. Hence, Vile sets out to create a “*pure doctrine*” of the separation of powers, representing an ideal type. The “*pure doctrine*” is formulated in the following way: “*It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.*” The “*pure doctrine*” consists of three elements: 1. Division of the agencies of government into three categories, enabling internal checks and balances. 2. The assertion that there are three functions of government: the legislative, executive, and judicial functions. 3. The separation of persons. Vile, *Constitutionalism and the Separation of Powers*, pp. 7-8, 13-19.

¹⁵ The necessary and, in comparison, abstract functions mentioned above should according to Vile be distinguished from the less abstract tasks of the government, such as the duty of keeping order, of building roads, and of providing for defence. The recommendation that follows with the “*pure doctrine*” of the separation of powers is that each of these functions should be fulfilled by the appropriate branch of government. However, the ideal type of strict separation of functions has been modified by the idea of *partial separation of functions*. The latter can be illustrated by the power of impeachment enjoyed by the legislature, a shared legislative function but all other functions kept separate, and a veto power of the executive branch over legislation. The power to intervene is limited, and although all branches can exercise some authority in the sphere of all three functions, the separation of functions is still upheld in principle. *Ibid.*, pp. 17-20.

legal scientists.¹⁶ Three ideal types of various modes of governance are examined in this Chapter:

- the parliamentary¹⁷,
- the constitutional¹⁸, and
- the authoritarian.

The first mode of governance to be examined is the parliamentary, to be followed by constitutional democracy.¹⁹ Thereafter the significant characteristics of authoritarian political systems will be examined.²⁰ These three modes of governance should be seen as abstract ideal types. Regarding the ideal type of a parliamentary mode of governance, it is important to keep in mind that traditional parliamentary systems such as Sweden and the United Kingdom are moving towards the ideal type of constitutional democracy, which also means that it is difficult to uphold a clear separation between the two models.²¹ Still, an attempt will be made since the different models are at variance as regards the channels available to the individual in order to claim accountability of political and administrative powers. The most important difference between parliamentary and

¹⁶ This author has no theoretical ambitions concerning the definitions of the three ideal types to be described in the following sections.

¹⁷ “Parliamentary systems owe their name to their founding principle, namely, that parliament is sovereign.” Giovanni Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, London, MacMillan Press, 2nd ed, 1997, p. 101.

¹⁸ A constitutional state is a state in which the constitution serves as the highest law and the state is governed by the rule of law – “So long as the constitution is honoured, the state is a constitutional state.” Schwartz, *The Struggle for Constitutional Justice*, p. 6. This condition could also be described as constitutional legality. According to Schwartz, constitutional democracy requires, in addition, the protection of civil and political rights necessary for a democracy to be established and sustained. *Ibid.*, p. 7. Thus there are higher demands on the substance of a constitutional democracy compared to a system characterised by constitutional legality. For the purpose of this study, a constitutional mode of governance equals constitutional democracy. See also, Eivind Smith and Olof Peterson, ”Konstitutionell demokrati som begrepp och som ideal”, in *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (7-41), pp. 30-34.

¹⁹ This starting point is motivated by the fact that the majority of the group of states that we are concerned with either consider themselves to be democratic states, or strive to become one.

²⁰ One of the purposes of this dissertation is to discuss the impact of constitutionalism as a legal and political idea on post-Soviet Russia and the judicial-technical solutions that come with it. Therefore this Chapter includes authoritarian modes of governance in order to enhance the understanding of the difficulties experienced in contemporary Russia. The question whether the Russian federation is an authoritarian state or not will be dealt with Part III. However, it is common knowledge that Soviet Russia was authoritarian as to its mode of governance when Gorbachev initiated reforms in 1985.

²¹ This is a result of the spread of what Stone calls the “new constitutionalism” after the Second World War. Stone, *Governing with Judges*, p. 2. The definition of “new constitutionalism” is accounted for below.

constitutional democracy is what institution is considered the final protector of individual rights and freedoms: the courts or the parliament. This will be further developed below.

Different modes of governance have been analyzed by several scholars in terms of separation of powers and functions, taking their starting point in the doctrine of separation of powers or the doctrine of parliamentary sovereignty,²² often without an explicit and in-depth discussion of the principal-agent relationship.²³ The principal-agent relationship contributes to this study by shifting focus from the horizontal macro perspective often applied when studying state governance, to a vertical approach that takes its starting point in a micro perspective. One of the purposes of this dissertation is to discuss individual legal activism as an alternative understanding of political participation. Put differently, this concerns the possibilities for an individual (the principal) to exercise control of the legislature and the executive (the agents) through the judicial channel.

According to Vile, the traditional theory of separation of powers has lost its scientific value. After accounting for the historical roots and the contemporary nature of governments in the United States, Great Britain, and France, Vile concludes that *“The reality of the working of governments provides a difficulty for the traditional theory of the separation of powers, which divides the powers and the functions of government into three, for, in effect, there are now four major sections of the political institutions of the democratic state: the legislature, the government, the administrative machine, and the judiciary”*.²⁴ Vile has clearly identified the difficulties with the separation of powers and functions; hence, in the following focus will be on the relation between the legislature, the executive, the administrative machine, and the judiciary. Regarding separation of functions, special attention will be on the legislative function, i.e. the policymaking function, on the one hand and the implementing, i.e. the administrative function, on the other. In addition, special attention will be placed on how the different modes of governance could be described in terms of:

- *the role played* by the individual,
- *means for control* of political and administrative powers available for the individual, and

²² See for example Vile, *Constitutionalism and the Separation of Powers*, and Barry Holmström, *Domstolar och Demokrati. Den tredje statsmaktens politiska roll i England, Frankrike och Tyskland*, Uppsala, Skytteanum, 1998.

²³ Stone being one exception, Stone, *Governing with Judges*, pp. 23-25, 88.

²⁴ Vile, *Constitutionalism and the Separation of Powers*, p. 400.

- *the individual's status* in the relationship between state and society.

The concept of individual legal activism clearly activates the debate on the pros and cons of judicial review. One of the more frequent arguments against judicial review is that it is counter-majoritarian and hence not in congruence with democratic governance. That specific question will be dealt with further below.

2.1.1 The Principal-Agent Relationship

Before accounting for the different modes of governance, a few words about the principal-agent relationship. Principal-agent relationships have been described by Francis Fukuyama as “*The overarching framework for understanding governance problems.*”²⁵ The principal-agent model, frequently referred to in economic theory but not so frequently applied by constitutional scholars, in this study appears positioned in a constitutional context. According to Fukuyama, one commonly-applied measure to improve governance is to harmonize the interests and incentives of principals and agents. One way of reaching this goal is to increase the transparency of the behavior of the agents, in order to be able to control their activity and hold them accountable.²⁶

For the purpose of this study, regarding the public sector, individuals constituting the public at large represent the principal. If we are dealing with a democracy, then the elected representatives are the agents of the people. Clearly, the principal-agent relationship can, both in the private and public sectors, be divided into multiple levels. In the public sector the *first level of agents* is the elected representatives of the people. The assembly of representatives constitutes the principals of the executive branch (including both government and administration). Thus, *the second level of agents* is the executive branch and in this context, *individual agents* are ministers and public servants.²⁷ But, most importantly

²⁵ This framework was originally developed in an endeavour to understand the difference between individual and organizational interests concerning private firms. In the private sector, the principals are the shareholders, while their agents are the boards of directors. The latter in their turn have their agents in the members of the senior management. See Fukuyama, *State Building. Governance and World Order in the 21st Century*, p. 48. In his book, Fukuyama deals with the causes of state weakness and the importance of successful state-building. He argues that the latter is of great importance in order to strengthen weak or failed states so that they will not generate problems such as corruption, drugs, terrorism, and AIDS, with effects far beyond their own borders. State weakness is to a large degree a symptom of a non-functioning public administration, and Fukuyama presents a model for how to monitor, understand, and explain public sector goals and output in weak states.

²⁶ *Ibid.*, p. 49.

²⁷ *Ibid.*, pp. 48-49.

and often forgotten, *the primary principals are citizens and individuals* residing within the territory of a particular state. In sum, the principals are rulers with the authority of delegation and the ultimate source of power.

In this context, the question that subsequently arises is *who is the principal of the court and the judges?* The conventional answer would be that the court and the judges are independent both in theory and practice and that they have to be in order to fulfil their task. Still, taking into consideration that judges are agents whose purpose it is to enforce laws adopted by parliamentary assemblies, the legislative assembly is usually the principal.²⁸ However, is this an obvious conclusion? Not necessarily. The principal of the courts could also be the individual in the capacity of primary principal.²⁹ This is especially the case when we are concerned with constitutional courts and their safeguarding of the constitution.³⁰ The question is then whether courts and judges are agents on the first or second level?

The agents own, by means of delegation, decision-making authority in order to implement services desired by the principals. Yet, it is not self-evident that the agent will act in the interests of the principal.³¹ Reasons for not doing so might include self-interest on the part of the individual agent or their organization, loyalty to the organization, and a feeling of knowing better than the principal as to what actions are required. The behavior of public officials, including MP's, can be

²⁸ See, for example, Stone, *Governing with Judges*, pp. 23-25. Stone, taking his starting point in constitutional politics as contracting politics, argues that the courts are established and power delegated to judges in order for them “...to perform the linked function of dispute resolution and law application.” The political power is the principal, while the agents, i.e. the courts, are allowed some discretion to fulfil their purpose, which is to settle disputes that arise under the constitution.

²⁹ When discussing the role of courts in terms of principal-agent relationships, accountability should be kept in mind. The primary principal might not be able to control the courts and their activity as efficiently as the legislative assembly, if judges are not directly elected by the people. This could be one argument in favour of the courts being considered as agents of legislative assemblies, on the condition that the latter have some degree of control. However, control by legislative assemblies could in some circumstances be realised only by changing the constitution or the equivalent. When a referendum is required for a change, the primary principals still exercise ultimate control. In cases where referendums are not required, a qualified majority is usually demanded. Should it be possible to alter the status and conditions of judges by statute, then changes are likely to be easier to achieve. But still, perhaps even more importantly, political influence on the judiciary is seen as violating the idea of a rule-of-law and democratic state. The judiciary should act independently from the political branch. In a democratic state, the judge should protect the values of rule of law, the latter being a necessary but insufficient condition for democracy. The party striving towards that goal should be the principal of the court, be it the political majority and/or the primary principals.

³⁰ In addition, political parties are not the principal of constitutional judges, according to Stone, since the latter base their activity on a normative document, i.e. the constitution, which stands above normative acts adopted by the legislature. Stone, *Governing with Judges*. p. 24 and p. 88.

³¹ *Ibid.*, p. 23.

influenced by bribes, payoffs to family members, and promises of future employment or career advancement, hence control mechanisms are in order. There are several ways to achieve accountability, depending on who is the principal and who is the agent, for example through open and free elections, audit review, inspections conducted by official agencies, constitutional judicial review, and administrative adjudication. The latter two will be dealt with in depth below in Chapter Three.

2.2 Parliamentary Systems

2.2.1 Separation of Powers and Functions

A parliamentary mode of governance is characterized by the exclusive representation of the will of the people in the legislative assembly. The ruling majority in the legislative assembly is the legitimate bearer of state sovereignty as agents of the people. Thus, the ideal type of parliamentary system is not a system based on the separation of powers as understood according to “*pure doctrine*”.³² However, this is not by definition the same as a total lack of checks and balances between the different state organs.³³ *The partial separation of functions*, understood for example as the sharing of legislative powers, while all other functions are to be strictly separated, could be mentioned as one example, with *parliamentary control of the executive* as another. In addition, the judiciary, as part of the executive, should be independent when fulfilling its functions. The most vital characteristic of parliamentary systems is that the ultimate power rests with the parliament and that the separation of functions aims to control all state bodies other than the parliament³⁴, as illustrated by the weak powers of the courts to declare statutes null and void.³⁵

³² See below, Chapter 2.1, footnote 14.

³³ Parliamentary systems as defined by Sartori are based on legislative-executive power-sharing. There is no separation of powers between the parliament and government. Sartori, *Comparative Constitutional Engineering*, pp. 101-104.

³⁴ Concerning Sweden see Hans Ragnemalm, *Administrative Justice in Sweden*, Stockholm, Juristförlaget, 1991, p. 17.

³⁵ The role played by courts in parliamentary systems, especially in enforcing the will of the parliament, can be exemplified by the Swedish courts and their use of *travaux préparatoires* to define the will of the legislature in order to interpret the law in congruence with it.

The executive acts as the agent of the legislative assembly, enforcing the will of the latter.³⁶ For the purpose of this study, the executive is extensively defined, and hence includes both the government and the administrative apparatus. The government enforces the policy decisions of the legislative assembly with the help of the administrative apparatus. However, the government can also act as a decision-making and law-adopting body in its own right, when the legislative assembly has delegated the necessary powers.³⁷

The relationship between government and administrative apparatus varies between different states. In Sweden, administrative bodies lie under the government, which in its turn answers to the legislative assembly.³⁸ However, a minister may not interfere in the activity of administrative bodies in order to change decisions in individual cases.³⁹ Swedish administrative bodies are independent and the Swedish system does not apply the principle of ministerial responsibility. The Swedish government takes decisions as a collective body.⁴⁰ Still, individual ministers can be subject to political control through a vote of no confidence by the *Riksdag*, i.e., the representative assembly.⁴¹ In the United

³⁶ Vile is fairly critical of the term *executive* and how it is used. He is of the opinion that the term long ago lost its original connotation since the political leaders of a state, either as presidents or members of cabinets, have become extensively involved in the formulation of policy and legislation, quite apart from its implementation - the original task of the executive. Nowadays, according to Vile, it is the administrative apparatus - influenced but not controlled by the political leadership - that implements laws. Vile, *Constitutionalism and the Separation of Powers*, p. 400.

³⁷ See for example *the Swedish Instrument of Government* (Regeringsformen, hereafter RF:n) 8:7-13.

³⁸ According to RF:n 11:6.

³⁹ RF:n 11:7. According to this article no state authority, including the representative bodies at the national and local level, is allowed to interfere and decide how an administrative organ should decide in a particular case when that case concerns the relationship between the administrative organ on the one hand and an individual or local representative organ on the other. The same applies concerning the application of law. Individual civil servants are personally responsible for their decisions. According to Ragnemalm, Swedish civil servants are less dependent on directives from above, compared to civil servants in other countries, due to the fact that parliamentary responsibility of ministers does not include responsibility for decisions on a subordinate level. Ragnemalm, *Administrative Justice in Sweden*, pp. 53-54. In the United Kingdom, parliamentary control of both the government and the administration is stronger, at least nominally, due to the principle of ministerial responsibility among other things. See for example Mike Radford, "Mitigating the Democratic Deficit? Judicial Review and Ministerial Accountability", in *Administrative Law Facing the Future. Old Constraints and New Horizons*, eds. Peter Leyland and Terry Woods, London, Blackstone 1997, p 35.

⁴⁰ Thomas Bull, "Konstitutionella snedsteg – en studie av svensk trohet mot grundlagen", *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (71-89), p. 81.

⁴¹ RF:n 12:4. For an investigation of the *legal* responsibility of Swedish MPs and ministers of the Swedish Government see, Olle Lundin, "Riksdagsledamöternas och statsrådets rättsliga ansvar",

Kingdom, on the other hand, which employs the principle of ministerial responsibility, ministers can be held responsible for the conduct of administrative authorities under their responsibility.⁴² Thus, political accountability for departmental and administrative activities is more explicit in the UK than in Sweden.

In conclusion, the ideal type of parliamentary systems is characterized by the notion that the will of the people is manifested by the substance of the laws adopted by the legislative assembly and implemented by the executive. The government is responsible to the legislative assembly, while the support of the latter is required for the government to remain in power. The role to be played by the courts is limited. Control mechanisms of political powers are political rather than legal.

2.2.2 Principal-Agent

Taking the citizen⁴³ as our starting point, the legislative assembly acts as an agent on behalf of the individual. Depending on what model of parliamentarism is being employed, individuals can control their agents to differing degrees. In Sweden, where the administrative bodies (*myndigheter*) are independent in relation to the government, the principal cannot control the activity of the state administration through ordinary elections. The government, however, is subject to indirect control by the primary principals through elections, due to parliamentary control of the government. Compare this with the United Kingdom, where parliamentary control is extended to indirectly include the administrative apparatus through the principle of ministerial responsibility. The foregoing being a simplification of the process, the purpose here is to illustrate what channels are available for the

in *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (154-171), especially pp. 165-166.

⁴² Still, the principle of individual ministerial responsibility has been subjected to various interpretations over the years. Individual responsibility refers to the responsibility borne by a minister in the capacity of political head of a government department. Responsibility can be invoked due to both personal and causal fault. The latter refers to the responsibility of the minister to oversee and supervise the department properly and efficiently. See Christopher Kam, “Not Just Parliamentary ‘Cowboys and Indians’”: Ministerial Responsibility and Bureaucratic Drift”, *Governance: An International Journal of Policy and Administration*, vol. 13, no. 3, July 2000, (365-392), and Diana Woodhouse, “UK Ministerial Responsibility in 2002: The Tale of Two Resignations”, *Public Administration*, vol. 82, no. 1, 2004, (1-19).

⁴³ This starting point is necessary, but not unproblematic, since non-citizens are in this sense without agents “of their own” since in general they cannot vote in elections to the national legislative assembly. For an example see Olivier Danjoux, *L'Etat c'est pas Moi. Reframing Citizenship/s/ in the Baltic Republics*, Lund, Studentlitteratur, 2000. The basic protection of individual rights and freedoms is extended by most states to include non-citizens.

principal to exert control of its agents. For a citizen - hence, a primary principal - to claim accountability of the administrative apparatus, the judicial channel is one alternative, which is one of the *raisons d'être* of administrative courts. Nevertheless, additional (mainly political) channels are usually available, for example parliamentary committees, ombudsmen, citizens' commissions - as in Sweden, for example. These include, for example, different Ombudsmen such as the Parliamentary Ombudsmen (JO)⁴⁴, the Equal Opportunities Ombudsman (JämO)⁴⁵, the Children's Ombudsman⁴⁶, the Disability Ombudsman⁴⁷, the Consumer Ombudsman⁴⁸, the Ombudsman against Discrimination on grounds of Sexual Orientation⁴⁹. In addition, there is the Ombudsman against Ethnic Discrimination (DO)⁵⁰, who has several means available to exercise control of both private and state actors. One such means is the possibility to bring a case

⁴⁴ JO is elected by the Swedish *Riksdag* for a period of four years and can be re-elected. Anyone who feels mistreated by a public authority, or an official employed by a public authority or a local government, can file a complaint to the JO. The JO does not have jurisdiction over members of the *Riksdag*, the government, or local and municipal councils. Currently, there are four ombudsmen with their own exclusive area of jurisdiction, and they are directly and individually responsible to the *Riksdag* for their actions. An ombudsman can act as a special prosecutor and can bring charges against an official, although this rarely happens. JO can also initiate disciplinary procedures and in addition can issue critical advisory comments. For an examination of the legislative framework that directs the activity and regulates the powers of the JO, see Jesper Ekroth, *JO-ämbetet. En offentligrättslig studie*, Stockholm, Stockholms universitet, 2001.

⁴⁵ Jämställhetsombudsmannen, (JämO), in English *Equal Opportunities Ombudsman*. JämO is appointed by the Government and has independent status. JämO's task is to ensure compliance with *the Equal Opportunities Act* (2000:773) and parts of *the Act on Equal Treatment of Students in Higher Education* (2001:1286). According to section 46 of *the Equal Opportunities Act*, JämO has the right to bring an action before a Labour Court on behalf of individuals. Should the Employee Organisation, according to the law, have the right to file a complaint on behalf of an individual, then JämO may only file a complaint if the organization does not.

⁴⁶ Appointed by the Government for a term of six years and does not have the right to instigate a case before a court of law on behalf of children.

⁴⁷ Appointed by the government with the right to instigate court proceedings on behalf of individuals, according to sections 25-26 of *the Act on Prohibition of Discrimination in Working Life of People with Disability* (1999:132).

⁴⁸ The Consumer Ombudsman is also head of the Consumer Agency. The agency is a state agency and the Ombudsman is appointed by the Government.

⁴⁹ Is appointed by the Government and does have the right to institute court proceedings on behalf of individuals according to sections 24-25 *the Act on Banning Discrimination in Working Life on grounds of Sexual Orientation* (1999:133).

⁵⁰ *Ombudsmannen mot etnisk diskriminering* is a government authority, and the DO is appointed by the government for a period of six years. According to sections 37 and 38 of *the Act Against Ethnic Discrimination in Working Life* (1999:130), the DO has the right to bring an action before a Labor Court on behalf of individuals. Should the Employee Organization, according to the law, have the right to file a complaint on behalf of the individual, DO may only file a complaint if the organization does not.

before a court of law, which is available for all but the Disability Ombudsman and the Children's Ombudsman. All ombudsmen, except for the JO, are appointed by the Government. However, individual ministers are not allowed to direct the activity of the Ombudsmen.

In the United Kingdom, the principal can, theoretically, affect the administrative apparatus through elections since ministers can be held responsible for the performance of the state administration, so that if the latter performs poorly it could affect the outcome of an election. If a minister runs his department and the relevant administrative organs ineffectively, it might harm the Party as a whole and might well negatively influence the voting behavior of the constituency.⁵¹ Still, Vile does not seem to put much faith in political and parliamentary control, concerning which he states that “*The complete failure of parliamentary control over the administrative machine in Britain is witnessed by the amazing proliferation of regulators and “ombudsmen” that has characterized the past thirty years*”.⁵² Vile is referring among others to the Parliamentary Commissioner for Administration, the Police Complaints Authority, and the Local Government Ombudsman.⁵³ In addition to using the voting procedure to exert control and claim accountability, principals can use the judiciary. This option has been improved in the United Kingdom by the adoption of the Human Rights Act in 1998.⁵⁴

A feature common to both the United Kingdom and Sweden, and to most parliamentary systems, is that the interest of the primary principal should be safeguarded and represented by the legislative assembly. The courts are in themselves not considered as agents of the principals, at least not as far as concerns statutes and their compliance with the constitution or the ECHR, since statutes are seen as the ultimate manifestation of the will of the people.⁵⁵

⁵¹ In this context it should be mentioned that Party control of ministers is rather harsh, probably as a result of ministerial responsibility.

⁵² Vile, *Constitutionalism and the Separation of Powers*, p. 397.

⁵³ However, Vile finds that powers of ombudsmen are inadequate for them to redress the problem. This is the case at least as concerns Ombudsmen within the public sector, since their activity is advisory rather than regulatory. Taken together, this - in combination with the extra-parliamentary committees - amounts, according to Vile, to strong indicators of the failure of traditional mechanisms of control. *Ibid.*, p. 398.

⁵⁴ See for example, Grosz, Beatson and Duffy: *Human rights, The 1998 Act and the European Convention*, London, Sweet & Maxwell, 2000, Chapter One. See also, the Human Rights Act 1998 Article 3.

⁵⁵ One important consequence of political systems characterized as parliamentary systems is related to voting rights. In most states, citizenship is required for the right to vote on a national level. Participation in elections is the most important channel available in parliamentary systems to exert an influence on the policy of the state, as manifested in statutes. Citizens living and

Constitutional judicial review, if any, is not so dominant and there are few constraints on the power of the legislative assembly, which is the ultimate and only agent of the primary principal, the citizen.

To sum up, the primary principals in a parliamentary systems do, in theory, have at least three agents on different levels; the legislative assembly on the first, the government on the second, and the administrative apparatus on the third. Traditionally, the primary principals control only one agent directly by political participation and that is the legislative assembly. The other agents are, as a rule, subject to indirect control by the principals.⁵⁶ Our theoretical models allow us to identify the most important agent in terms of representation, and ways to control and hold that agent accountable.⁵⁷ However, what happens when that agent is not the most important actor in terms of power and influence on the lives of individuals? What happens when important functions are placed with an agent on the sub-level? Should this be the case, then the primary principal can only exercise indirect control of that agent in a parliamentary system. In systems with a limited possibility of constitutional judicial review, and judicial review of administrative powers, the question is of great significance. The most dominant means of exerting control and influence is by voting and turning to one of the ombudsmen if available. Judicial review can be an option, although to a limited extent if compared to the possibilities likely to be available in a constitutional democracy.

2.3 Constitutional Democracy Systems

2.3.1 Separation of Powers and Functions

The essence of constitutional democracy is that there are limits to the exercise of the will of the majority and hence of state power. That is, the agents - be it the president, the executive, or the parliament - are constrained in their exercise of power by the protection of individual rights and freedoms as stipulated in a constitution. The aim is to protect the primary principals and that aim is often

working within a state of which they are not citizen do not have access to this traditional political channel. Thus, a consequence of the parliamentary system is that the need for an alternative channel for political participation is enhanced for non-citizens spending much of their time in a country of which they are not citizens. This is a likely situation in the new Europe and it contributes to an additional argument in favour of individual legal activism. In theory, and in practice, the importance of an alternative channel for political participation is further underlined by increasing movement of persons.

⁵⁶ By using the parliament or other means of external control available, such as judicial review.

⁵⁷ Who that actor is, is an empirical question to be answered through thorough investigations and analysis of individual political systems.

realised by the existence of a constitution with a normative force in combination with institutions capable of enforcing the constitution, for example a constitutional court.

In the ideal type of constitutional democracy, the will of the majority, as defined through election outcomes, is not sacred in the sense that the highest value to be protected is individual freedom. And the courts have an important role to play for the protection of these rights. Post-World War II development in Europe has altered constitutional politics in the sense that human rights have been given a significant place within constitutional law, also in traditional parliamentary democracies such as France and the United Kingdom. In addition, constitutional courts or their equivalent have been established in order to uphold the superiority of the constitutions, as for example in Italy, Spain, Germany, and in all of the European post-Socialist states.⁵⁸ Still, the tradition of parliamentary democracy in Europe is strong. However, recent developments have shown that a parliamentary system and constitutional judicial review is not a contradiction in terms. As shown by Alec Stone Sweet, the traditional parliamentary democracies in Europe are moving towards becoming constitutional democracies.⁵⁹

Concerning the separation of powers and functions in constitutional democracies – clearly both presidential and parliamentary systems, and almost all systems in between, can have characteristics of a constitutional democracy in the sense that the constitution is normative and enforceable. Still, one of the most crucial questions concerning constitutional democracies is the separation of functions. A court with the right to exercise constitutional judicial review and to declare unconstitutional laws null and void is likely to come to share, at least, negative legislative powers with the legislative assembly and the government. The will of the majority as manifested by statutes can be hindered in its implementation by a body which is not necessarily directly controlled and elected by the primary principals - to what degree is determined by the design of the court system, the mandate of the court, and doctrines developed by the court.⁶⁰ In conclusion, in the ideal type of constitutional democracy the parliament is not the exclusive source of power – rather, the constitution constitutes the ultimate source of power and legitimacy. And since the constitution is to be normative and enforceable as this ideal type, the courts are also likely to play a different role if

⁵⁸ Stone, *Governing with Judges...* p. 31.

⁵⁹ *Ibid.*

⁶⁰ See for example Stone, *Governing with Judges* and Kis, *Constitutional Democracy*.

compared to parliamentary systems in relation to both political and administrative powers.

2.3.2 Principal-Agent

Within the ideal type of constitutional democracy, constitutional courts, and judges otherwise exercising constitutional judicial review, reviewing legislative and administrative acts, at least in theory, with the aim of protecting the rights of the primary principals, i.e., the rights of individuals. This is one of the components of what Stone calls the ambition of taming the state.⁶¹ In pursuing the ambition to tame the state, a “*new constitutionalism*”⁶² has developed in Europe, especially in traditional parliamentary states. The new constitutionalism is, according to Stone, based on the following principles:

1. State institutions are established by, and derive their authority exclusively from, a written constitution.
2. The constitution assigns ultimate power to the people through elections.
3. The use of public authority, including legislative authority, is lawful only when exercised in accordance with constitutional law, as regards both the political process *per se* and its outcome.
4. Constitutional law includes rights, and a system of justice to protect those rights.⁶³

Thus, the mandate to exercise constitutional judicial review emanates from constitutions establishing constitutional courts or enabling constitutional judicial review in ordinary courts. Theoretically, the primary principals, as the original source of authority, have recognized and delegated this power to the courts via the constitution. The legislative assembly will probably adopt statutes in which the rights and duties of constitutional judges are specified further. Thus, the mandate and the power is further regulated and controlled by the legislative assembly.

The following question to be asked is then whether constitutional judges are agents of the legislative assembly or whether they are agents of the people in their capacity of primary principals? Since it is the legislative assembly that regulates the

⁶¹ Stone, *Governing with Judges*, p. 37. The other components being: constraining government in a system of democratic control and embedding states in pan-European structures such as the European Union.

⁶² Supposedly as a contrast to the American model of constitutionalism, on the one hand, and early British constitutionalism, on the other.

⁶³ Stone, *Governing with Judges*, p. 37.

activity of the judges in detail and the legislative assembly, sometimes in cooperation with the president, if there is one, that appoints the judges - then the most likely answer would be that the judges' principal is the legislative assembly and that the individuals constituting the electorate only indirectly constitute the principals of the constitutional judges. However, the answer may not be so self-evident. For if all power derives from the primary principals, then so, too, will the power of the courts, especially the constitutional courts. The conclusion reached by, for example, Stone should only mean that "the chain of command" has grown longer – since the parliament is the agent of the people and should act in the interests of the people, in the best of worlds.⁶⁴

If we compare the principal-agent relationship in parliamentary and constitutional democracies, the rights of the primary principals as individuals are more explicit in the latter. In addition, there are more channels available in a constitutional democracy for an individual to invoke in order to protect those rights; hence, the ruling majority is under stricter and more pluralistic control in the sense that legal and political control work side by side.

2.4 The Authoritarian Mode of Governance

2.4.1 Separation of Powers and Functions

First, let us conclude that there is a vital difference between totalitarian and authoritarian systems. Totalitarian systems do not recognise any pluralism or separation of powers and functions. Neither will individuals be given any freedom; thus the principal-agent relationship is of no relevance.⁶⁵ However, according to Linz's definition of *authoritarianism*, some pluralism, although controlled, can exist

⁶⁴ Clearly, independence of courts and judges would imply that they are nobody's agents. Still, if the highest law is the constitution and its starting point is the protection of individual rights and freedoms, in the abstract, then courts and judges are agents of the primary principal when they apply the law.

⁶⁵ Linz characterizes a system as totalitarian when there is an "ideology, a single mass party and other mobilizational organizations, and concentrated power in an individual and his collaborators or a small group that is not accountable to any large constituency and cannot be dislodged from power by institutionalized, peaceful means." Only their simultaneous presence makes a system totalitarian. Juan J. Linz, *Totalitarian and Authoritarian Regimes*, Boulder, Lynne Rienner Publishers, 2000, p. 67. See also, Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and post/Communist Europe*, Baltimore, the Johns Hopkins University Press, 1996, p. 40. For an overview of theories on totalitarianism, see Paul Brooker, *Non-Democratic Regimes. Theory, Government and Politics*, London, MacMillan Press, 2000, pp. 8-21.

and although individuals are not as free as in a democracy they still have some leeway in their everyday life.

Authoritarian systems, according to Linz, are “*political systems with limited, not responsible, political pluralism, without elaborated and guiding ideology, but with distinctive mentalities, without extensive nor intensive political mobilization, except at some points in their development, and in which a leader or occasionally a small group exercises power within formally ill-defined limits but actually quite predictable ones.*”⁶⁶ The pluralism referred to is a limited pluralism, which could also be described as a limited monism. Limitations on pluralism can be both legal and *de facto*. For a system to be characterised as authoritarian, groups should exist that are not created by or dependent on the state and that influence the political process in some way.⁶⁷

Characteristic for authoritarian regimes is that there is no real separation of powers. Moreover, although there can be some separation of functions, for example a nominal parliament adopts laws and the executive enforces the law, nevertheless the direction and substance of policy is determined and controlled by a group of people that also control the latter institutions. Although the debate on how to define authoritarianism on the one hand, and various hybrids between democratic and authoritarian modes of governances on the other, is lively and ongoing, for the purpose of this study Linz’s definition of authoritarianism fulfils its purpose, that is, to discuss various channels available to individuals in order to control political and administrative powers in authoritarian systems.⁶⁸

⁶⁶ Linz, *Totalitarian and Authoritarian Regimes*, p. 159. Criticism of Linz’s theory on authoritarianism has been forwarded by Brooker on the basis of a lack of a “*systematic and coherent framework.*” Brooker, *Non-Democratic Regimes*, p. 29.

⁶⁷ Linz, *Totalitarian and Authoritarian Regimes*, p. 161.

⁶⁸ The terminology of democracy, totalitarianism, and authoritarianism is a constant and longtime topic for academic debate. And in the wake of political changes in Latin America, Southern Europe, and the dissolution of the Soviet Union, the debate has obtained new fuel. New definitions and terminology are constantly presented, often with the aim of describing a hybrid, that is, a system that is neither democratic, nor authoritarian. For an overview see, Harley Blazer, “Managed Pluralism: Vladimir Putin’s Emerging Regime”, *Post-Soviet Affairs*, vol. 19, no. 3, July-September 2003, (189-227). See also, Larry Diamond, *Developing Democracy. Toward Consolidation*, Baltimore, the Johns Hopkins University Press, 1999, pp. 7-19 and Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation*. The category *post-totalitarian* regimes was first coined by Linz in *Totalitarian and Authoritarian Regimes* as a subcategory to authoritarian regimes, and thereafter presented as an independent category in *Problems of Democratic Transition and Consolidation*. Post-totalitarian states differ from authoritarian states in the sense that they clearly emanate from totalitarian states. In addition, they are characterized *inter alia* by an almost non-existent political pluralism, a party which formally enjoys a monopoly of power and an official guiding ideology. Another important difference is that authoritarian regimes are more likely to have had a historical experience of pluralism, which is not the case in post-totalitarian states. See

2.4.2 Principal-Agent

Symptomatic for authoritarian systems as defined by Linz is that the political power is not responsible to the citizens through groups such as political parties and interest organisations, even if they can be responsive to them to some extent. Support by a constituency is not required in order to gain political power and electoral control is weak or non-existent. Rather, political power is granted by a ruling group. Still, the ruling group might take popular support and influence into consideration when granting a certain person a political position in order to strengthen the power of that person.⁶⁹ At least, as long as that popularity does not threaten the ruling group by awarding independent and uncontrollable support for a potential competitor. Authoritarian systems rarely incorporate any independent channels or institutions for individuals to turn to in order to exercise control of political and administrative powers. Although some pluralism does exist, political parties, lobby organizations, and interest organizations are likely to have a weak “undesired” impact on the political process and its outcome. Nevertheless, legal autonomy is possible in an authoritarian system. The concept of judicial independence has been provided several meanings and content by both political and legal scientists. However, a distinction can be made between:

1. the autonomy of judges in relation to other persons and institutions, and
2. the autonomy of judges concerning judicial behaviour.

The latter refers to judges being able to render decisions that appear to be independent although the judiciary is exposed to external, for example political, pressure. Clearly, the two types of autonomy are closely linked and ultimate judicial independence requires the presence of both. Still, as argued by Peter H. Russell, “..analysis will suffer if we run them together”.⁷⁰ A judge’s capacity to think independently and to render independent decisions does not automatically result from enjoying a high degree of institutional autonomy, and *vice versa*.⁷¹

further, Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation*, pp. 44-45. The USSR under Gorbachev is described as a post-totalitarian state. *Ibid.*, p. 375.

⁶⁹ Linz, *Totalitarian and Authoritarian Regimes*, p. 161.

⁷⁰ Peter H. Russell, “Toward a General Theory of Judicial Independence”, in *Judicial Independence in the Age of Democracy. Critical Perspectives from Around the World*, eds. Peter H. Russell and David M. O’Brien, Charlottesville, University Press of Virginia, 2001, (1-24), p. 6.

⁷¹ *Ibid.*

Autonomous courts are possible in authoritarian systems, even though cases and questions of political importance will probably be kept from the courts.⁷²

2.5 Conclusion

The purpose of this Chapter has been to account for and discuss three ideal types of different modes of governance: parliamentary, constitutional democracy, and authoritarian. I have chosen to focus on various modes of governance in order to illustrate what channels are available to the individual for political and legal participation, depending on the system of governance in which individuals find themselves. There is a strong correlation between the mode of governance and the number of channels for activism and participation available to the individual. In parliamentary democracies, individuals are mainly directed to traditional channels such as elections and ombudsmen, and to a lesser extent to the judicial channel. In constitutional democracies, the traditional channels are complemented by a potentially more extensive use of the judiciary, especially due to the generous approach to constitutional judicial review. In authoritarian regimes, traditional channels, such as electoral control and lobbying through interest organizations, are not likely to be effective in order to exercise control of political and administrative powers. However, interests that do not initially threaten political power and stability might find the legal system in authoritarian systems useful, provided a certain minimum autonomy for the legal system does exist. This means that the legal system in authoritarian regimes can complement traditional channels for control in an extremely important manner. This conclusion underlines the imperative of a strong and vital state-building process.⁷³ In order to draw any conclusions regarding legal participation in authoritarian systems, the state's policy towards the legal system in general, and towards the courts and support structures in particular, will have to be examined. An assessment of developments in these areas might also enable conclusions concerning the direction of overall political development in a particular state.

⁷² Russell, "Toward a General Theory of Judicial Independence", p. 9. See also, Peter H. Solomon, "Judicial Power in Russia: Trough the Prism of Administrative Justice", *Law and Society Review*, vol. 38, no. 3, September 2004, (549-582), p. 551.

⁷³ See Francis Fukuyama, "The Imperative of State-Building", *Journal of Democracy*, vol. 15, no. 2, April, 2004, (17-31) and Rose and Munro, *Elections Without Order*.

3. Judicial Control of Political and Administrative Powers

3.1 Introduction

The previous Chapter discussed *inter alia* the possibility of individuals to invoke political accountability of political and administrative powers in various modes of governance. This Chapter focuses on the relationship between political and administrative organs on the one hand, and courts on the other. The purpose is to discuss this connection in terms of rights enforcement and judicial review. The focus is on individuals and their possibilities to control the political and administrative powers by using the judicial channel. In the light of this discussion, a model for analysis of the character of public law adjudication will be suggested. It will be argued that judicial review of legislative and administrative acts issued by the executive can be of importance for creating a sustainable democracy in times of globalization and Europeanization, since tentatively this is where the real power is exercised. Its importance for countries engaged in legal transition trying to establish a rule of law state will be discussed in Chapter Five, Part II.

In a democratic state, the people are the sovereign. “*Democratic government for the people is realized by the people, with the laws embodying the wishes of the people.*”⁷⁴ In most states, the parliament is considered the representative of the people; hence democracy is indirect, exercised by representatives elected by the people. Statutes are seen as symbolising the will of the people. In states adhering explicitly to the model of separation of powers, courts are to uphold checks and balances on the other state organs and to safeguard respect for and implementation of the constitution by exercising judicial review.⁷⁵ Whatever model is chosen, the relationship between the legislative assembly and the executive, and their respective legislative powers is usually stipulated in a constitution or a statute.

Legislative powers are usually regulated by constitutions and vested in the people as represented by the legislative assembly. Thereby, popular control of legislation, as the output of the political process, is direct through elections, and indirect

⁷⁴ Sajó, *Limiting Government*, p. 49.

⁷⁵ E.g., the United States, Russian Federation.

where constitutional judicial review is possible.⁷⁶ In parliamentary democracies, as for example in the United Kingdom and Sweden, the courts' powers to declare statutes unconstitutional - thereby rendering them null and void - are usually limited.

Still, as stated above, the executive is being awarded more powers and more influence due to several factors such as globalization, European integration, and increasing demands of efficiency. The jurisdiction of the executive can be residual⁷⁷ or explicitly⁷⁸ stipulated. The activity exercised by the executive can be divided into two categories⁷⁹:

1. *The adoption of legislative (normative) acts:* This can be policy-related in the sense that the executive is using exclusive legislative powers, which are explicitly stated in the constitution or equivalent, in order to adopt legislative acts. The executive is in these circumstances to be considered part of the political branch and is acting independently and on its own initiative within given limits. Additionally, legislative measures such as regulations and decrees, aiming merely to implement the will of the people as manifested in statutes, can be adopted by a government by delegation in statutes.⁸⁰

2. *The adoption of administrative decisions:* The activity exercised by the executive can also be mere administrative actions, not including legislative and policy-making by

⁷⁶ It can also be indirect by participating in lobbying organisations, working on committees, or otherwise being engaged in policy-related work. See below Chapter 4.2.

⁷⁷ As is the case in France and to some extent in Sweden. Article 34 of the French Constitution of 1958 stipulates the legislative powers of the Parliament. The Executive has the power, according to Article 37 of the French Constitution of 1958, to legislate on all other areas. According to the same article, the government can ask the *Conseil constitutionnel* to declassify statutes or articles in statutes, so that the government can amend or repeal them, i.e. the *Conseil constitutionnel* declares the matter to fall under the jurisdiction of the government. John Bell, *French Constitutional Law*, Oxford, Clarendon Press, 1992, pp. 32, 78. According to RF:n 8:13 the Swedish Government can issue regulations concerning enforcement of statutes and regulations in other areas that are not, according to the RF:n, to be issued by the Swedish Parliament (*Riksdag*). For example, regulations that impose obligations on private subjects fall under the exclusive jurisdiction of the *Riksdag*. See also Ragnemalm, *Administrative Justice in Sweden*, pp. 20, 34.

⁷⁸ As in the Swedish case. See 8:7 of the Swedish RF:n concerning delegated legislative powers of the government.

⁷⁹ See also, Zaim M. Nedjati and J.E. Trice, *English and Continental Systems of Administrative Law*, Amsterdam, North-Holland, 1978, pp. 8-14. Nedjati and Trice identify three functions of the government; the executive, legislative, and the judicial function. Here we are concerned with the legislative and the executive functions.

⁸⁰ For the Swedish solution see, Fredrik Sterzel, "Lagstiftningsmakten och förordningsmakten", in *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (122-153).

the executive, i.e. policy implementation. In these cases the executive is part of the administrative branch.

In conclusion, both the legislative assembly and the executive can produce legislative acts, as results of a political process in which the will of the people in terms of policy-oriented goals is laid down. In addition, the executive is responsible for administrative actions (to be defined below) that implement the former. When doing so, it is required that the *ultra vires* principle is respected as an important part of how good administration is conducted.

Legislative acts adopted by the legislative assembly are generally subject to a more transparent procedure than simple adoption of government resolutions. This is true in the sense that legislative acts adopted by the executive are not always subject to ventilation in committees and public hearings as is the case when the legislative assembly adopts statutes.⁸¹ Thus, the electorate's control of the executive is more difficult due to lack of transparency. In this study I am concerned with both legislative and administrative acts adopted by both parliaments and executives, and to what degree and under what circumstances these acts can be made subject to judicial control. Of special interest is the right for individuals to initiate judicial review in these cases, since popular control of the executive in most cases is only indirect, while at the same time the executive is granted wider and more far-reaching powers.

Courts control the activity of legislative assemblies and executives to varying degrees, depending on the political system and the model of judicial review chosen by a state. When discussing legal participation as a complement to political participation, which will be done below in Chapter Four, it is important to draw the distinction between legislative measures on the one hand, and administrative acts, on the other. This is especially so if the electorate only has indirect control of the executive, where the actual power is being exercised. Before moving on to discuss judicial review of legislative and administrative acts, we discuss the material basis for judicial control of legislative and administrative actions.

⁸¹ For the Swedish example, see Iain Cameron, "The Swedish Experience of the European Convention on Human Rights Incorporation", *International Comparative Law Quarterly*, 1999, no. 48, p. 54. In France, the Government may ask the Parliament for authority to take measures, *ordonnance*, which usually fall under the Parliament's power to adopt statutes, for a limited period of time. Since this is an extraordinary measure and the situation in which the Government partly takes over the legislative prerogative of the procedure is more complex, the *Conseil d'État* is involved, as is the Parliament. Hence the procedure is more transparent than is common concerning legislative acts adopted by government. Article 38 of the French Constitution of 1958 and Bell, *French Constitutional Law*, pp. 102-108.

3.2 A Rights-Based Concept of Administrative Law?

In order to answer this question we have to take a path through the constitutional framework, including the ECHR. Constitutions can be both power-conferring and power-constraining. The power-conferring nature of a constitution refers to the institutional design of state agencies and the separation of powers and functions, while the power-constraining aspects are related to checks and balances and bill of rights. Chronologically, the former usually precedes the latter.⁸² Much attention has been focused on the power-conferring features of constitutions, within both legal and political science. However, although the power-restraining functions of constitutions gained theoretical and intellectual ground after the French and American revolutions in the second half of the 18th century, it is not until after World War II, the fall of the Soviet Union, and the increasing impact of the ECHR on national legal orders that the power-restraining features of constitutions are anew subject to scholarly and political attention in Europe. Loughlin suggests that the recent emphasis on rights of citizens and the obligations of government, in combination with the positivization⁸³ of basic rights (i.e. natural rights) “*has the potential to reconfigure the architecture of public law*”.⁸⁴

For the purpose of this dissertation, a rights-based concept of administrative law means that rights, stipulated in national constitutions and in the ECHR, restrict the exercise of political and administrative power, in the sense that they can be invoked before a court of law, and that they are enforceable. Thus, the overall issue (in this Chapter) is the connection between constitutional and administrative law and its impact on administrative law adjudication⁸⁵ on the one hand and the

⁸² R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge, Cambridge University Press, 1995 and R.C. van Caenegem, *European Law in the Past and the Future: Unity and Diversity over two Millennia*, Cambridge, Cambridge University Press, 2002.

⁸³ Loughlin uses Habermas to describe what is meant by positivization in this context. It is (and Loughlin refers to Habermas) “*the autonomous creation, by contract, of legal compulsion springing solely from the compulsion of philosophical reason*”. Loughlin, *The Idea of Public Law*, p. 122. Cappelletti gives expression to the same idea when he states that “*The modern constitutions, their bills of rights, and judicial review are the elements of a ‘positive higher law’ made binding and enforceable: they represent a synthesis of a sort of legal positivism and natural law. They reflect the most sophisticated attempt ever designed to ‘positivize’ values without, however, either absolutizing such values or relinquishing them to the mutable whims of passing majorities.*” Cappelletti, *The Judicial Process in Comparative Perspective*, p. 210.

⁸⁴ Loughlin, *The Idea of Public Law*, p. 114.

⁸⁵ In the German system, it is practically undisputed that administrative law is founded on the constitution, the German Basic Law. Mahendra P. Singh, *German Administrative Law in a Common Law Perspective*, Heidelberg, Springer, 2001, p. 10. In the French legal system, on the other hand, the link between judicial review and fundamental rights was weak several years after the establishment of the Constitutional Council in 1958. One of the explanations is that the Council came to be an institution that engaged in abstract review *a priori*. It was mainly concerned with

general impact of the ECHR⁸⁶ on national constitutional and administrative law on the other. The question is to what extent the constitution and the ECHR put limitations on the power of the ruling majority⁸⁷ on the one hand and on public administration on the other?⁸⁸ Questions related to the normativity of a

procedure. Other explanations are the absence of a bill of rights in the French Constitution (French doctrine refers to the “constitutional bloc”, i.e. texts and principles that have constitutional value even if they are not a part of the Constitution *per se*) and the parliamentary system. Until 1971, when a government-sponsored law was declared unconstitutional for violating constitutional rights, the Constitutional Council was not considered a guardian of fundamental rights – indeed, rather the opposite. Marie-Claire Ponthoreau and Jaques Ziller, “The Experience of the French *Conseil Constitutionnel*: Political and Social Context and Current Legal-Theoretical Debates”, in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, pp. 121, 123. This decision paved the way for an enforceable charter of rights. Stone, *Governing with Judge...*, p. 41 and Bell, *French Constitutional Law*, p. 138. The *Conseil d'État* reviews both governmental regulations and administrative acts. It frequently refers to general legal principles, which means that a number of substantive principles are considered by the *Conseil d'État*. Thus, the French legal system has a longer and differing tradition of control of administrative powers if compared to the control of political powers, i.e. of legislative powers. French administrative judges are obliged to consider the “constitutional bloc” when reviewing the validity of governmental actions. Bell, *French Administrative Law*, p. 219. The review of statutes has been more formalistic than the review of administrative acts, at least until 1971 when the *Conseil* wanted to create an image of a Council whose aim was to protect civil liberties. Ponthoreau and Ziller, “The Experience of the French *Conseil Constitutionnel*...”, pp. 126, 134. In the United Kingdom, the adoption of the Human Rights Act 1998 means that the public administration is bound by the ECHR. However, the ECHR is not superior to preliminary legislation and the courts cannot declare null and void an administrative act that is in congruence with preliminary legislation, but in violation of the ECHR. The court can, however, file a declaration of incompatibility with Parliament. Thus, the English system, theoretically, provides for a more restricted rights-based concept of administrative law than, for example, Germany and France.

⁸⁶ According to Article 1 ECHR, the High Contracting Parties guarantee to everyone within their jurisdiction the rights and freedoms stipulated in Section I ECHR. How states choose to ensure the protection that the ECHR requires is up to them. It can be done by amending national laws and practices. There is no formal obligation to implement the ECHR into national law, although it has been recommended by the ECtHR as the most efficient way to guarantee the rights and freedoms stipulated in the Convention. Iain Cameron, *An Introduction to the European Convention of Human Rights*, Uppsala, Iustus Förlag, 2002, pp. 37-38.

⁸⁷ This is the core question when deciding whether a state is a constitutional or parliamentary democracy. For example, in India, which is a common law country, the courts have decided that unrestricted and unguided discretion delegated from the legislature to the executive and the administration is not in congruence with the basic rights in the Indian constitution. The German Basic Law puts similar restrictions on the federal and regional legislatures. Singh, *German Administrative Law*, pp. 152-153.

⁸⁸ Cappelletti is referring to a “new system of transnational judicial review” characterized by the fact that the ECHR is directly applicable and superior to national legislation, which is for example the case in France, (Article 55 of the French Constitution of 1958). Cappelletti, *The Judicial Process in Comparative Perspective*, p. 167. According to Bell, the ECHR is frequently invoked before the French administrative courts, especially as concerns the legality of administrative acts. Bell, *French Administrative Law*, p. 226.

constitution and the ECHR in a national legal order are of course only capable of being answered by studying specific legal orders.⁸⁹ Still, we can engage in a discussion as to the theoretical and ideological aspects of a rights-based concept of administrative law and its relevance for rights enforcement.

In order to clarify the problem, the question concerning the impact of constitutions on administrative law will be rephrased: *does the constitution put material limitations on political and administrative powers and if so how and to what degree?* The answer to the first question might seem self-evident in that the constitution normally stands above all other laws according to the hierarchy of legal norms.⁹⁰ However, how and to what degree a constitution can be invoked and by whom, in order to control the use of administrative power, is not as self-evident.

The question, whether constitutions put limitations on administrative power is closely related to the supremacy and normative force of the constitution as mentioned above. However, the supremacy of a constitution is in itself not enough to determine for whom the constitution is binding. Is it binding only for the legislature or is it binding for all state organs? In this context, the following questions arise: *in which courts can the constitution be invoked and to what extent is it possible to apply the constitution directly?*⁹¹ Given that a state recognizes the normative force of its constitution, various meanings can still be attributed to its normative character depending on the structure of the legal system and the function of the courts. The constitution can be considered to have direct effect in the sense that it can be enforced by a court of law, in other words the constitution stipulates enforceable rights. On the other hand, the constitution can be seen as primarily issuing commands to the legislature to enact or to refrain from enacting laws, meaning that the constitution mainly stipulates rules of competence.⁹²

⁸⁹ For a discussion on the legal force of the Swedish RF:n, see Caroline Taube, "Regeringsformen: positiv rätt eller redskap för rättshaverister?". See also Karin Åhman, "Rättighetsskyddet i praktiken – skydd på pappret eller verkligt genomslag?". Both in *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (42-70), (172-204). See also *Grundlagens makt. Konstitutionen som politiskt redskap och som rättslig norm*, ed. Eivind Smith, Stockholm, SNS Förlag, 2002.

⁹⁰ The supremacy of the constitution can be manifested by the hierarchy of legal norms and by amending rules. If there is no large discrepancy between the rules for amending the constitution and rules for adopting new legislation, then the supremacy of the constitution is weak. Sajó, *Limiting Government*, p. 39.

⁹¹ *Ibid.*, p. 43.

⁹² *Ibid.*, pp. 43-44.

Of interest in this context is what constitutes the common denominator for member states of the CoE⁹³ as regards judicial review and rights enforcement. The impact of the ECHR on national administrative law will therefore be touched upon in Section 2.4.4. According to Bell, the signing of the ECHR symbolizes the extent to which different countries agree on important values which should function as guidelines for the exercise of administrative power. The ECHR is mainly concerned with fair procedures and material fundamental rights of citizens, while the ECtHR's case law puts additional and constant pressure on the member states as to the convergence of national law with ECHR standards.⁹⁴ In addition, there are common social problems which all countries have to deal with. Taken together, this creates common standards and a common dynamic of policy development.⁹⁵ It has been concluded that the ECHR has a major influence on securing adequate remedies, such as access to courts and reduction in delay.⁹⁶ In summary, by ratifying the ECHR a contracting state binds itself to protect the rights of individuals as stipulated in the ECHR. This will clearly have an impact on the guidelines and the legislative framework for the domestic exercise of administrative powers, which is quite noticeable in several countries, for example Sweden and the United Kingdom, and - as will be further discussed in Part III - in Russia.

Another question necessary to pose in this context is whether a rights-based concept of administrative law has any implications for how democracy is to be defined. Procedural democracy is by some considered to be one of the best forms of government, since it holds values such as equal political rights, majority rule, and political accountability through electoral control high. An alternative approach takes its starting point in the values and ideals in virtue of which we hold procedural aspects of democracy important.⁹⁷ The main argument for the latter

⁹³ EC law has also had a large impact on the development of administrative law in its member states. However, this study addresses questions of relevance for both EU member states and countries that are not members of the EU. Thus, the common denominator is the CoE and the ECHR.

⁹⁴ John Bell, "Mechanisms for Cross-fertilization of Administrative Law in Europe", in *New Directions in European Public Law*, eds. Jack Beatson and Takis Tridimas, Oxford, Hart Publishing, 1998, (147-168), pp. 151-152. Due to the ECtHR's dynamic method of interpretation, the obligation under Article 1 ECHR can be described as a continuing obligation. Cameron, *An Introduction to the European Convention..*, p. 37.

⁹⁵ Bell, "Mechanisms for Cross-fertilization of Administrative Law in Europe", p. 158.

⁹⁶ *Ibid.*, p. 162.

⁹⁷ Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review", *Law and Philosophy*, 9, 1990-1991, (327-370), p. 339.

approach is that procedural and formal democracy will not in itself guarantee that the outcome of the political process will be fair, even if the process in itself is considered to be. And if fairness is to play a vital role for the justification of political democracy, then it must, according to Samuel Freeman, have a more fundamental and material aspect to it.⁹⁸ Accordingly, this implies that certain substantive rights and requirements of justice, such as freedom of conscience and thought, freedom of association and political participation - in general freedom to pursue one's own plan of life - underlie our commitment to democracy and its procedures. These are the substantive values that, according to Freeman, can be realized through judicial review when traditional democratic procedures fail.⁹⁹

If we accept Freeman's justification of judicial review, then it follows that it is desirable that the values referred to by Freeman should be enshrined in a constitution and that they as far as possible have normative effect. Besides being legally binding, these rights are supposed to function as guidelines for the state in its relation to its citizens. Since we cannot know the constellation of the majority of tomorrow, it is in everyone's interest to lay down binding rules as to the protection of fundamental individual rights and freedoms. If this be the case, the exercise of administrative powers will be subject to a rights-based concept of administrative law since state powers should be exercised in accordance with the law according to the principle of legality and the supremacy of the constitution.

To sum up, a rights-based concept of administrative law¹⁰⁰, even though its empirical existence might be weak in some states, especially in post-Socialist states, is fundamental for a rule-of-law state. The role of the administrative arm can be described as striking a balance between private and public interests and as "*..the instrument which [not only] organizes the public administration but also the law that regulates the exercise of the administrative powers and provides for the control of its use*".¹⁰¹

As will be further discussed in Part III, the rights catalogue in the CRF and the ECHR do have normative effect in the Russian legal order.¹⁰² What has the effect of this been on the substance of Russian administrative law and its enforcement?

⁹⁸ *Ibid.*, p. 340.

⁹⁹ *Ibid.*, p. 368.

¹⁰⁰ I am concerned with administrative law in the broad sense, including both administrative procedure and material administrative law.

¹⁰¹ *The Administration and You*, Strasbourg, Council of Europe Publishing, 1996, p. 7.

¹⁰² To be further discussed in Part III, Chapter Three.

This question will be answered in Part III. First, judicial review as rights enforcement will be elaborated upon.

3.3 Judicial Review as Rights Enforcement

3.3.1 Introduction

In parliamentary democracies, fundamental freedoms have been considered as being realised through politics rather than enforced by a court of law - parliaments are considered the guardians of fundamental rights¹⁰³, and hence the courts have focused on controlling the legality of political power. Judicial review usually differs as to its character depending on whether we are concerned with constitutional judicial review of primary legislation (statutes) on the one hand, or judicial review of sub-statutory (delegated) legislative acts and administrative acts, on the other. The latter tend to focus on whether the act in question is *ultra vires*. However, the trend in Europe since the middle of the 20th Century has been a shift away from focusing strictly on legality.¹⁰⁴ Focus used to be on legality and *ultra vires*, but, as illustrated by John Bell in his study of French Constitutional Law, “..the reference of enacted lois to the Conseil [Constitutionnel] has become a procedure for challenging them on wider, substantive grounds, particularly for breach of fundamental rights”.¹⁰⁵

After having discussed the connection between constitutional and administrative law and the impact of the ECHR in this regard, the focus now shifts to the judicial channels available in order to realize the material and procedural rights established in constitutions and in the ECHR. Constitutional judicial review, exercised by both constitutional and ordinary courts, constitute the starting point. Judicial review of governmental actions will thereafter be dealt with.

¹⁰³ For the French case see Bell, *French Constitutional Law*, p. 138. That this is still the case in the United Kingdom can be illustrated by the 1998 Human Rights Act. According to this, courts can issue a declaration of incompatibility if an act of preliminary legislation should not be in congruence with the ECHR. This enables Parliament to consider the preliminary legislation in question. The ECHR does not stand above preliminary legislation and Parliament has the final say concerning the latter. See *Human Rights Act 1998* Art. 3 and Grosz, Beatson and Duffy: *Human rights, The 1998 Act and the European Convention*, London, Sweet & Maxwell 2000, Chapter One.

¹⁰⁴ On this development see, for example, Martin Shapiro & Alec Stone Sweet, *On Law, Politics and Judicialization*, Oxford, Oxford University Press, 2002.

¹⁰⁵ The original purpose of the review exercised by the *Conseil constitutionnel* was to keep the Parliament within its competence, as is stipulated in Article 34 of the 1958 French constitution. Bell, *French Constitutional Law*, p. 32.

3.3.2 Constitutional Judicial Review

Constitutional judicial review can be described in terms of judicial review exercised in order to establish the constitutionality of legislative acts, uphold the horizontal and vertical separation of powers, and to defend individuals' rights and freedoms. A court exercising constitutional judicial review has the power to invalidate a legislative act because it is in conflict with the constitution. In this context, the constitution is considered the highest legal norm, to be applied and interpreted by judges.¹⁰⁶ Constitutional judicial review can be either centralized or diffused. In the former, constitutional courts exercise constitutional judicial review and they have the exclusive right to declare a law to be in violation with the constitution, rendering it null and void. By contrast, in a diffused system of constitutional judicial review, like the American, ordinary courts exercise constitutional judicial review.¹⁰⁷

When a constitutional court has been established, it is common practice that its jurisdiction to rule on constitutional matters is exclusive, at least as to the constitutionality of statutes. When a case before a court of general jurisdiction raises questions of constitutional matters, the proceeding before the general court is likely to be suspended so that the constitutional court may decide on the constitutional issue. In some countries, high courts enjoy exclusive competence over constitutional disputes in addition to their ordinary jurisdiction.¹⁰⁸ Another solution is the high courts sharing constitutional adjudication with lower courts, i.e. constitutional judicial review is both decentralised and diffused.

Constitutional judicial review can be either abstract or concrete. In ordinary courts it is usually concrete, meaning that the litigation is a result of a real controversy, while constitutional courts can engage in both abstract and concrete review. Abstract review takes place in the absence of a concrete controversy in the sense that the case will not be heard or decided on the merits.¹⁰⁹ In a diffused system like the American, constitutional judicial review will only be exercised when a concrete controversy is to be decided. Abstract review can be exercised *ex priori* or

¹⁰⁶ Stone, *Governing with Judge*, p. 21.

¹⁰⁷ *Ibid.*, p. 32.

¹⁰⁸ For example, the Supreme Court in Estonia is the constitutional judicial review court: The Estonian *Courts Act* (as amended 2003), Article 26 (3). Available at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022>, (2004-03-01).

¹⁰⁹ When a constitutional court *à la* European model engages in concrete constitutional judicial review, it is reviewing, for example, a legislative act as a separate stage in an ongoing judicial process. The case is concrete since the contested legislative act is being applied in the specific case before, for example, a court of general jurisdiction. Stone, *Governing with Judges*, p.45.

ex posteriori, sometimes initiated by a third party, for example a procurator or an ombudsman, sometimes by political actors and bodies.¹¹⁰ It all depends on the national design of the court system on the one hand, and of the institute of judicial review on the other. National varieties are several.¹¹¹ In Common law legal systems, the courts usually derive their power of judicial review from the principle that anyone who has been subjected to an illegal action can turn to a court of law for redress. In civil law countries, a court's power to exercise judicial review is dependent on legislative support.¹¹²

3.3.2.1 Constitutional Complaints

The institution of constitutional complaint can be seen as the corollary to basic rights established in a constitution. This is the case in, for example Germany, Russia, and Hungary. Constitutional complaints are, by nature, of an expository and public character.¹¹³ Still, some constitutional courts have established relatively strict conditions to be fulfilled in order for admissibility to be granted.¹¹⁴ However, some constitutional courts, like the Hungarian, apply *actio popularis* when concerned with constitutional appeals lodged for violations of rights guaranteed by the Hungarian Constitution and to eliminate unconstitutionality by omission.¹¹⁵ In conclusion, constitutional courts and other courts engaged in constitutional judicial review are generally concerned with intra-governmental disputes,

¹¹⁰ Pros and cons are constantly debated. Kelsen was of the opinion that a constitutional court should review a legislative act before its enforcement since that would allow the sovereign character of the statute to be preserved after its promulgation. *Ibid.* p. 36. Others who would argue for abstract review *a priori* raise concerns of legal certainty, while those who are against abstract review *a priori* argue, *inter alia*, that it is likely to politicize constitutional courts, thereby potentially harming their legitimacy and popular support.

¹¹¹ See, for example, *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, and Stone, *Governing with Judges.*, regarding Spain, Italy, France and Germany.

¹¹² Mahendra, *German Administrative Law*, p. 120.

¹¹³ To be further discussed in Chapter 3.3.4.5.

¹¹⁴ At least this is the case where a constitutional court has established detailed requirements for admissibility of a constitutional complaint, such as exhaustion of remedies in the ordinary courts, possibility of a violation of rights which is direct, personal, and present, and that the violation of the right is conducted by a public authority. These are the requirements that the Federal German Constitutional Court demands in order to declare a constitutional complaint admissible. Sabine Michalowski and Lorna Woods, *German Constitutional Law. The Protection of Civil Liberties*, Aldershot, Ashgate, 1999, pp. 45-47. Spain also requires that all other judicial remedies have been exhausted, Stone, *Governing with Judges*, p. 47.

¹¹⁵ *Act on the Constitutional Court*, Article 21 (4), available at <http://www.mkab.hu/en/enpage5.htm>.

reviewing constitutionality of norms, and considering constitutional complaints. Questions related to constitutional interpretation will not be dealt with in this study.

3.3.3 Judicial Review of Governmental Actions

3.3.3.1 Introduction

When concerned with judicial review as rights enforcement, judicial review of governmental action is of great significance. This is due, firstly, to the direct influence of the latter on the lives of individuals and, secondly, considering the fact that the primary principals only exercise indirect political control of the executive, as shown above. In addition, modernization and globalization has increased the power of the executive and the delegation of administrative powers to bodies of more or less official character. The range of administrative activities is wide, ranging from the classical minimum functions such as defence, taxes, education, and policing, to newer functions including, for example, cultural activities, protection of the environment, and social security.¹¹⁶ In the following, the definitions of governmental action and administrative acts will be accounted for and discussed, before exploring the nature of administrative law adjudication.

The increasing power of the executive, and the potentially correlated decreasing power of the legislative assembly, has made it difficult to exercise direct control of the adoption and implementation of policy and administrative measures through electoral and legislative processes. Thus, it could be argued that to claim accountability the importance of individual checks on state authorities and administration increases. In this sense, the function of judicial review of governmental action can be seen as a democratic institution, enabling indirect participation in and direct control of public affairs. In this context, indirect participation in public affairs equals control of administrative authorities. Individuals' checks can be based on a claim of violation of a person's protected interest, i.e. rights as stipulated in national constitutions and international treaties, or other legislative acts. Individuals' checks can also be abstract as to their nature, in that judicial review of a legislative or administrative act has been initiated because it allegedly violates for example the constitution.

¹¹⁶ *The Administration and You*, p. 7.

3.3.4.2. *Governmental Action and Administrative Acts*

For the purpose of this dissertation, van Dijk's definition of governmental action will be used. According to van Dijk, governmental action in a broad sense comprises any action of one or more persons fulfilling a public function, including both government officials and private persons. Governmental actions may have both an individual (non-normative) and a general (normative) character. In addition, factual acts of government agencies such as regulations and decisions fall within the definition of governmental action.¹¹⁷

Although taking as his starting point a definition of governmental action, Van Dijk is mainly concerned with judicial review of administrative acts. Administrative acts are defined as any governmental action that is neither exercise of judicial functions nor parts of legislative and governmental policy. Thus, the legislative and policy-making activity of the government is not included. Rather, the definition of administrative acts refers to governmental action that is directed to the realisation, implementation, and further development of that policy.¹¹⁸ Van Dijk's definition is close to the definition of the term *administrative act* used by the CoE. According to this definition, "administrative act" means any individual decision or measure which:

1. is taken in the exercise of public authority,
2. directly affects, favourably or unfavourably, the rights, liberties, or interests of private persons protected by law, and
3. is not an act performed in the exercise of a judicial function.¹¹⁹

Each national legal order will have its own definition of what constitutes governmental action and administrative acts. The Russian definition will be accounted for in Part III. However, van Dijk's definition makes cross-national comparisons possible. Even though this dissertation is not in itself a comparison between two or more national legal orders, it seems reasonable to apply this

¹¹⁷ Van Dijk has compared judicial review of governmental action and the interest to sue in England, USA, France and, at that, time West Germany. In order to make the comparison, van Dijk had to define what is meant by governmental action in such a way that it could be applied to all the countries being compared. In addition, van Dijk accounts for and compares international judicial review of governmental action. P. van Dijk, *Judicial Review of Governmental Action and the Requirement of An Interest to Sue*, Alphen aan den Rijn, Sijthoff & Nordhoff, 1980, p. 4.

¹¹⁸ *Ibid.*, p. 5. See also Nedjati and Trice, *English and Continental Systems of Administrative Law*, pp. 74, 86. Administrative acts are defined as unilateral, authoritative acts with direct legal effect, taken by a public administration body. Legislative and judicial acts are excluded.

¹¹⁹ *The Administration and You*, pp. 10-11.

definition of governmental action and administrative acts in the theoretical framework of this study since it puts the study of Russian administrative law in a wider context.¹²⁰ Henceforth, the terms “governmental action” and “administrative acts” as defined here will be used.

Governmental actions regulated by, and based on, legislation of a public law character affect the life and property rights of individuals differently than legislation of a private law character. The latter is in most cases of a dispositive nature, while the former in general is a means to realise state policy by imposing obligations and rights on individuals. The state-citizen relationship increases the need for control of legislation of a public law character regarding the procedure for adoption, its material substance, as well as its implementation. The law binds not only the citizens but also the state. Upholding legality of governmental action will contribute not only to protecting individual human rights and freedoms. It will also contribute to upholding the legal order and legitimacy of the state. There are different ways of exercising control of governmental action. As stated above, judicial review of statutory and sub-statutory legislative acts usually differs in the sense that the former aims to assess constitutionality of the statute in question, while the latter aims to assess its legality. In addition, control of administrative acts can be exercised through administrative- (internal) and judicial review, and by ombudsmen.

3.3.4.3 Judicial Review of Administrative Acts

There are, at least, three types of control that can be exercised concerning administrative acts¹²¹:

- Judicial review.
- Internal review by the administrative authorities.
- Review by official persons, for example the ombudsman.

Although this dissertation focuses on *judicial review* of governmental actions, the other two types of control of administrative acts will be examined briefly in order

¹²⁰ In fact, van Dijk in the introduction to *Judicial Review of Governmental Action* stated that he regretted that a socialist legal system was not included in his work. van Dijk, *Judicial Review of Governmental Action*, p. 3. Much has happened since van Dijk’s work was published. Russia, which used to be a socialist system, is now a civil law system and a member of the CoE. Still, there are some peculiarities left in the Russian legal order, remnants of the Soviet system.

¹²¹ *The Administration and You*, p. 37. In Russia all three types exist. Russia has a strong tradition of internal review by the administrative authorities, as does - for example - Sweden. These three types of judicial or quasi-judicial control will be briefly discussed in the following.

to put in perspective the institution of judicial review of administrative acts. We will start with judicial review.

Different states have chosen various procedural solutions as to how judicial review of administrative acts should be conducted. Some have separate administrative courts – as, for example, do Sweden, France, and Germany. In the English and American systems, ordinary courts hear cases concerning judicial review of administrative acts. Russia does not have administrative courts, as will be further discussed below in Part III. As regards the substance of judicial review of administrative acts, the court is concerned at least with the legality of the action. However, when determining whether a governmental agency has kept within its powers or mandate, courts have to take account of the fact that the discretionary powers of the governmental agency may be wide. If so, courts may control the use of these powers in the light of the purpose for which such wide discretionary powers were given, that is, for its reasonableness and for its conformity with general principles such as good administration.¹²² Judicial review of administrative acts can also contain more substantial considerations, such as whether basic rights and morality have been considered.¹²³ The character of judicial proceedings differs depending on the origin of the judicial review of administrative acts. Judicial review of administrative acts can for example originate from actions against the government based on specific performance on behalf of the government, or from a tort claim. In addition, it can originate from an action for annulment of an administrative act or decision. Complaints originating from governmental performance or request for damages are most often private and the proceeding of a private character.¹²⁴ On the other hand, it is not always necessary that the victim should personally initiate annulment of an administrative act, since the purpose of the proceeding can be enforcement of the law in the public interest.

Internal review is conducted within the administrative authority itself. For example, this might be by the administrative body responsible for the appealed administrative act, a superior authority, or a special appellate authority. In some legal orders, internal appeal is permitted, while in others it is required that this should have been exhausted before judicial review can be invoked. According to the CoE, the existence of internal review must not preclude a right to judicial

¹²² Van Dijk, *Judicial Review of Governmental Action*, p. 7.

¹²³ Compare the German system.

¹²⁴ The issue is the legal position of the applicant *vis-à-vis* the government. Van Dijk, *Judicial Review of Governmental Action*, p. 11.

review. In its recommendations the CoE makes a connection between the limits put on courts when exercising judicial review and the importance of internal review by administrative authorities: When judicial review is limited in the sense that a court cannot hear the case on its merits or it cannot replace the decision of the administrative authority, it is argued that the importance of internal review increases, especially if that means that the merits of the case can be reviewed and a new decision issued, if necessary.¹²⁵

In some countries, prior exhaustion of administrative remedies (internal review) is required. In other countries, the internal review must be halted until a judicial review has been completed, if the latter has been initiated. Several pros and cons regarding prior exhaustion of internal review can be identified. Some of the pros are related to procedural economy.¹²⁶ If it is suspected that judicial review might be superfluous, for example because the legality of the administrative act is not at issue, the requirement of exhaustion of administrative remedies seems adequate. In addition, if administrative remedies are not exhausted one has to take into consideration whether the administrative decision is final and whether its legal consequences are certain when conducting judicial review. Should it be that a judicial decision overrides a non-final administrative decision, then the question of democratic legitimacy might arise, especially so if the court may hear the case on its merits before the administration has reached its final decision. Further, it might be a question of expertise since internal review can be considered more suitable for questions related to the use of discretionary powers and the weighing of interests. On the other hand, in cases where it is obvious that a court will have to hear the case, for example cases where prior precedents and statements make it clear that judicial review will be required, then prior exhaustion of administrative remedies can be questionable.¹²⁷ Additionally, I would argue that external review, i.e. judicial review, could increase the legitimacy of the administration and its activities since it might give citizens a feeling of not being “kidnapped” by persons and institutions that have a direct interest in the outcome of the complaint. In addition, internal review will usually not, although there are exceptions, allow the question of legality to be considered by judges or other legal professionals.

¹²⁵ *The Administration and You*, p. 43.

¹²⁶ In French and English courts, judicial review is allowed only in exceptional cases if alternative remedies are available. John Bell, *French Administrative Law*, Oxford, Clarendon Press, 1998, p. 169.

¹²⁷ Van Dijk, *Judicial Review of Governmental Action*, pp. 207-208.

So far, we have dealt with judicial and internal review. Review of administrative acts can also be conducted and initiated by *official representatives as applicants acting in the public interest*. That might be *inter alia* ombudsmen, Attorney Generals, and procurators. According to van Dijk, governmental agencies play an important role as initiators of non-judicial review in most cases, though not so often with judicial review.¹²⁸ In Russia, the Procurator may file a complaint before a court of law in the public interest if the victim is unable to do so in person due to listed circumstances - see further in Part III.

3.3.5 The ECHR and Review of Administrative Acts

This Section examines when and to what extent the ECHR and the case-law of the ECtHR command judicial control of administrative acts. The ECHR has had, and continues to have, a strong impact on national legal orders, not only in the post-Socialist European states but also in the old member states.¹²⁹ This impact can be expected to continue to grow, especially within the sphere of administrative law. However, initially the ECHR was little concerned with administrative law and administrative procedure. Several states assumed that Article 6 (1)¹³⁰ was only applicable to private law due to its reference to “civil rights and obligations”.¹³¹ Numerous contracting states have experienced difficulties with Article 6 in relation to issues that, according to national law, have an administrative law character.¹³² It has been discussed whether Article 6 should apply either fully or not at all to the use of administrative powers. Neither was

¹²⁸ Van Dijk, *Judicial Review of Governmental Action*, p. 213. See also Cappelletti, *The Judicial Process in Comparative Perspective*, p. 275. According to Cappelletti, entrusting the right to sue to representatives of the state concerning violation of social, collective and diffuse rights has been shown to be inadequate. Some of the explanations given are that state representative might not be independent in relation to the political and administrative branches that they are to supervise, and that in civil law countries the state representative is usually a career judge, so that it might be difficult to bring about the change of attitude that plausibly is needed to conduct partisan advocacy.

¹²⁹ See, for example, Wiweka Warnling-Nerep, *Rättsprövning och Rätten till Domstolsprövning*, Stockholm, JureCLN, 2000, p. 35.

¹³⁰ Article 6 (1) “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*”

¹³¹ Cameron, *An Introduction to the European Convention of Human Rights*, p. 79.

¹³² Warnling-Nerep, *Rättsprövning och rätten till domstolsprövning*, p. 40.

considered a good idea since the general purpose of the ECHR is to protect citizens in relation to their states. In addition, there is nothing in the *travaux préparatoires* implying that Article 6 should be applicable only to disputes between individuals.

3.3.5.1 Article 6 and Administrative Law

In order to assess whether Article 6 (1) is applicable, the first question to be asked is whether the dispute in question falls under Article 6 (1). If so, access to a fair hearing of the case before a court of law is required. It has been established on a case-by-case basis that certain administrative law issues fall under the ECHR and that Article 6 is applicable to administrative law and procedures due to an extensive interpretation of the term “determination of civil rights and obligations”. This is especially so when administrative decisions have direct effect on individuals’ rights and obligations.¹³³ Civil rights and obligations must be the object of the dispute¹³⁴ and the dispute must be sincere; moreover, if administrative actions are decisive for private rights, then Article 6 can be applicable. The dispute must be over the existence, scope, or manner of exercise of civil rights and obligations, recognised under national law.¹³⁵ However, the concept of civil rights and obligations as stipulated in the ECHR is autonomous¹³⁶, meaning that it is not interpreted solely by reference to domestic

¹³³ *Ringeisen v. Austria*, 16 July 1971, (*Application no. 2614/65*). It is not required that both parties to the proceedings are private parties. It suffices that the administrative law applied is decisive for the private law relations of the complainant for Article 6 (1) to be applicable.

¹³⁴ *Le Compte et al v. Belgium*, 26 June, 1981, (*Application nos. 7299/75;7496/76*), (para. 47). The case concerned disciplinary actions against two medical doctors and whether their rights according to Articles 3 and 6 had been violated. On the question whether this was a civil rights issue, the ECtHR held that “..it is sufficient to note that it is by means of private relationships with their client and patients that doctors in private practice, such as the applicants, avail themselves of the right to continue to practise; in Belgium, the relationships are usually contractual and, in any event, are directly established between individuals on a personal basis.” Accordingly, the right to continue to practise constituted, in the case of the applicants, a private right and thus a civil right within the meaning of Article 6 (1). The cases of Dr. Albert and Dr. Le Compte were not heard publicly by a tribunal competent to determine all the aspects of the matter and pronouncing judgment publicly. In this respect, there was, in the particular circumstances, a breach of Article 6 (1).

¹³⁵ *Le Compte et al v. Belgium*, (para. 49).

¹³⁶ On the ECtHR’s doctrine of autonomous concepts, see George Letsas, “The Truth in Autonomous Concepts: How to Interpret the ECHR”, *European Journal of International Law*, Vol. 15 No.2, 2004, (279-305). Apart from ‘civil rights and obligations’, other autonomous concepts according to the Court’s theory on autonomous concepts include: ‘criminal charges’, ‘possessions’, ‘association’, ‘victim’, ‘civil servant’. The ECtHR describes autonomous concepts as those whose “definition in national law has only relative value and constitutes no more than a starting point”. See, *Chassagnou and others v. France*, 29 April, 1999, (*Applications nos. 25088/94, 28331/95 and 28443/95*).

law. Still, national law is not without significance, since whether a right is civil or not according to the ECHR is determined in the light of the *substantive content and effect* of the right as stipulated in national law, and not by its legal classification *per se*. Only the character of the right at issue is relevant.¹³⁷ The theory of autonomous concepts of the ECHR aims to strengthen protection of the rights stipulated in the ECHR. This is so that contracting states will not try to diminish the protection offered by the Convention by using legal-technical concepts and classifications not referred to in the ECHR.¹³⁸ After reaching the conclusion that a civil right or freedom is affected by an administrative act, the question of judicial review of administrative acts within the national legal order arises.

3.3.5.2 Article 6 and Judicial Review of Administrative Acts

In *James v. UK*, the ECtHR stated that Article 6 does not require that there be a national court with the mandate to invalidate or override national law and that Article 6 does not in itself guarantee any specific content of civil rights and freedoms. Article 6 becomes applicable when a dispute refers to “*a right which can be said at least on arguable grounds to be recognised under domestic law*”.¹³⁹

In the *Golder* case, the Court considered the question whether access to a court in civil proceedings falls within the rights protected by Article 6. The right of access to a court is not explicit in Article 6. The ECtHR found that right to access to a court is inherent in the rights stipulated in Article 6, and that everyone has the right to have any claim relating to their civil rights or obligations brought before a court or a tribunal.¹⁴⁰ One of the arguments for this interpretation of the ECHR was that access to courts is necessary for a proceeding - to which the requirements of Article 6 are applicable - to be initiated in the first place. Thus, the right to access to courts was considered an implied right. Still, the right to access to a court is not absolute, according to the Court. However, limitations put on such a right should not be allowed to injure the substance of the right.¹⁴¹

¹³⁷ *König v. Germany*, 28 June, 1978, (*Application no. 6232/73*). Withdrawal of a license to run a private clinic concerns a right of a private nature.

¹³⁸ *Chassagnou and others v. France*.

¹³⁹ *James v. United Kingdom*, 21 February, 1986, (*Application no. 8793/79*) (para. 81, § 2). In this case the applicant had access to a tribunal, if a cause for claiming non-compliance with the national law in question had been found (para. 81, § 4).

¹⁴⁰ *Golder v. United Kingdom*, 21 February 1975, (*Application no. 4451/70*) (para. 36).

¹⁴¹ *Ibid.* (para. 38).

Whether a domestic claim is actionable or not depends, according to the ECtHR in *Fayed v. United Kingdom*, not only on the substantive content but also on “*the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court*”. This means that although member states do have a certain margin of appreciation in regulating the right of access to court, any such regulation will be subject to the requirement that the limitations imposed:

- do not impair the very essence of that right,
- are imposed in pursuit of a legitimate aim, and
- are proportionate to the aim pursued.¹⁴²

Although the ECtHR cannot create any substantive rights by interpreting Article 6 if such a right has no legal basis in the state concerned, nevertheless these principles reflect the ECtHR’s task of striking a balance between protecting individuals’ rights and freedoms and the general interest of the community. For if a state could remove a wide range of individual claims related to civil rights from the jurisdiction of the courts without constraint or control by the ECtHR, then this would not be in congruence with the rule of law in a democratic society or with the principles underlying Article 6.¹⁴³

However, the Court recognises that access to a court may be more restricted when a case is concerned with activities in the public sphere than is acceptable with litigation involving persons acting in their private capacity.¹⁴⁴ In the *Pellegrin* case, the ECtHR stated that disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law, do not attract the application of Article 6 (1).¹⁴⁵ In conclusion, Article

¹⁴² *Fayed v. United Kingdom*, 21 September, 1994, (*Application no. 17101/90*) (para. 65). See also presentation by Peter Duffy published in *Judicial Control of Administrative Acts*, Strasbourg, Council of Europe Publishing, 1997, p. 131.

¹⁴³ *Fayed v. United Kingdom*, (para. 65).

¹⁴⁴ *Fayed v. United Kingdom*, (para. 75).

¹⁴⁵ *Pellegrin v. France*, 8 December, 1999, (*Application no. 28541/95*)(para. 67). In this case the Court laid down a new criterion to be applied in order to determine the applicability of Article 6 (1) to public servants. The Court adopted a functional criterion based on the nature of the employee’s duties and responsibilities. According to the Court, in the public-service sector some posts involve responsibilities in the general interest or participation in the exercise of powers that are being conferred by public law. The state does have a special interest in relation to persons holding these posts in terms of special bonds and loyalty. As examples of such posts the Court mentioned the police and the armed forces. (para. 64-65). “*In practice, the Court will ascertain, in each case, whether the applicant’s post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. In so doing, the Court will have regard, for guidance, to the categories of activities and posts listed by the European Commission in its communication of 18*

6 is applicable to judicial review of administrative acts when the dispute concerns an administrative act that has a direct effect on an individual's civil rights as protected by national law and the ECHR.¹⁴⁶

3.3.5.3 Review of Administrative Acts and Article 13

Concerning review of administrative acts, it is also vital to consider Article 13 of the ECHR since this Article can impose requirements of effective judicial remedies for administrative interference with fundamental rights. Its purpose is to ensure adequate and effective safeguards against abuses of substantive rights under the ECHR.¹⁴⁷

Efficient protection and enforcement of substantive rights under the ECHR depends on procedural rights as stipulated in Articles 6 and 13. Article 6 has been discussed above, hence we will now focus on Article 13. There is an overlap between Article 6 and Article 13. The requirements put on states under Article 13 are less strict than the requirements under Article 6, according to the ECtHR. Therefore, complaints under Article 13 have been included in complaints under Article 6 when possible, since Article 6 has been considered a *lex specialis*.¹⁴⁸ Nevertheless, Article 13 is wider in its scope of application in that it includes effective remedies for violations of the Convention and its protocols, for example violation of Article 6 by allowing lengthy proceedings. In the Kudla case, the ECtHR reviewed its case law concerning the question whether a finding that Article 6 (1) had been breached by definition excluded the application of Article 13, in cases of lengthy proceedings. Taking into consideration the vast numbers of complaints filed to the ECtHR concerning lengthy proceedings, the Court found that Article 13 is to be considered even if a violation of Article 6 has occurred according to the Court.¹⁴⁹

March 1988 and by the Court of Justice of the European Communities." (para. 66). Should the Court find that the post is of the kind mentioned here, then Article 6 (1) will not be applicable.

¹⁴⁶ According to the Court in the *Pellegrin* case, disputes concerning pensions fall under Article 6 (1) because on retirement employees break the special bond between themselves and the authorities; they find themselves in a situation exactly comparable to that of employees under private law in that the special relationship of trust and loyalty binding them to the State has ceased to exist and the employee can no longer wield a portion of the State's sovereign power, (par. 67).

¹⁴⁷ *Judicial Control of Administrative Acts*, p. 128.

¹⁴⁸ See *Kudla v. Poland*, 26 October, 2000, (*Application no. 30210/96*), (para. 135).

¹⁴⁹ See *Kudla v. Poland*. In the case of *Kormacheva v. Russia*, the judge responsible for the excessive length of the proceeding was officially reprimanded. However, the ECtHR did not consider that

Article 13 stipulates the right for individuals to an effective remedy before a national authority in relation to claims emanating from rights protected by the ECHR. Should the national authority not be a court, then it is required that the authority is genuinely independent and capable of correcting the situation complained of.¹⁵⁰ The remedy under Article 13 must be personally available to the applicant. In addition, more important substantive rights require tougher remedies.¹⁵¹ Still, it is not necessary to establish a breach of substantive rights in order for the ECHR to find that a breach of Article 13 has occurred. It suffices that the complainant has an arguable claim.¹⁵² In the case of *Stockholms försäkrings och skadeståndsjuridik v. Sweden*, the Court found a violation of Article 13. The applicant's rights under Article 1 of Protocol No. 1 to the Convention had been breached and Article 6 (1) of the Convention was not applicable. In these circumstances, the Court considered that a separate issue arose with regard to the complaint under Article 13, and that the applicant had an arguable claim for the purposes of that provision. The remedy proposed by the Swedish Government - a claim for damages from the State under the Tort Liability Act, presented either to the Chancellor of Justice or to the courts - was not considered to have been capable of providing relief for the purposes of Article 13 as regards the applicant's grievances under Article 1 of Protocol No. 1. There was no evidence of any other remedy available under Swedish law that could have provided such relief; thus there had been a breach of Article 13 of the Convention.¹⁵³ Still, Article 13, as interpreted by the ECtHR, does not require that the contracting states allow for abstract judicial review of legislative acts.¹⁵⁴

this specific procedure was an effective remedy against the length of the proceeding in terms of Article 13. *Kormacheva v. Russia*, (Application no. 53084/99), (para. 62).

¹⁵⁰ *Klass and others v. Germany*, 6 September, 1978, (Application no. 5029/71).

¹⁵¹ Iain Cameron, *National Security and The European Convention on Human Rights*, Uppsala, Iustus Förlag, 2002, p. 37.

¹⁵² Cameron, *An Introduction to the European Convention of Human Rights*, pp. 127-128. *Klass and others v. Germany*, and *Valsamis v. Greece*, 18 December, 1996, (Application no. 21787/93) (violation of Art. 13 although no violation of a substantive right).

¹⁵³ Case of *Stockholms försäkrings- och skadeståndsjuridik AB v. Sweden*, 16 September, 2003, (Application no. 38993/97), (para 71).

¹⁵⁴ Hans Danelius, *Mänskliga rättigheter i europeisk praxis. En kommentar till Europakonventionen om de mänskliga rättigheterna*, Stockholm, Norstedts, 2000, p. 302.

3.3.5.4 Scope of Review of Administrative Acts¹⁵⁵

In 1980, the Committee of Ministers of the Council of Europe adopted a recommendation as to the exercise and control of discretionary powers¹⁵⁶ by administrative authorities. Principle no. 9 of the *Explanatory Memorandum* deals with the nature of control. Concerning control of the use of discretionary powers by administrative authorities, the recommendations adopted were general in nature owing to the diversity of control systems in the different member states.¹⁵⁷ Principle no. 9 is mainly concerned with the control of *legality* of an administrative act taken when exercising discretionary power. However, it does not exclude the possibility that courts or other independent bodies that control the legality of acts might also consider the merits of these acts. The fact that a competent administrative authority is to control both legality and merits should not be interpreted as excluding control of both legality and merits by a court. According to the recommendation and its explanatory memorandum, it is up to each member state to determine the content of the concepts of legality and merits. It is also recognised that it is difficult to establish clear boundaries between the two concepts.¹⁵⁸

Regarding ECtHR case law on the scope of judicial review of administrative acts, the review must be generous enough to admit a consideration of the civil rights and obligations concerned. Whether the scope of review is sufficiently broad is decided on a case-by-case basis, taking into consideration the grounds for the appeal, and conduct of the review. For example, if only the legality of an administrative decision is questioned, then a more limited scope of review might be enough, while if the questioned decision is based on erroneous facts or subjective values, then a wider scope of review would be required.¹⁵⁹

¹⁵⁵ The recommendation and explanatory memorandum attached to it define administrative acts as “any individual measure or decision which is taken in the exercise of public authority and which is of such nature as directly to affect the rights, liberties or interest of a person whether physical or legal.” *Recommendation No. R (80)2* adopted by the Committee of Ministers of the Council of Europe on 11 March 1980, p. 6.

¹⁵⁶ Discretionary power is defined as “a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate.” *Ibid.*

¹⁵⁷ *Ibid.*, p 17.

¹⁵⁸ *Ibid.*

¹⁵⁹ Danelius, *Mänskliga rättigheter i europeisk praxis*, p. 146.

3.3.5.5 Conclusion

The ECHR does not stipulate a general right to appeal administrative acts; rather, the principle can be deduced from Articles 6 and 13, as these have been interpreted by the ECtHR. Article 13 stipulates the right for individuals to an *effective remedy* before a national authority in relation to claims emanating from rights protected by the ECHR. Article 6 is applicable to *judicial review* of administrative acts when the dispute concerns an administrative act that has a direct effect on an individual's civil rights as protected by national law and the ECHR. In these cases the Court requires the existence of procedures for obtaining judicial review of, at least, the legality of administrative decisions. There is still a broad margin of appreciation for the contracting states as regards control of discretion. However, the review cannot be limited to the extent that it can no longer be considered to be an effective judicial remedy and thereby undermining the right as protected by Articles 6 and 13.¹⁶⁰

3.3.6 Characterizing Public Law Adjudication

One of the most important aspects of the rule of law is the existence of legal rules governing and limiting the actions of public officials. This goes hand in hand with access to an impartial judiciary in order to enforce respect for these limits. The effect of constitutional law on administrative law has been discussed above and the impact of the ECHR and the ECtHR on judicial review of administrative acts has been examined. In order to further analyze and broaden the understanding of public law adjudication and its functions in a societal and democratic context, a model will be presented. The model contains two ideals regarding the character of public law adjudication, (see fig. 1, below). The model is based on research made by van Dijk and Joanna Miles. When put together, a new hypothesis is developed and new conclusions can be drawn. The contribution of this author is to highlight the potential social and democratic effects of public law adjudication (in combination with individual legal activism, which is to be further elaborated below).

In the following, the character of public law adjudication will be discussed in terms of rules on standing (*locus standi*), the character of the court proceeding, and

¹⁶⁰ *Administrative Discretion and Problems of Accountability*, Strasbourg, Council of Europe Publishing, 1997. As to exercise of discretionary powers by administrative authorities, see *Recommendation No. R (80)2 Concerning the Exercise of Discretionary Powers by Administrative Authorities*, adopted by the Committee of Ministers of the Council of Europe, 11 March 1980, and *Explanatory Memorandum*, p 7.

the character of the court decision. It will be argued that the character of public law adjudication is such that in “old” democracies it can contribute to strengthening democracy by allowing control and accountability to be exercised where a large part of the actual power lies, i.e., with the executive. In addition, concerning post-Socialist states, it is suggested that public law adjudication in combination with individual legal activism can function as an alternative to electoral control of political and administrative powers.

3.3.6.1 Rules on Standing in Public Law Adjudication

Miles is of the opinion that standing rules should reflect the substantive decision to be made by a court. Thus, if the court decision is concerned with strictly individual rights, or with collective, social and diffuse (and in that sense public) rights, that should be decisive for how the standing rules are defined. She suggests two models for analysing and evaluating standing rules when we are concerned with rights enforcement in public law¹⁶¹:

- The Individualist Model, and
- The Communitarian Model.

These models should be understood as ideal types. Applying the *Individualist model* of rights enforcement, no objective interest in the conduct of the violator justifies that third parties should have the right to bring the matter before a court of law. The only wrong committed is that towards the victim and thus only the victim should enjoy standing, exclusively.¹⁶² However, should there be several victims of the same wrongdoing, then the matter becomes more complicated. According to Miles, it is justifiable that the autonomy of the victims affected by a complaint

¹⁶¹ Miles’ ambition, when presenting the theoretical framework for rights enforcement and standing rules, is to remedy a lack of theoretical understanding of standing in public law, especially in England, concerning the implementation of the Human Rights Act. Joanna Miles, “Standing under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication”, *The Cambridge Law Journal*, March 2000, Vol. 59, (133-167), pp. 148-151. Nevertheless, the theoretical framework presented by Miles is also useful for analyses to be made in this study. Concerning the differences between the common law and civil law legal orders, it has been mentioned elsewhere that the difference is diminishing. This is also the case concerning public interest litigation. See Cappelletti, *The Judicial Process in Comparative Perspective*, pp. 294-299, and “Vindicating the Public Interest Through the Courts: A Comparativist’s Contribution”, *Buffalo Law Review*, 643, 1975-1976, (643-690).

¹⁶² See also Cappelletti, *The Judicial Process in Comparative Perspective*, pp. 272, 275. Cappelletti describes the individualist model as an individualistic nineteenth century concept of litigation, awarding the right to sue, with narrowly defined individual rights, only to the maltreated person, who is personally interested. The individual is allowed to sue in order to vindicate their own interest only. Cappelletti calls this the individual standing solution.

filed by another victim be overridden, since the victim applicant does have a personal stake in the outcome. That stake renders a legal and moral right to complain, whatever the impact on other victims. Nevertheless, should an ideological group such as *Amnesty* file a complaint, then the autonomy of the victims prevails, according to the Individualist model of rights enforcement. Thus, the starting point for the Individualist approach is the individual and his or her rights.¹⁶³ In order for litigation to be initiated by a third party, the beneficiary of the violated right must approve of such a complaint being filed.¹⁶⁴ Since it might be difficult to obtain approvals, it is recommended that such actions be barred altogether if the Individual approach to rights enforcement is adopted.¹⁶⁵

On the other hand, the *Communitarian model* of rights enforcement rejects victim autonomy as the dominant concern. Rather, the dominant concern is the public interest of lawful government and the enforcement of substantive law. The basis of the argument is that the public good of judicial review of governmental action in order to ensure its lawfulness is such that it can be imposed on an unwilling beneficiary without consent. The public good is to ensure that governmental action does not breach fundamental rights or otherwise exceeds its powers - one of the fundamental aspects of a rule-of-law state - and that the material law is being enforced. According to Miles, the communitarian view recognises a collective public right to hold the government responsible for its actions. This can be realised by generous standing rules. “*The only right that the victim has here is to be treated by the government in accordance with the law, whether he wants such treatment or not.*”¹⁶⁶

However, the difficult question remains – irrespective of what model of rights enforcement constitutes the starting point - and that is, how to define the person or group of persons to be awarded standing?¹⁶⁷ There is a sliding scale from a narrow definition, such as the one presented above concerning the Individualist

¹⁶³ See also, Cappelletti “Vindicating the Public Interest Through the Courts..”, pp. 648-649. The individual approach to standing is the traditional approach in civil law legal orders.

¹⁶⁴ For an overview of the history of approval in English law, see Per Henrik Lindblom, *Progressiv process. Spridda uppsatser om domstolsprocess och samhällsutveckling*, Uppsala, IUSTUS, 2000, pp. 333-338.

¹⁶⁵ Cappelletti has voiced criticism as to the Individual approach to rights enforcement with the argument that in certain issues - for example consumer, discrimination, and environmental - the interest of one person might be too small to encourage individuals to sue. This means that the wrongdoer does not have a strong enough incitement to stop the illegal activity. Cappelletti, *The Judicial Process in Comparative Perspective*, p. 275.

¹⁶⁶ Miles, “Standing under the Human Rights Act 1998”, p. 152.

¹⁶⁷ The question of how to define standing rights cannot be answered without taking into consideration the rights to be protected: individual, diffuse, collective, or fragmented.

approach, to a sufficient interest and from there to the *actio popularis*.¹⁶⁸ It could be argued that the communitarian approach to rights enforcement does not necessarily exclude that the damage be individualised to some degree. Cappelletti points to the new social, diffuse, and collective rights; and states that these rights can only be protected by new social, diffuse, and collective remedies and procedures.¹⁶⁹ But, as pointed out by Per Henrik Lindblom, collective and diffuse interests do not exclude the individualistic approach to rights enforcement. Rather, group actions and individual complaints complement each other.¹⁷⁰

The question of how to identify the potential victim, i.e. the rights holder, will determine whether a certain set of standing rules are to be characterized as communitarian or individual. Consequently, concerning the communitarian approach to rights enforcement, the plaintiff (the rights holder) could be a victim, alone or in group, a concerned citizen, an interest organization, or a governmental representative, for example an ombudsman,¹⁷¹ while only the affected person, i.e.

¹⁶⁸ The definition of a sufficient interest varies between different legal orders. See van Dijk, *Judicial Review of Governmental Action*, pp. 18, 19-20. *Actio popularis* is understood as the right to invoke a case before a court of law conferred upon all members of a community. Its *raison d'être* is the idea that legality of governmental action is in the interest of all, hence an action against an illegal act could be invoked by all members of a given society. The only condition for filing a complaint is a legal capacity to sue, i.e. to be a subject of rights and duties, either as a private or legal person. Compare for example with the Canadian and the Indian standing rules. Both systems allow standing when an individual can show a genuine interest as a citizen (Canada) and when a member of the public has a sufficient interest, which includes a genuine concern for the rights of others (India). Sadurski, "Legitimacy and Reasons of Constitutional Review After Communism", pp. 183-184.

¹⁶⁹ The kind of rights that Cappelletti is referring to include, e.g., social rights, such as freedom from indigence, freedom from ignorance and discrimination, rights and duties of associations, communities and classes, consumer and environmental rights. The complexity of modern society is such that traditional two-party litigation might not serve the interest of the affected persons or society at large. Cappelletti, *The Judicial Process in Comparative Perspective*, pp. 271-272. On the definition of diffuse and collective rights, see Lindblom, *Progressiv process*, pp. 316-317. Concerning access to justice regarding collective and diffuse rights, Lindblom suggests that a *new* factor to consider when analyzing standing rules is that the interested and affected parties can be hard to identify. In addition, not all parties are affected to the same extent and with the same consequences. Those not so much affected might expect that the more affected parties initiate the proceeding. A likely scenario is that many people are concerned and affected but no one wants to initiate a court procedure, all for their own reasons, hence, the free-rider problem arises.

¹⁷⁰ For the reasons stated above. *Ibid.*

¹⁷¹ See for example, *Ibid.*, pp. 323-326. Allowing interest groups and concerned individuals to act in the interest of others or the general public are by Cappelletti referred to as the "Private Attorney General" Solution, as opposed to the "Governmental Attorney General" acting as the general representative of the state. Cappelletti is fairly critical of the latter solution which he deems is inefficient, partly due to the potential lack of political independence of the state representative. Cappelletti "Vindicating the Public Interest Through the Courts..", pp. 652-664

the victim, has exclusive standing according to the Individualist approach to rights enforcement.

The question of relevance in this context is, in the absence of *actio popularis*, whether sufficient interest can and should be subscribed to, for example, a collective, or an interest organisation, apart from or in parallel with, the directly affected individual. When it comes to the enforcement of collective and diffuse rights, the free-rider dilemma, and the public interest of legal administration would speak in favour of granting interest organisations standing rights since they would have the human and financial resources needed in order to litigate.¹⁷²

3.3.6.2 *The Character of the Court Proceeding*

The court proceeding as such can be of private or public character. The character differs depending on the origin of the judicial review. Complaints originating from request for damages are most often private, so that the proceeding will be of a private character. The issue is the legal position of the applicant *vis-à-vis* the government. Cases of a private character comprise actions in which the government is asked to perform, or not to perform a certain act, or to pay damages based on contractual or non-contractual liability towards the applicant. The action resembles private law remedies. For example, according to van Dijk inaction on the part of the government falls within the category of private character cases if there is a legal duty to act and a corresponding right attached to the act. In that case, failure to act constitutes an unlawful act.¹⁷³ However, concerning annulment of administrative acts, it is not always required that the victim should personally initiate the process - the purpose of the proceeding can be the enforcement of the law in the public interest. Thus, the proceeding might have a collective interest¹⁷⁴ and a *public* character. A legislative or administrative act can be submitted to the court for annulment by, for example, an affected party or by an official authority such as a Procurator, in this case representing the public interest.¹⁷⁵ Thus, individuals can initiate proceedings of a public character when both the private and the public interest are at stake, without the private interest

¹⁷² Cappelletti "Vindicating the Public Interest Through the Courts..", p. 676.

¹⁷³ van Dijk, *Judicial Review of Governmental Action*, pp. 201-202.

¹⁷⁴ In French administrative law, any user of a public service has a sufficient interest to sue. This has been described as a collective interest, which should not be confused with *actio popularis*. The latter is not accepted in French administrative law. Bell, *French Administrative Law*, p. 167.

¹⁷⁵ A solution that Cappelletti finds inadequate to the problem of standing in areas of diffuse interests. See Cappelletti, *The Judicial Process in Comparative Perspective*, pp. 274-278.

determining how to characterise the proceeding.¹⁷⁶ In these cases, the requirement of personal interest is often used as a condition for admissibility for practical reasons.

In conclusion, van Dijk draws a distinction between the admissibility of a complaint and the proceeding on the merits *per se* as to how the proceeding in its entirety can be characterised. For example, a private interest in terms of personal harm can be required to initiate judicial review of governmental action leading to annulment of the act. In these cases, in terms of admissibility the case has a private character. Whether the proceeding on the merits should be considered to have a private or public character is decided by whether the requirement of personal harm is restricted to the admissibility test, or whether it is also a condition for proceeding on the merits, i.e. whether the purpose of the proceeding is to establish personal harm or to assess the legality of the contested governmental action.¹⁷⁷

The distinction between the private and public character of a proceeding is of relevance, since it has been argued that if a court decides that a case is of public character, then the court would be more likely to take into consideration public interest and procedural economy when interpreting standing rules. A court or the legislature might be more liberal when determining who has an interest to sue.¹⁷⁸

3.3.6.3 *The Character of the Court Decision*

In order to analyse the courts' functions in public law adjudication, Miles accounts for two models of adjudication¹⁷⁹:

- The Dispute Resolution Model, and
- The Expository Justice Model.

These models are for the purpose of this study employed in order to highlight the character of court decisions in public law adjudication. Public law adjudication can, according to Miles, be either reparative - *the dispute resolution model*, or

¹⁷⁶ Cappelletti, referring to Judge Jerome Frank, calls this the '*Private Attorney-General*' solution. Individuals and/or organizations are allowed to act in a court for group interest although they are not directly injured themselves. In short, a "*flexible utilization of private persons and organizations for the protection of diffuse rights.*" *Ibid.* pp. 283-284.

¹⁷⁷ van Dijk, *Judicial Review of Governmental Action*, pp 202-204.

¹⁷⁸ *Ibid.*, pp. 11-12.

¹⁷⁹ Miles, "Standing under the Human Rights Act 1998", pp. 152-155.

expository - *the expository justice model*.¹⁸⁰ In the former case, the dispute is considered to be private and the general public is directed towards the political forum to ventilate their concerns with public policies. The dispute is private in the sense that it is only concerned with the victim and the wrongdoer and how to settle the dispute between them, i.e. it is reparative. In *the expository justice model*, the role of the courts is wider and more forward-looking. In this model, the activity of the court aims to fulfil the role of expositor of the law, but more importantly as the expositor of the public values enshrined in the law.¹⁸¹ Judicial pronouncements as to the proper interpretation of rights guarantees, besides granting remedies for a past event, will have an effect on future interactions between state and citizen.

If we apply Miles' argument that standing rules should reflect the substantive decision, then the standing rules ought to be generously designed if the effect of the court decision is expository in a broad sense.¹⁸² As a general rule, a decision adopted in line with the dispute resolution model affects only the parties to the case. Nevertheless, a subsequent appeal court decision has both a reparative and expository character in that the decision can create a precedent. The main question is to what extent the affected non-parties are bound by the court decision.¹⁸³ The effects of decisions in public law adjudication is likely to go beyond the parties in the proceedings.¹⁸⁴

¹⁸⁰ Compare with Lindblom's description and analysis of the Swedish civil and administrative procedural law's old and new functions. Per Henrik Lindblom, "Domstolarnas växande samhällsroll och processens förändrade funktioner – floskler eller fakta?", *Svenske juristtidning*, årgång 89, 3/04, (229-262).

¹⁸¹ Since it lies in the nature of adjudication to expose the law, the most important difference is the self-perception of the court and the effect that that self-perception has on legal reasoning and wording. A more elaborate and principle-founded legal reasoning that balances various principles and values would contribute to the exposition of the public values enshrined in the law.

¹⁸² The standing rules in for example French administrative law are rather generous. The *Conseil d'État* has accepted that any user of a public service may have an interest to sue. Bell, *French Administrative Law*, pp. 166-167.

¹⁸³ Lindblom, *Progressiv process*, p. 316. For example, if a French administrative court annuls an administrative decision, then the court's decision is valid against all - *erga omnes*. Bell, *French Administrative Law*, p. 215.

¹⁸⁴ Compare with, Cappelletti "Vindicating the Public Interest Through the Courts..", p. 682.

3.3.6.4 Conclusion

Fig. 1. The Character of Public Law Adjudication:

Standing:	The Individualist Model	The Communitarian Model
Proceeding:	Private Character	Public Character
Decision:	Dispute Resolution	Expository Justice
	 Liberal	 Republican

The model presented here is built on two ideals concerning the character of public law adjudication. Clearly, few legal orders would actually fit into any one of these models; rather, we would find that most legal orders are a mixture of both. Even though this is likely to be the case, it is of value to discuss ideas and ideal types in order to identify principles on which legal systems and legal institutes are founded.

The Liberal model as to the character of public law adjudication is based on liberalism as a political and philosophical idea. According to liberalism, sometimes combined with conservatism¹⁸⁵, the common good is the accumulation of individual acts over a period of time where the good outweigh the bad.¹⁸⁶ Thus, the individual's self-interest constitutes the starting point, in both theory and practice. Loughlin summarizes the common core of liberal theories as "*(the) conception of the individual as autonomous and existing prior to, and separate from, society...*".¹⁸⁷

Republicanism takes its starting point in striving for the common good and achieving the common good as such. The common good is achieved when every action of a citizen is determined by civic virtue and not exclusively by self-interest.¹⁸⁸ Thus, societal integration is not primarily the result of actions based on individual self-interest, but rather on the aspiration to achieve the common good. In this particular context, "the common good" may be defined as a *status quo* in which the government respects and acts according to the law and in the interest of

¹⁸⁵ Loughlin, *Public Law and Political Theory*, pp. 63-104.

¹⁸⁶ Kis, *Constitutional Democracy*, p. 3.

¹⁸⁷ Loughlin, *Public Law and Political Theory*, p. 96.

¹⁸⁸ Civic virtue involves readiness to participate in public affairs and to subordinate private interests to the interests of the community. Kis, *Constitutional Democracy*, p. 3.

its primary principals, i.e. a Rule of Law State. *The Republican model* as to the character of public law adjudication takes as its starting point the common striving for a Rule of Law State, where the striving as such is an important element of societal integration. Societal integration in liberal thought, on the other hand, is based on individual self-interest, hence the Liberal model of character of public law adjudication is closer to this political idea in that a Rule of Law State will be achieved by an accumulation of actions motivated by individual self-interest. Liberalism, which dominated political philosophy in the early 19th century, arose as a criticism of republicanism. However, while the values aspired to, i.e. individual rights and freedoms, are in large part the same in both republican and liberal thought, nevertheless the ways to achieve their realization differ. This is illustrated and concretized above in fig. 1 as regards the character of public law adjudication.¹⁸⁹

3.3.7 Summary and Conclusions

The move towards increased judicial review as a means to achieve rights enforcement is a trend throughout Europe which has developed since World War II in Western Europe, and after the fall of the Soviet Union in Central and Eastern Europe. The adoption of bills of rights, ratification of the ECHR, the goal to set straight a path that has been interrupted by revolution, war, and occupation, and the ambition to adjust the legal system so that it fits new world and societal orders have played an important role in this development. There has already been an impact on rights enforcement in, for example, France and the United Kingdom. This in its turn has contributed to the development of a rights-based concept of administrative law. For civil law legal orders, with their view on the role to be played by the courts and the strict division between civil and public law manifested in some states by the establishment of administrative courts, this trend might have a significant impact on public law adjudication in the sense that court decisions might become more expository in character, and hence not only focused on dispute resolution - although the former does not exclude the latter. In the long run, this will probably mean that the courts and judges will come to play a different, perhaps stronger role than was initially intended, especially in parliamentary democracies. The model presented above is an attempt to see the political and moral aspects of public law adjudication from both the individual's

¹⁸⁹ It is interesting to note that the liberal model applies to most of the civil law legal orders and the republican model to common law legal orders such as the United States. This probably follows from the differing starting points for defining democracy.

and society's perspective. However, the increasing role played by courts and judges is not undisputed. Therefore, the following Section provides an overview of the pros and cons of judicial review.

3.4 Judicial Review and its Critics: A Discussion

3.4.1 Background

This dissertation argues that judicial review in combination with individual legal activism can constitute an alternative or complement to traditional channels for political participation. This approach requires *inter alia* a generous approach to standing. However, at least two arguments can be made against a generous approach to judicial review. One is that judicial review restricts the will of the majority and that it is therefore undemocratic. Another argument is based on economic calculations, i.e., that a generous approach to judicial review would be too costly and it would not contribute to system efficiency.¹⁹⁰ The purpose of this Section is to illustrate the debate; hence the author has no ambition to exhaustively account for all possible arguments and perspectives.

3.4.2 Judicial Review and Democracy

The debate concerning the relationship between democracy and judicial review is extensive both in time and substance.¹⁹¹ Judicial review of statutes and governmental actions has been criticised for potentially limiting the will of the majority and hence it has been considered undemocratic.¹⁹² Critics of judicial review often see majority rule as the ultimate way to evaluate and realise considerations of everyone's preferences.¹⁹³ The type of democracy adhered to by some of the critics of judicial review is often termed *proceduralist democracy*. Proceduralist democracy emanates from a market theory on democracy, which focuses on preference aggregation through elections.¹⁹⁴ Although this model of

¹⁹⁰ Another reasons could be the risk of courts becoming too involved in policy making. On this topic and for a discussion on the pros and cons of abstract constitutional review see, Sadurski, "Legitimacy and Reasons of Constitutional Review After Communism", especially, pp 178-183.

¹⁹¹ For more detailed accounts of the debate see Joakim Nergelius, *Konstitutionellt rättighetskydd. Svensk rätt i ett komparativt perspektiv*. Stockholm, Ftizes, 1996, and Holmström, *Domstolar och demokrati*.

¹⁹² Among others see Holmström, *Domstolar och demokrati*, p. 432.

¹⁹³ See Robert A. Dahl, *Democracy and its Critics*, New Haven, Yale University Press, 1989, especially chapter 10 on Majority Rule and the Democratic Process, pp. 135-152.

¹⁹⁴ See, for example, Tom Campbell, "Legal Positivism and Deliberative Democracy", in *Law and Democracy*, ed. Tom Campbell and Adrienne Stone, Aldershot, Ashgate, 2002, pp. 75-80.

preference aggregation is not ultimate in the sense that it does not guarantee 100 percent consensus, nevertheless it is considered the best of the available models and solutions both in terms of legitimacy and efficiency. If democracy is considered to equal majority rule, then judicial review is undemocratic since it restricts or abolishes the will of the majority. In addition, not only is judicial review considered counter-majoritarian, but it is also conducted by judges, who in most cases are not subject to electoral control.

However, democracy does not have to be determined and defined in procedural terms. It can also be substantial.¹⁹⁵ If the *substantial approach to democracy* is chosen, then democracy is considered as built on fundamental democratic principles such as equal freedom and independence of all citizens. To illustrate the essence of the substantial approach to democracy, we will borrow the voice of Samuel Freeman. According to Freeman, democracy is best described in terms of the basic ideas underlying the social contract tradition – equal freedom, equal rights, and equal political participation. These fundamental values are further specified as equal rights to self-determination and equal participation in political processes, rights with strong influences on the lives of individuals. Focus is on the capacity and interest of each individual to freely pursue a freely-decided interest and to equally participate in any political institution that might have an impact on the way individuals choose to live their lives. Freeman describes the conflict between majoritarian democracy and judicial review in terms of a conflict between the right to equal political participation and the right to substantial civil and social rights that should not be subject to limitations for political motives. “*The legitimacy of judicial review depends ultimately on how we strike the balance between these two sets of potentially conflicting rights.*”¹⁹⁶

According to Freeman, it is a strategic question - depending on historical and social circumstances - whether judicial review is appropriate for a particular society as a means of enforcing a democratic constitution and achieving rights enforcement.¹⁹⁷ Freeman argues that judicial review can be needed if the legislature for various reasons, for example corruption, populism, opportunism, or

¹⁹⁵ Nergelius, *Konstitutionellt rättighetsskydd*, p. 112.

¹⁹⁶ Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review”, pp. 331-332.

¹⁹⁷ For a discussion on the difficulties experienced and the *raison d'être* for introducing judicial review to the West German legal system after World War II, see Klaus von Beyme, “The German Constitutional Court in an Uneasy Triangle between Parliament, Government and the Federal Laender”, in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, (101-118), pp. 101-102.

unawareness of the poor quality of the law¹⁹⁸, fails to correct legislative errors. Freeman also mentions a public sense of justice, which is not fully developed or not directed to the legislative procedure in order to achieve changes. The latter argument might be stronger for countries experiencing a legal transition. This will be further discussed below in Chapter Five of Part II. In summary, the point made by Freeman is that judicial review in itself is neither a requirement nor a precondition for a state to be democratic in the sense that individual rights and freedoms are protected. Whether this is the case must be assessed on the basis of empirical facts in each case.

Judicial review can be an effective means for assuring equal freedom and equal rights of sovereign citizens, which are fundamental for the free pursuit of their good.¹⁹⁹ Still, judicial review has been considered to contribute to inequality in the sense that, for example, it is a process with limited access, and that judges cannot always be considered impartial.²⁰⁰ One of the pros, however, is that when considering the constitutionality of a contested legislative act the court will in its reasoning make explicit and articulate, not necessarily develop or amend, the values underlying the constitution. In this sense courts can, according to Freeman, play an important role in creating a common sense of justice and public good.²⁰¹ A similar argument has been developed by Ferejohn and Pasquino. They argue that courts offer public reasons for action – reasons that we as citizens can embrace and that can provide indirect democratic justification for public action.²⁰² Freeman refers to the American constitution and its peculiarities in his conclusion. “..one of the most compelling reasons for the authority of judicial review is to insure against the potential abuse of executive power in situations where Congress is either incapable or unwilling to intervene.”²⁰³ This question will be further discussed and developed below under the Chapter on “Individual Legal Activism”. Regarding judicial review of

¹⁹⁸ Judicial review can function as a watchdog institution making the legislature aware of the problem, as the English Human Rights Act is designed to do (see above).

¹⁹⁹ Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review”, p. 363.

²⁰⁰ On this point see Cappelletti, *The Judicial Process in Comparative Perspective*, p. 46. According to Cappelletti, the legitimacy of the judicial procedure can be enhanced by ensuring “equal accessibility of the ‘legal system’”, meaning that the recruitment of judges must take place within all strata of the population and that all should have equal opportunity of access to the courts.

²⁰¹ Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review”, p. 363.

²⁰² John Ferejohn and Pasquale Pasquino, “Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice”, in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, (20-36), pp. 23-24.

²⁰³ Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review”, p. 367.

governmental actions, especially administrative acts, it might be asked whether the same issue of democratic legitimacy arises as usually does when we are discussing constitutional or judicial review of statutes. Do administrative acts represent the will of the people? Additionally, governmental actions are not subject to the same transparent procedure as the adoption of statutes usually is. Still, as has been dealt with above, the powers and the influence of administrative organs are on the increase, which in its turn urges a new approach to judicial review of administrative acts.

3.5 Summary

The purpose of this Chapter has been to discuss constitutional and administrative judicial review and the theoretical connection between democracy, rights enforcement, and public law adjudication, especially judicial review of governmental action. In particular, administrative acts have been discussed. In addition, the character of public law adjudication has been discussed in order to place rights enforcement in the public law area in a wider societal, political, and philosophical context. The argument has been put forward that judicial review of governmental actions is of utmost importance for a sustainable democracy, and the model used for discussing the character of public law adjudication should be seen as an attempt to further problematize and conceptualize the question. In order to further elaborate on how judicial review can contribute to democratic improvements by, for example, increasing accountability and popular participation - Epp's support structure theory will be presented in the following Chapter. Thereafter the idea of individual legal activism will be further elaborated.

4. Expanding Rights Litigation - Boosting Rights Enforcement?

4.1 Introduction

In this Chapter, Charles E. Epp's theory on Rights Revolutions will be described and its relevance for post-Socialist legal reforms will be discussed briefly. Epp takes his starting point as the transformation of judicial protection of individual rights in the United States. The transformation that led to increased judicial protection of individual rights and the development of the Constitution in this aspect is commonly called the *Rights Revolution*. Epp describes the term “*rights revolution*” as “*a sustained, developmental process that produced or expanded the new civil rights and liberties.*”²⁰⁴ He raises questions such as: Why did the Rights Revolution occur after 150 years of focus on business disputes? What were the sources and conditions for the rights revolution?²⁰⁵

One of the more important court decisions regarding judicial protection of individual right in the United States was delivered in 1961. That was when the US Supreme Court, in the *Monroe* case, opened up the door for civil lawsuits in order to redress official abuses of individual rights.²⁰⁶ This case was the first in which the Supreme Court decided in favour of and supported individual civil law suits as a result of official abuses of power. The *Monroe* decision opened the door for further civil law suits to redress abuse of official power, violating individual rights. In the mid-1930s, ten percent of Supreme Court decisions involved individual

²⁰⁴ Epp, *The Rights Revolution*, p. 7.

²⁰⁵ *Ibid.* pp. 1-2.

²⁰⁶ *Monroe v. Pape*, 365 U.S. 167 (1961). A black man and his family had been harassed during an arrest. In addition, Mr. Monroe was denied his right to have an attorney present during interrogation. Mr. Monroe sued the City of Chicago and thirteen of its arresting officers for violation of his and his family's rights under the Fourteenth Amendment and a federal civil rights statute for invasion of his home and his arrest and detention without a warrant. Monroe argued that these acts violated his rights, privileges, and immunities secured by the Constitution, within the meaning of R. S. 1979. The federal district court and the court of appeals refused Monroe standing. The Supreme Court reversed the decision of the lower courts and granted Monroe right to standing and cause of action against the police officers under R. S. 1979. The city of Chicago was not held liable because Congress had not intended to bring municipalities under that section. According to the US Supreme Court, in enacting R.S. 1979, Congress intended to give a remedy to parties deprived of their constitutional rights, privileges, and immunities by an official's abuse of position.

rights. At that time, the Supreme Court dealt mostly with business disputes. By the late 1960s, seventy percent of Supreme Court decisions involved individual rights.²⁰⁷

Epp focuses on common law legal systems in his research (Canada, India, and the United Kingdom, besides the United States) and legal systems that, besides being common law legal orders, have a different historical development from post-Socialist states. Taken together, this of course affects the prospect for, and the shape of, a rights revolution. However, in this context, it is interesting to consider the experience of India. The legal history of India is not comparable to that of the United States and the United Kingdom. Rather, there is a similarity between the Russian and the Indian legal transitions in that both have adopted a legal system that does not have deep historical roots in the respective country.

It could be argued, and rightly so, that the Russian case is not comparable to the countries that Epp discusses. However, as mentioned above, India might constitute an interesting subject for reflection, and it provides us with a starting point that allows us to broaden the use of Epp's theory. In the late 1970s, Indian judges tried to set off a rights revolution. The attempt failed. In theory, the Indian constitution and Indian statute law provide the basic structure required for a judicial rights revolution; moreover, the cultural prerequisites for a rights revolution seemed to be present to a sufficient degree.²⁰⁸ A judge-led trend of social action and public interest litigation was made possible by loosened standing requirements, enabling individuals and groups to bring cases before a court of law on behalf of others as long as there was a sufficient interest.²⁰⁹ According to Epp, the Indian judges' support for the rights revolution and the concrete measures that were taken can be seen as the result of a post-Emergency judicial transformation.²¹⁰ The Indian Supreme Court was eager to reinstall its trustworthiness and legitimacy that it had benefited from before Emergency rule, at least with the liberal élite of the country. The Supreme Court had been an active

²⁰⁷ Epp, *The Rights Revolution*, p. 1-2.

²⁰⁸ *Ibid.* p. 77, 80.

²⁰⁹ Sufficient interest included a general concern for others, unable to assert their own claim. *Ibid.*, p. 86.

²¹⁰ *Ibid.*, p. 89. The term "post-Emergency" refers to the Emergency rule imposed by Indira Gandhi between 1975-1977, as the result of a court decision stating that the election of Mrs Gandhi in 1975 was illegal. The Supreme Court validated the election of Gandhi, however. The Court also upheld the suspension of the Fundamental Rights protected by the Indian Constitution. During Emergency rule, several political opponents were imprisoned. As a result, respect for the Court decreased significantly. *Ibid.*, p. 76.

policy-maker since Independence and it often opposed the policies of the national government. Still, the attempt to create a vivid rights revolution failed. The failure was manifested by the fact that the Supreme Court, despite its efforts, only adopted a few key decisions on individual rights. The denial of constitutional and legal rights for a large portion of the Indian population continued. It even turned out that there was a decline of rights cases on the judicial agenda. The explanation for the failed rights revolution, according to Epp, is the weak and fragmented support structure in India, which has been unable to develop a sustained and strong agenda on individual rights.²¹¹

Let us return to the Russian case. To start with, Russia entered into a phase of legal transition with Gorbachev coming to power in 1985. Changes in the legal order took a liberal direction, although to a limited extent. By adopting a reform package based on *perestroika* and *glasnost*, Gorbachev set the path for legal, political, and economic transition in the USSR and Russia. Russia does not have a 200-year history of liberalism, and Russian courts have not been dealing with business disputes for 150 years before turning to civil rights. In addition, Russia has a Civil law system and not a Common law system. However, that fact does not in itself make an investigation of the Russian support structure superfluous, especially since a support structure in itself is vital for a process of changing concepts of rights in countries experiencing a legal transition. Why this should be the case is further elaborated upon below.

Differences between common and civil law systems concerning the role played by *inter alia* courts and sources of law will be touched more upon below under legal participation. Here it suffices to say that common law and civil law systems represent some of the same ideas such as the protection of individual rights as shown above.²¹² The constitutional and human rights development in the Civil law countries of Western Europe after World War II has been described as a “*constitutional and civil rights revolution*” characterised by a concern for the creation of both national and transnational effective instruments to protect individual rights and freedoms.²¹³ Thus, with reference to human rights, it is correct to speak of a universalising western law, if compared to other traditions.²¹⁴ The differences between common and civil law legal orders are in that respect not that substantial.

²¹¹ *Ibid.*, p. 83, 95, 108.

²¹² See Tuori and the deep structure of law in Part I, Chapter Three.

²¹³ Cappelletti, *The Judicial Process in Comparative Perspective*, pp. 207-208.

²¹⁴ H. Patrick Glenn, *Legal Traditions of the World*, Oxford University Press, 2000, p. 153.

In his book *The Rights Revolution*, Epp starts by accounting for the conventional explanations for a rights revolution. The different explanations will be further examined below and are thus only presented here. The conventional explanations focus on the following characteristics:

1. constitutional guarantees of individual rights,
2. judicial independence,
3. leadership from activist judges, and
4. rights consciousness in popular culture.

However, Epp shows that rights revolutions are primarily a function of pressure from below and that the pressure from below is helped by an effective support structure for legal mobilization. Support structures preceded and supported the rise of rights revolutions in, for example, the United States. The support structure for legal mobilization consists of *inter alia* rights-advocacy organizations, rights-advocacy lawyers, and differentiated and pluralistic sources of financing, for example governmental financing and private funding.²¹⁵ Earlier research shows that political pressure and organized support for protection of individual rights did have an impact on the judicial agenda. Epp's study differs from this research in that his emphasis is on material resources, difficulties in obtaining these, and the key role of material resources in civil rights litigation.²¹⁶ This is called *the support structure explanation* of rights revolutions. Epp meets criticism such as that a rights revolution creates a tension between democracy - defined as majoritarian rule - and judge-made law, where the latter infringes the former, with the argument that a well-developed support structure will lead to a "democratization of access to the judiciary".²¹⁷ Thus, broad support in terms of multiple resources, allowing for widespread litigation involving individuals from all *strata* of society to participate, potentially enhance the legitimacy of the judiciary.²¹⁸

In this dissertation, the theory of a support structure for legal mobilization functions as the starting point for a discussion on individual legal activism. Individual legal activism and support structures for legal mobilization can contribute to understanding and describing the dynamics of law. Effective use of the support structure can contribute to changes in the legal culture, in that it

²¹⁵ Epp, *Rights Revolution*, pp. 20-21.

²¹⁶ *Ibid.*, p. 3.

²¹⁷ For a discussion see Part II, Chapter 3.4.

²¹⁸ Epp, *Rights Revolution*, pp. 5, 18.

constitutes the dynamic link between the surface level of law and the legal culture level of law as defined by Tuori.²¹⁹ By making it easier to use the judicial process and thereby contributing to an increased use of this in order to invoke rights, pressure will be put on judges and legal scholars to rethink and redefine the concept of rights and their approach to rights enforcement. In addition, it has the potential to democratize judicial litigation since a strong support structure helps individuals who are less likely to use the judicial process due to lack of knowledge, time, and financial means to overcome those thresholds.

It is reasonable to apply the theory of rights revolutions also in studies of states with a civil law tradition, especially if the state in question either has a constitutional court or a chamber of the Supreme Court²²⁰ practising judicial review, with the power to declare laws violating the constitution null and void, or if the state is a member of the EU or the CoE. In this sense a ‘negative law-making process’ exists that can be used by citizens to manifest discontent with the outcome of the political process. The legal argumentation and the procedures may, of course, differ, although in the long run the effect might be the same.

One important aspect related to the (negative) law-creating activity of courts is that this activity depends on specific actors, for example private parties, NGOs, and labour unions, to initiate the proceedings. Few courts have the right to initiate cases *ex officio*. Therefore, an actor perspective is required. In this dissertation, the concept of individual legal activism allows us to adopt such a perspective. But first, in order to clarify how the support structure theory complements the conventional explanations, a more thorough account for both the latter and the support structure explanation will follow.

4.2 Explanations for a Rights Revolution

4.2.1. Conventional Explanations

One of the conventional explanations of a rights revolution is *the Constitutional-Centred explanation*, referring to structural judicial independence and the existence

²¹⁹ See above Part 1, Chapter Three. This argument supplements Tuori’s in the sense that not only legal actors, but also the wider public are considered as being able to generate a movement between the various levels of law.

²²⁰ As in Estonia. According to Schwartz, the reason for establishing a constitutional chamber of the Supreme Court had more to do with economics than with philosophy, politics, or history. There were too few constitutional issues to make it rational to establish a separate constitutional court. Schwartz, *The Struggle for Constitutional Justice*, p. 24, and footnote 7.

of a bill of rights.²²¹ Judicial independence is necessary in order for judges to be free to devote enough attention to and approval of civil rights and liberties. Structural independence for courts and judges is therefore vital. This can be obtained by guaranteeing economic and personal security of the judges and by protecting the activity of judges from political manipulation.²²² As discussed above, judicial independence can be described in terms of autonomy of the courts on the one hand, and of the individual judge on the other.²²³

A bill of rights is in itself an important precondition for judicial as well as individual legal activism. However, it is not a necessary precondition for a lively debate on civil rights, as the case of the United Kingdom clearly shows.²²⁴ It is often suggested that the existence of a bill of rights, in combination with judicial review, contribute to an (not always intended) expansion of judicial power.²²⁵ In addition, bills of rights are believed to shape popular culture, and might contribute to the development of “rights consciousness” in terms of an increased awareness of one’s rights and duties. Epp describes this development as an encouragement of individuals to think of harm to their interests as violations of rights stipulated in the bill of rights. Still, the societal and legal impact of a bill of rights is dependent on the forces around it and it is not in itself enough to create a rights revolution.²²⁶ Nonetheless, the existence of a bill of rights and an independent judiciary is also not in itself enough. In addition, liberal procedural laws making it possible to invoke the rights stipulated in the bill of rights before an independent judiciary is vital. This is one of the reasons for focusing in this study on procedural laws concerning the right to judicial review of governmental actions.²²⁷

Another conventional explanation for the phenomena of rights revolutions is the *Judge-Centred Explanation*, referring to judicial leadership and docket control.²²⁸

²²¹ Still, as stated by Sartori “*Rights were not protected by declarations but by the very structures of constitutional government.*” Sartori, *Comparative Constitutional Engineering*, p.195.

²²² Epp, *The Rights Revolution*, p. 11.

²²³ See above Chapter 2.4.2, Part II. Autonomy of the individual judge is somewhat connected to the Judge-Centred explanation.

²²⁴ Nergelius, *Konstitutionellt rättighetskydd*, pp. 341-365.

²²⁵ Holmström, *Domstolar och demokrati*, pp. 426-427 and Epp, *The Rights Revolution*, p. 12.

²²⁶ *Ibid.* p. 13. In the long run this might contribute to development of a rights-based concept of public law, with the latter used as a sword in the service of individuals trying to obtain redress or manifest discontent with state administration. See above Chapter 3.2, Part II.

²²⁷ See above Chapter 2.3-4.

²²⁸ Docket control implies judicial freedom to choose which cases are to be heard, i.e., it is connected to control of the court’s agenda.

According to the Judge-Centered explanation, judicial protection of individuals' rights results primarily from liberal and supportive judges who have the power to focus on cases that interest them, since they control the dockets. The existence of judges that are supportive of individual rights is naturally a necessary, but not a sufficient, condition for a rights revolution. This is because it is these judges that in the end also decide the outcome of a particular case. Still it is necessary that someone brings a case before a court of law, which, according to Epp, is the main reason for regarding the explanations accounted for so far as incomplete.²²⁹ It should also be mentioned that a constitutional court *à la* European model, contrary to the US Supreme Court, does not have discretion to refuse to hear a case that falls under its jurisdiction if the case is properly presented to the court and the matter has not been decided on before.²³⁰ In this context, it is interesting to note that the Indian Supreme Court Judges do not exercise docket control as do the US Supreme Court judges. Additionally, Article 32 of the Indian Constitution stipulates a right to directly petition the Supreme Court in matters relating to Fundamental Rights.²³¹ It could be argued that the judge-centred explanation is not likely to play an equally important role in a civil law system as in a common law system. This is because civil law legal orders usually stipulate in a statute when a court may declare a case admissible or when it may to refuse to hear it.²³² However, caution is required when drawing this conclusion. The issue of discretion is a complex matter, which can not be further discussed here.²³³

The last of the conventional explanations listed by Epp is the *Culture-Centered Explanation*. This explanation deals with popular culture and rights consciousness. It argues that popular consciousness influences judicial protection of individuals'

²²⁹ Epp, *The Rights Revolution*, pp. 14-15.

²³⁰ As an example. According to the *Rules of the Supreme Court of the United States*, adopted January 27, 2003 and effective May 1, 2003, Rule 10, review of a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a review of a lower court's decision will be granted only for compelling reasons. In the *Rules of the Supreme Court*, Rule 10, the character of the reasons considered by the Court is accounted for. The list is not exhaustive. A petition is seldom granted for errors consisting of erroneous factual findings or the missapplication of a properly stated rule of law. Regarding the original jurisdiction of the US Supreme Court, which includes cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State is a party, the Federal Rules of Civil Procedure apply. See Rule 17 of the *Rules of the US Supreme Court*. Direct appeals from US District Courts can be authorized by law.

²³¹ Epp, *The Rights Revolution*, pp. 81, 83.

²³² The higher courts of France, Germany, and Italy therefore decide thousands of cases that are not necessary for developing and clarifying the law. Cappelletti, *The Judicial Process in Comparative Perspective*, p. 50.

²³³ See for example, Aharon Barak, *Judicial Discretion*, New Haven, Yale University Press, 1989.

rights in several ways. For example, judges are themselves shaped by the society they are active in.²³⁴ Therefore it is considered unlikely that they will question or undermine policies (on a macro level) adopted in their time. It is also estimated that judges lack the structural independence and institutional power to enforce a decision that runs contrary to popular beliefs. And finally, it is argued that the number and kinds of issues that citizens bring before a court of law depends on whether the dispute is framed in terms of rights in the society in which the controversy arises.²³⁵ This explanation deserves to be further discussed, since this dissertation deals with countries that are undergoing legal reforms from a socialist legal system. The outcome of the reforms is affected by the norms and behaviour of individuals with experience, in most cases, from socialist legal systems.

The *Culture-Centered Explanation* is important in the sense that it recognises that cultural frames affect citizens' perception of what changes are in fact possible to achieve, and what circumstances actually constitute a problem that needs to be solved and how to solve it. Still, the *Culture-Centered Explanation* should not be overemphasised, or simplified for that matter, especially in times of globalisation of the human rights discourse, and especially in Europe due to the influence of the ECHR and ECtHR.²³⁶ A minimal recognition of rights is, according to Epp, a necessary precondition for the development of a civil rights agenda. Still, rights consciousness is not in itself sufficient - even if in combination with the other explanations - if necessary material resources in order to instigate a claim are missing. Epp's thesis on the importance of a support structure for legal mobilization²³⁷ will be examined in the following Section.

4.2.2 The Support Structure Explanation

According to Epp, the process of legal mobilization cannot be seen as a direct response to constitutionally protected rights, judicial decisions, or demands arising from a rights-conscious population. A 'rights-friendly' legal culture is not a necessary precondition for a rights revolution, although it might make it easier. As

²³⁴ As an illustration, Cappelletti's idea that civil law judges, typical bureaucratic judges, are less suited than their American colleagues to consider collective interest litigation due to tradition, education, and political history. Cappelletti, *The Judicial Process in Comparative Perspective*, pp. 294-295.

²³⁵ Epp, *The Rights Revolution*, pp. 15-16.

²³⁶ See Pamela A. Jordan, "Does Membership Have Its Privileges?: Entry into the Council of Europe and Compliance with Human Rights Norms", *Human Rights Quarterly*, 25, 2003, (660-688).

²³⁷ Epp, *The Rights Revolution*, pp. 15-17.

expressed by Epp “....cases do not arrive in supreme courts as if by magic.” Therefore, the existence of a support structure is vital for a rights revolution to take place. According to Epp, legal mobilization depends above all on resources such as rights-advocacy lawyers and organisations, and sources of financing, what Epp calls the support structure.²³⁸

The support-structure explanation rests on two assumptions: the existence of widespread and sustained litigation on the one hand, and multiple resources on the other.²³⁹ The explanatory value of widespread and sustained litigation can be, but is not necessarily, stronger for common law legal systems than for civil law legal systems in that the courts in the former system do exercise docket control and potentially also due to the principle of *stare decisis*. The highest courts in a common law legal system will probably not hear a case until a critical mass of cases related to the same issue have reached the judicial system. Still, the highest courts in civil law legal systems do also have some discretion to decide what cases to hear. In that sense they do control their dockets. Still, the importance of creating a momentum in civil law systems should not be underestimated. Therefore, the resources provided by the support structure should, theoretically, be of the same importance in both common and civil law legal systems.

Common for both legal systems is that litigation requires knowledge, time, and money, all of which require a support structure. Rights litigation is more efficient if steady streams of complaints are being filed before the courts, while resources are needed to initiate a complaint successfully, since someone has to, for example, bear the economic cost, and contribute with legal expertise. All this goes towards creating an incentive for the individual to take on the struggle, even though it might result in a costly and time-consuming process.

Epp’s analysis led to the conclusion that judicial protection for individual rights is widespread, although not universal. It has been greatest in the U.S. and Canada, and weakest in India. It is present but not vital in Great Britain.²⁴⁰ The most significant developments of the support structure in the U.S. started shortly after

²³⁸ *Ibid.*, p. 18. For a similar argument in the Swedish context see, Lindblom, “Domstolarnas växande samhällsroll och processens förändrade funktioner – floskler eller fakta?”, p. 250.

²³⁹ Epp, *The Rights Revolution*, p. 18.

²⁴⁰ In reaching the conclusion that the support structure explanation is the strongest for explaining rights revolutions, Epp has compared rights revolutions in the U.S., India, Great Britain, and Canada, between 1960-1990. Epp’s book was published in 1998. Much has since happened in the UK, for example the Human Rights Act and its implementation.

1910, and in the other countries in his study after 1965.²⁴¹ Epp concludes that the language of rights became increasingly widespread in the mid-sixties in each of the countries.²⁴² The existence of support structures preceded and supported the development of rights revolutions, especially in the US and Canada, but not in India, which as a result never experienced a rights revolution.

4.2.3 Summary and Conclusions

Conventional explanations of a rights revolution are: constitutional guarantees of individual rights, judicial independence, leadership from activist judges, and rights consciousness in popular culture. However, Epp shows that rights revolutions are primarily a function of pressure from below. In order for pressure from below to initiate a 'rights revolution', an effective support structure is required. The support structure for legal mobilization consists of rights-advocacy organizations, rights-advocacy lawyers, and various sources of financing. Epp's research differs from earlier research since his emphasis is on material resources, difficulties in obtaining them, and the key role of material resources in civil rights litigation. This is called *the support structure explanation* of rights revolutions. This explanation is not self-sufficient; it is rather a complement to the conventional explanations. However, the conventional explanations, possibly excluding the cultural explanation, could also be seen as preconditions rather than explanations. The discussion continues as to which explanation is the strongest, (although not in this dissertation). If the support structure explanation is correct, then rights revolutions would have taken place only where and when a support structure exists, according to Epp.²⁴³

We now move on to define and discuss the concept of individual legal activism. Above it has been suggested that the existence of a vibrant support structure can enhance individual legal activism in civil law countries in general, and in post-Socialist countries in particular – whether this is so will be further discussed below in Chapter Six. A vibrant support structure - allowing for individual legal activism and thereby contributing to equal access to justice - has the potential to strengthen democracy by increasing the prospect for judicial review in order to claim accountability of political and administrative powers.

²⁴¹ Epp, *The Rights Revolution*, p. 20.

²⁴² *Ibid.*, p. 23.

²⁴³ *Ibid.*, p. 5, 23.

5. Individual Legal Activism: An Alternative Way of Understanding Political Participation?

5.1 Introducing and Defining the Concept of Individual Legal Activism

Let us assume that a vibrant support structure as defined in Chapter Three is a precondition for individual legal activism. This means that using the judicial process appeals not only to economic entrepreneurs with economic incentives to engage in litigation, but also to private (and sometimes public) actors that aim to halt a particular governmental action.²⁴⁴ This, in a broad sense, is what has been called “*ideological plaintiffs*”²⁴⁵ who are likely to act in the interest of values that are not exclusively material, such as welfare protection, environmental issues, and good public administration in general. But in order to go in depth into this question we need to ask ourselves what brings forth the motivation for individuals and private organisations to use the judicial process? (Although this specific question is impossible to answer in this study, still it might be useful to keep it in mind.) To claim accountability of contracting parties and civil servants in order to enforce non-pecuniary rights could be one answer, economic incentives another.²⁴⁶ However, there is also public interest litigation, focusing on *inter alia* welfare protection, environmental issues, and good public administration in general. The reasons for *not* engaging in judicial litigation might be easier to identify. Reasons might include lack of knowledge about the possibilities of initiating a process, underestimating the chances of winning, fear of losing, and lack of economic and legal resources - just to mention a few. In addition, there is

²⁴⁴ Mauro Cappelletti and Bryant Garth, “Access to Justice: The Newest Wave in the Worldwide movement to Make Rights Effective”, *Buff. Law Review*, 183, 1977-1978, (181-292), p. 215.

²⁴⁵ Ideological plaintiffs can be both individuals and organizations. Cappelletti, *The Judicial Process in Comparative Perspective*, p. 26. Cappelletti refers to Jaffe, who coined the expression.

²⁴⁶ It has been argued, most recently by Kathryn Hendley, that the key incentive for using the law is private property rights. Traditional explanations for the low demand for law to protect rights and interests in Russia, besides absence of property rights, are the poor quality of the law, and the politicization of legal institutions. Kathryn Hendley, “Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law”, in *Contemporary Russian Politics*, ed. Archie Brown, Oxford University Press, 2001, (131-138).

the free-rider problem concerning collective and diffuse rights – many people are affected but none is really willing to take the initiative to instigate a judicial proceeding. They would not object, however, should any one else initiate litigation.²⁴⁷

5.1.1 Individual Legal Activism

Individual legal activism is, in this dissertation, seen as a function of the possibility *de jure* to initiate judicial review of legislative acts, decisions, and actions by state administration and public bodies on the one hand, and the *actual use* of this right on the other. Thus the concept has a legal-technical as well as a societal and empirical feature to it. This means that we are not only concerned with the legal rules, but also with the actual use of this right and its potential impact on society and the lives of individuals. Therefore, the concept of individual legal activism can contribute to analysis and understanding of the legal system as a social phenomenon.

Using the legal system to achieve political and legislative ends is not uncommon in both common law and civil law legal systems. Developing a support structure to use the courts for political change has been a political strategy of liberals and egalitarians, especially in the United States.²⁴⁸ In civil law countries, the phenomenon is relatively new, but on the increase.²⁴⁹ One of the purposes of this dissertation is to discuss the use of the legal system to exercise control of state power, to achieve policy change, and to obtain redress of grievances in the public law area in civil law legal systems. The question is: *Can individual legal activism be an alternative way of understanding political participation in civil law systems in general and in post-Socialist civil law systems in particular?*

²⁴⁷ Lindblom, *Progressiv process*, p. 317.

²⁴⁸ Epp, *The Rights Revolution*, p. 22. However, using courts for political agendas is not uncommon for Europe. See Holmström, *Domstolar och demokrati..*, pp. 424-425. However, the support structure strategy does not seem to be as developed. According to Cappelletti, this due to the “*traditional reluctance to accept groups united to further a common interest*” in civil law nations. Cappelletti, *The Judicial Process in Comparative Perspective*, p. 295.

²⁴⁹ Sweden gained its first rights advocacy organisation in December 2002, *Centrum för rättvisa*. This is a non-profit public interest law organisation that aims to strengthen the rights of the individual in relation to the state through initiating court litigation and by influencing public opinion. See <http://www.centrumförrattvisa.com>, 2004-08-26. In the European post-Socialist states, public interest law organisations have constituted a vital part of democratisation and rule-of-law building projects. See also, Lindblom, “*Domstolarnas växande samhällsroll...*”, pp. 252-253.

The *level* of individual legal activism can be measured by counting the number of cases initiated by individuals or on behalf of individuals in relevant courts. The *impact* of individual legal activism on a *macro level* can be studied by accounting for the outcome of cases initiated by individuals or on behalf of individuals in the highest instance. For example, if a statute has been declared unconstitutional and declared null and void, then that specific act of individual legal activism has contributed to a change on the macro level regarding the substance of legislation. On a *micro level* a complaint initiated by or on behalf of an individual might lead to a specific situation being corrected, for example by declaring an administrative decision illegal.²⁵⁰ The *motivation* for individual legal activism, especially in the public law area, can be that individuals use the legal system in order to enforce their rights as stipulated in constitutions and other legislative acts, at the same time as they manifest their discontent with state administration, and maybe in the longer run with the state and its policy, or *vice versa*. A plausible *effect* of individual legal activism within public law adjudication can be that ordinary or administrative courts highlight a certain problem and identify principles having constitutional value before the matter reaches the higher instances or the constitutional court if such a court exists.²⁵¹

5.1.2 Individual Legal Activism and Democracy

Individual legal activism is important in the long-term perspective in the sense that it leads to personal experiences, for good or for worse. An activist role for the individual in the judicial process might contribute to improving the legitimacy of the legal system, or if it is poorly functioning to further weakening of it. This can be compared with the way political participation contributes to enhancing the legitimacy of the political system by establishing a “*participant political culture*” and involving “*an activist role for the self in the polity*”,²⁵² which leads to the consolidation of democracy. In this context it could also be argued that individual legal activism, in theory, contributes to the legitimacy of the political system as a whole, and in the long run. Some clarification is needed – an individual with low trust in a

²⁵⁰ This study is not quantitative in the sense that data measuring the degree of individual legal activism will be presented and analyzed. That would require a separate study. Such a study would be difficult, although not impossible, to conduct on the Russian case since far from all court decisions are published. This is especially the case concerning courts of lower instances.

²⁵¹ For example, the French *Conseil d'État* identified principles with constitutional value before the *Conseil Constitutionnel* had its say on the issue. Bell, *French Administrative Law*, p. 221.

²⁵² An activist role in the polity involves voting, political interests, information, knowledge, opinion-forming, and organizational membership. Diamond, *Developing Democracy*, p. 171.

legislative assembly might not consider voting worthwhile, behaviour that in the long run can cause severe damage to the legitimacy of the political system.²⁵³ On the other hand, if the same person feels that an alternative way to make a difference could be to initiate judicial review, then the judicial process might contribute to a participatory form of democracy in terms of invoking accountability of responsible politicians.

According to Diamond, the following is fundamental for political participation²⁵⁴:

- Political efficacy.
- Self-confidence and a sense of competence on the part of the citizenry that their actions may produce a change in policy or redress grievances.

These prerequisites could be applied to a *participation-oriented analysis of the judicial process* as well. It could be argued that judicial efficacy, self-confidence, competence, and trust in the judicial system are necessary components for participation in the judicial process, and hence for the legitimacy of the judicial system and in the long run of the legal order as a whole. However, recalling Epp's support-structure explanation of rights revolutions allows us to question this assumption, at least regarding individual legal activism as defined above and in the short-term perspective. For example, if my case is being prepared by legal experts with the support of organizations contributing economic and human resources, whether I trust the legal system or whether I have faith in the fairness and efficacy of the judicial process probably will not be factors that determine whether the complaint is filed or not.²⁵⁵

What if individual legal activism is being exercised on a relatively large scale and all the cases are lost, or perhaps they never even got to be heard by a court of law due to, for example, corrupt officials. What would the consequences be of this negative experience? Probably devastating for the legitimacy of the legal system. According to Cotterrell, it is of great importance to make a distinction between the function and the purpose of law. The function is changeable over time. *'The function of the Statute, in sociological terms, is [...], not dependent on the will of its creators but*

²⁵³ This is a serious problem in several of the European post-Socialist countries, but also in Western European nation-states and on the EU level.

²⁵⁴ Diamond, *Developing Democracy*, p. 171.

²⁵⁵ Interestingly, in post-Communist countries trust in the courts is comparatively higher than trust in other political institutions. *Ibid.*, p. 206. A different, but not unimportant, issue is the degree of trust in NGOs. For a support structure to successfully contribute to individual legal activism, a minimum degree of trust is required.

on its present contribution to the maintenance of existing social and economic purpose.²⁵⁶ Thus the function of law is a reflection of the way that, for example the state on the one hand and private individuals on the other, consider the law and how they are using it. For example, the purpose of judicial review and the definition of standing rules might not aim to make possible or stimulate individual legal activism with a political goal, but the function of judicial review in combination with a certain set of standing rules might be just that.²⁵⁷ This is where countries such as Russia have an enormous task in front of them. We will now move on to discuss additional aspects of individual legal activism as an alternative understanding of political participation. First, the traditional ways of political participation will be examined briefly, in order to illustrate differences and similarities between political and legal participation.

5.2 Political Participation

The traditional way of exercising political participation and control is by voting.²⁵⁸ By taking active part in elections, we exercise our right to direct political participation. The principle of “one man, one vote” is supposed to ensure equality in the political process, while representation is considered to contribute to legitimacy of the political system. However, it is well known that the principle of “one man, one vote” is only a necessary condition of equality of power to influence the outcome of collective decision-making. However, it is not a sufficient condition. Great economic power and direct access to the mass media are factors that can distort the exercise of equality of power, in the sense that one voter can influence or control the voting behaviour of others. Additionally, electoral control, often based on citizenship, tends to exclude marginalized groups, for example non-citizens, immigrants, and the unemployed, from participation.²⁵⁹ In addition, the complexity of preferences does not receive adequate attention in the light of the “one man, one vote” principle.²⁶⁰ Another problem, highlighted by Vile, is that for reasons of efficiency, elections cannot be held too often. As a result, the electoral system must be designed so that it

²⁵⁶ Cotterrell, *The Sociology of Law*, p. 72.

²⁵⁷ See for example, Lindblom, “Domstolarnas växande samhällsroll..”, p. 252.

²⁵⁸ Other more or less traditional ways of exercising political participation and control can be through political parties, interest pressure groups, and the press.

²⁵⁹ Diamond, *Developing Democracy*, p. 9.

²⁶⁰ Carlos Santiago Nino, *The Ethics of Human Rights*, Oxford, Oxford University Press, 1991, pp. 242-243.

benefits both the government and the electorate, while governments have to be left some discretion enabling them to act as leaders and not merely as a body that passively follows public opinion. Vile concludes: “*It becomes obvious, therefore, that the electoral system is not, and cannot be, the sole means of control in a democratic system.*”²⁶¹

Political participation can also be obtained through being active in political parties, interest groups, lobbying and other organisations with an ambition to influence the outcome of the political process. Membership in political parties will not be discussed further here. It suffices to say that the explicit goal of political parties is to control or influence the policy-making process. By contrast, the explicit goal of interest groups is to satisfy the interests of its members. Interest groups are collections of individuals who share common beliefs, values, and concerns. They may be organized to varying degrees and represent different aspirations such as material, recreational, and humanitarian gains. Interest groups are generally considered as efficient communicators of segments of public opinion.²⁶² The channels that interest groups use in order to achieve their goal vary. The main goal is often to spread knowledge and information about a specific issue or the situation of a specific group with the ambition to influence popular opinion. Another goal can be to represent its members in various situations, for example in a judicial proceeding. Taking into consideration the complexity of preferences mentioned above, interest groups provide a supplement to the “one man, one vote” principle. However, interest groups should be distinguished from pure pressure groups, the purpose of the latter being pure political lobbying. As expressed by Mahler, the difference between the groups is that “*..all pressure groups are interest groups, but not all interest groups are pressure groups.*”²⁶³

Political participation through membership in organisations is protected by the right to be member of and to form an organisation. Additional political rights vital for various forms of political participation, such as demonstrations, are protected by, for example, the right to assembly and expression. As political demonstrations are becoming more and more violent around the world, it might be reasonable to suspect that the gap between the people and their representatives is growing, leading to increased frustration. This frustration might be further enhanced by established co-operation between the government and different pressure and

²⁶¹ Vile, *Constitutionalism and the Separation of Powers*, p. 363. See also Cappelletti, *The Judicial Process in Comparative Perspective*, pp. 40-46.

²⁶² Gregory S. Mahler, *Comparative Politics. An Institutional and Cross-National Approach*, Englewood Cliffs, Prentice Hall, 2nd edition, 1995, p. 145.

²⁶³ *Ibid.*, p. 146.

interest groups, especially labour and business groups. When this co-operation becomes monopolized and exclusive we are concerned with a regime characterised by corporatism.²⁶⁴

Several issues could be raised concerning the efficiency, legitimacy, and fairness of democracy. Some of these points are related to a changing world characterised by globalisation and unrest, which contributes to limiting the powers of national representative assemblies. Legitimate questions such as: is the acting-space the same for national assemblies today as it was yesterday? What role will national representative assemblies play in the future? Are elected officials acting in the interest of their voters? Another point to be made is the range of factors that influence decisions taken by elected representatives, for example pressure groups. How is lobbying conducted, openly or covertly? Is it a weak or a strong state²⁶⁵ we are concerned with, or perhaps a corporativistic state? The main point is that it is not only the minority voter that will have an interest in alternative ways of influencing and controlling the political process and its output.²⁶⁶ Although majority voters have their representatives in power, those representatives might not be able to act in the interest of the voters they represent due to some of the reasons accounted for here. Another factor to take into consideration is the complexity of preferences. When it comes to issues of special interest, majority voters might very well find themselves to be a part of the minority. Thus, the traditional forum for political participation might not be sufficient in a complex modern society. The question we carry with us to the next Section of this Chapter is whether participation through judicial litigation can be a plausible complement to traditional political participation.

²⁶⁴ *Ibid.*, p. 39.

²⁶⁵ The US is considered a weak state (i.e. open and negotiating) in sociological terms, since it allows interest groups to influence the political process. Within the sphere of administrative law, the process is extremely open for interest groups and specialists to influence administrative activity. See, for example, Martin Shapiro “Two Transformations in Administrative Law: American and European?”, in *The Europeanisation of Administrative Law. Transforming National Decision-making Procedures*, ed. Karl-Heinz Ladeur, Dartmouth, Ashgate, 2002, pp. 15-17. For a discussion on the definitions of strong and weak states, see Elisabeth Heger Boyle and Melissa Thompson, “National politics and Resort to the European Commission on Human Rights”, *Law and Society Review*, 2001, No. 35, (321-344).

²⁶⁶ The list of problems can be extended: are parliamentary systems becoming more president-oriented, leading to respective legislative assemblies’ loss of influence? How open and fair are elections in reality? Are votes counted correctly, what is the availability of neutral information, and so on?

5.3 Legal Participation

5.3.1 Participation through Litigation

Individuals can get a say concerning the way that the state is running its affairs in concrete matters, and concerning the quality of legislation adopted either through the representative assembly or through other state organs with the mandate to adopt legislative acts, by engaging in a judicial process. A judicial process can be initiated either by;

- suing the state for violating legitimate and legal individual rights or interests, or
- by initiating judicial review.

Participation through litigation is more directly goal-oriented in the short term, if compared to political participation, since the primary goal is to remedy a *status quo* that is considered to violate the law. The impact of legal participation can differ between civil- and common-law systems due to differences related to the role played by the courts and the hierarchy of legal norms and sources. Nevertheless, it should be kept in mind that according to Mac Cormick *et al.* the difference between the civil- and common-law systems should neither be overestimated nor simplified. This is exemplified by the increased importance of precedent in civil law systems, and the increased importance of statutory law in common-law systems.²⁶⁷

5.4. Prerequisites for Individual Legal Activism

In order for legal participation by individual legal activism to occur, several conditions have to be fulfilled. The type of conditions required can be divided into two sub-groups. The first group contains conditions of a legal-technical nature related to *locus standi*, while the other group is more concerned with practical matters making individual legal activism possible, for example legal aid, the establishment of rights advocacy organizations, and funding from various sources. The latter group will constitute the Support Structure, as defined by Epp.²⁶⁸ Each of these sub-groups will be dealt with more thoroughly in the following.

²⁶⁷ D. Neil Mac Cormick and Robert S. Summers eds., *Interpreting Precedents, A Comparative Study*, Aldershot, Ashgate, 1997, p. 2.

²⁶⁸ See above, Chapter Four, Part II.

5.4.1 Locus Standi: An Individual or Communitarian Approach to Rights Enforcement?

As discussed above in Chapter Three, Miles suggests two models of how to analyse and evaluate standing rules when we are concerned with rights enforcement:

- The Individualist Model, and
- The Communitarian Model.

Individual legal activism does not require a Communitarian approach to rights enforcement. However, this approach would make it easier in the sense that actors within the support structure would not have to identify, track down, and convince victims to file a complaint (with the help of the former). Arguments to be made in this context are that:

- the case load can become too heavy if the Communitarian approach is chosen²⁶⁹,
- that the questions raised in litigation if generous *locus standi* rules are applied risk being of a merely academic or hypothetical nature, and
- that we should not waste the courts' time with these matters.

It has also been argued that the Individualist approach would create litigation that is more concrete, focused, and hence more efficient. This is not necessarily the case. According to Miles, an interest group or specialist body with litigation experience is likely to make a more efficient presentation of a case before a court of law. In addition, it is more likely to successfully consider the interests of absent members of a group of victims, than would an individual applicant.²⁷⁰

Taking these arguments into account, the Communitarian model of rights enforcement makes a strong case in the public law sphere. This is especially the case in societies with legal systems going through relatively comprehensive changes – both at a systemic and a substantive level. Part III of this dissertation analyses the Russian *locus standi* rules with the help of the above-examined model of the character of public law adjudication and rights enforcement.

²⁶⁹ According to Lindblom, this danger is overestimated. Lindblom, *Progressiv process*, p. 321.

²⁷⁰ Miles, “Standing Under the Human Rights Act 1998”, p. 147.

5.4.2 Support Structures

Epp highlights the most important changes that took place at the beginning of the 20th Century concerning the availability of resources for legal mobilization. These are:

- creation of rights-advocacy organizations,
- the diversification and organisation of the legal profession²⁷¹,
- the gradual development of financing resources for civil rights litigation, and
- the establishment of a Civil Rights Section in the Justice Department.²⁷²

In this study focus will be on rights-advocacy organizations, the organization of the legal profession, and financing resources for civil rights litigation. Important factors to consider are the conditions for granting legal assistance in criminal, civil, and administrative law cases. In general, when discussing legal aid focus is usually on criminal law matters.²⁷³ However, respect for due process, legality, and individual rights and freedoms on the part of state officials, i.e., within the sphere of civil and administrative law, is also vital for upholding a rule-of-law state. So is providing legal assistance in these cases. Especially if taking into consideration, the likelihood that a large part of the population will come in contact with state authorities frequently during a lifetime. Large numbers of people face problems with housing, labour, welfare and social service benefits, and immigration just to mention a few. That is why the effect of legal aid and the respect for access to justice in civil and administrative law cases should not be underestimated.²⁷⁴

From the individual's perspective, the support structure and the legal aid offered can be of such a character that it helps the individual to litigate in person. The

²⁷¹ Up until then, most lawyers practised as in-house lawyers in large corporations. During the 20th Century increased numbers of lawyers started to practice in firms. The population of lawyers became diversified, etc. Epp, *Rights Revolution*, pp. 54-58.

²⁷²*Ibid.*, p. 48.

²⁷³ Legal aid, especially in criminal cases, is crucial for a state to rightly call itself a rule-of-law state. For example, limitations may exist as to the availability of legal aid related to the seriousness of the crime committed. If legal aid is granted only to defendants who risk lifetime imprisonment or capital punishment, then this might restrict civil rights litigation in minor offences. Another method affecting the incentive to engage in civil rights litigation is the "fee-sifting" method, according to which attorney's fees for successful plaintiffs are paid from defendants' funds. *Ibid.*, p. 60.

²⁷⁴ Legal aid in civil and administrative cases can take several shapes, for example it can include legal information services, community legal education, counselling and advice for individuals, representation in court, support in public-interest litigation, and appellate court advocacy - just to mention a few.

plaintiff may be represented by a counsellor and the costs are covered by public funds or insurance. It can also be that the litigation is overall run by an organisation or a governmental agency. The effect of generous legal aid in civil and administrative law cases will be especially important for the impoverished part of a population and non-citizens – both categories are likely to be underrepresented in national and regional governments and legislative assemblies.

In general, legal aid systems are funded by national budgets. However, often the government funding will not be sufficient and alternative financial sources have to be found, such as *pro bono* (voluntary work) advocacy and private donations.²⁷⁵ In this dissertation, focus is also on NGOs involved in human rights issues and litigation. We also examine working conditions of individual lawyers specialising in rights enforcement, which is an important part of the support structure. Both the existence and implementation of liberal rules in these areas are of importance for countries with a totalitarian and authoritarian past. Countries like Russia suffer from a weak civil society and inexperienced citizens, which before *glasnost* lacked experience of creating interest organisations that could function in the open. In this environment, interest organizations are highly sensitive to how the state relates to them and their activities. The Russian support structure will be analysed in Part III.

5.4.2.1 The ECHR and Legal Aid in Civil and Administrative Law Cases

The ECHR does not explicitly provide for the right to free legal assistance in civil cases. However, contracting states have an obligation to guarantee every individual an effective right of access to court in order to assess their civil rights and obligations.²⁷⁶ It is up to the state to decide how to secure this right. It can be done for example by simplifying procedural requirements or by providing legal aid.²⁷⁷ In *Airey v. Ireland* the ECtHR held that legal aid might be required in civil law cases, when legal representation is obligatory under national law, or in case of complex legal and procedural issues in order for the state not to be in violation of Article 6 (1).²⁷⁸ In this particular case, the claimant argued that the high cost of

²⁷⁵ *Access To Justice in Central and Eastern Europe. A Source Book*, Public Interest Law Initiative, Columbia University, 2003, p. 33. Available at <http://www.pili.org/publications/SourceBook/index.htm>, (2005-03-03).

²⁷⁶ Article 6 (1) ECHR.

²⁷⁷ *Access To Justice in Central and Eastern Europe*, p. 11.

²⁷⁸ *Airey v. Ireland*, 11 September, 1979, (*Application no. 6289/73*). As regards the violation of Article 6 (1) there were two dissenting opinions. See also *P., C. and S. v. United Kingdom*, 16 July, 2002, (*Application no. 56547/00*). In this case the Court found unanimously that there had been a

bringing a petition before the High Court prevented her from bringing proceedings and that there therefore had been a violation of Article 6 (1). If it is possible to appear before a court without legal assistance according to national law, it has to be taken into account if the claimant could present the case properly, which is a precondition for the right to access to be effective (para. 24). The ECtHR points to difficult issues of law and the emotional character of a case (in this case a marital case). The ECtHR concluded that the possibility to appear in person before a court does not necessarily provide the claimant with an effective right of access to justice. It further states that the fulfilment of obligations imposed on a contracting state sometimes requires positive actions on the part of the state and that the state cannot simply remain passive. “*The obligation to secure an effective right of access to justice falls into this category of duty.*”²⁷⁹ However, the Court underlines that the possibility to appear before a court in person, without a lawyer’s assistance, *can* meet the requirements of Article 6 (1) – it all depends on the circumstances, whether legal representation is compulsory under domestic law, or by reason of the complexity of the procedure or the case. The Court further states that this decision does not imply that a state must provide free legal aid in every dispute relating to civil rights and obligations. In this specific case the claimant was unable to find a solicitor that would take her case because she could not pay the total amount of costs for hiring legal representation. It all comes down to the protection rendered by the ECHR being effective and practical, not only existing in theory.

*Resolution 78 (8) on Legal Aid and Advice*²⁸⁰ states that no one should be prevented due to economic obstacles from pursuing or defending their rights before a court of law concerning civil, commercial, administrative, social, or fiscal matters. In order to achieve this all persons should have a right to necessary legal aid in court proceedings. According to the Resolution the responsibility for financing this legal aid system falls on the state. And the state should take necessary measures to bring the legal aid system to the attention of the public. As a complement to this

violation of Article 6 (1) when a mother whose child was taken from her by the social services did not have legal assistance during the court proceeding. In *Del Sol v. France*, 26 February, 2002, (*Application no. 46800/99*) the Court laid down that refusing an application for legal aid is not in violation of Article 6(1). A refusal is not in violation with ECHR Article 6 (1) if the ground for rejection is laid down in the applicable legislation, and if it was inspired by a legitimate concern that publicly-funded legal aid should only be used for appeals likely to be successful.

²⁷⁹ *Airey v. Ireland*, (para. 25).

²⁸⁰ *Resolution 78 (8) on Legal Aid and Advice* adopted by the Committee of Ministers of the Council of Europe on 2 March 1978 and Explanatory Memorandum.

Resolution the Committee of Ministers of the Council of Europe issued *Recommendation No. R(93)1 on Effective Access to the Law and to Justice for the Very Poor* on the 8th of January 1993.²⁸¹ The Committee of Ministers is especially concerned with “persons who are particularly deprived, marginalized or excluded from society both in economic, and in social and cultural terms” and their effective enjoyment of human rights. The purpose of the Recommendation is to improve existing legal advice and legal aid systems for the very poor. It recommends the governments of the member states to facilitate access to the law for the very poor by:

- raising the awareness amongst legal professionals about the conditions of the very poor;
- promoting legal advice services to the poor;
- reimbursing the cost of legal advice to the very poor through legal aid; and
- promoting the setting up of advice centres in underprivileged areas.

In addition, member states are encouraged to facilitate access to the courts by, for example, providing legal aid or other forms of assistance to all judicial cases and proceedings (civil, criminal, commercial, and administrative); extending legal aid to very poor stateless persons or aliens that are residents of the member state in question; considering the possibility of enabling NGOs or voluntary organisations to provide assistance and support to the very poor.

The obligation on member states to provide efficient access to justice can also have an effect on the use of legal fees in litigation. Should the cost be too high, this can constitute denial of justice. Charges as such are not unusual in civil and administrative cases, yet their existence may not be of such a character as to make litigation practically impossible. Whether the use of state fees restricts access to justice has to be determined in the specific case, taking living conditions in that specific state into consideration.²⁸²

5.5 Summary and Conclusions

Can individual legal activism also be an alternative way of understanding political participation in civil law societies? Many factors have to be taken into

²⁸¹ *Recommendation No. R(93)1 on Effective Access to the Law and to Justice for the Very Poor*, of the Committee of Ministers to the Member States, adopted 8 January, 1993.

²⁸² See, Jeremy McBride, “Access to Justice under International Human Rights Treaties”, *Parker School Journal of East European Law*, vol. 5, 1998, nos. 1-2.

consideration in order to find an adequate answer to this question. Some of the factors have been examined above, for example the design of *locus standi* rules, existence of support structures, and the difference between common and civil law legal systems. These are mainly theoretical considerations but I would say that in theory individual legal activism could contribute to an alternative understanding of political participation in civil law systems. In this context, an additional factor needs to be considered: that is, the current political climate of the country in question. Legal participation, made possible for everyone, could contribute to the legitimacy of the political system as a whole in the long run if it contributes to transparency, equal treatment, predictability, and enhanced accountability. Still, it is an empirical question whether individual legal activism exists as it is defined above in the first part of this Chapter and whether it benefits democratic development in one specific state.

6. Individual Legal Activism and Judicial Control of Administrative and Political Power in post-Socialist Societies

6.1 Introduction

One of several reasons for establishing constitutional courts in the European post-Socialist countries was to create a new institution without any connection to the former regimes and modes of governance, especially the old judiciary. Most of the new states opted for parliamentary systems but still wanted to be able to restrict the parliament due to experience as to what can be done in the name of the (artificial) will of the people.²⁸³ The new constitutional courts were considered to stand above everyday politics and by establishing them it was thought that they could bring trust, reason, stability, and continuity in a time of transition. The European post-Socialist states have the same civil law tradition as Continental Europe and as “returning to the West” was an important political strategy, establishing constitutional courts *à la* European model became an important part of that strategy.²⁸⁴ The new constitutional court judges were recruited from a wider circle including former activists, legal scholars, and judges. Needless to say, trust was not very strong in the ordinary courts and their judges. In addition, the civil law judge was not likely to take a broad and creative approach when solving constitutional issues due to bureaucratic and administrative traditions.²⁸⁵

While several studies on constitutional judicial review in Central and East European countries have been published²⁸⁶, studies of the judicial control of

²⁸³ Schwartz, *The Struggle for Constitutional Justice*, pp. 22-23.

²⁸⁴ Prochazka, *Mission Accomplished*, pp. 16-31.

²⁸⁵ Schwartz, *The Struggle for Constitutional Justice*, p. 23.

²⁸⁶ See amongst others *Revue de Justice Constitutionnelle Est-Européenne*, Presses Universitaires de la Faculté de Droit de Clermont-Ferrand Université d’Auvergne; Schwartz, *The Struggle for Constitutional Justice; The Rule of Law after Communism. Problems and Prospects in East-Central Europe*, eds. Marting Krygier and Adam Czarnota, Aldershot, Ashgate, 1999; *Legal Reforms in Post-Communist Europe. The View from Within*, eds. Stanislaw Frankowski and Paul B. Stephan III, Dordrecht, Martinus Nijhoff Publishers, 1995; *Constitutional Reform and International Law in Central and Eastern Europe*, eds. Rein Müllerson, Malgosia Fitzmaurice and Mads Andenas, London, Kluwer Law International, 1998; Levent Gönenc, *Prospects for Constitutionalism in post-Communist*

administrative powers are rare.²⁸⁷ This is in itself an interesting result that illustrates the fact that administrative law reform has not been high on the agenda. Consequences of not taking the importance of state-building (as opposed to democracy-building) in general, and administrative law reform in particular, into sufficient consideration are several and far-reaching for the individual. A strong state with the ability to provide social-economic welfare and security to its citizens requires a well-functioning administrative apparatus.

6.2 The Challenge of Individual Legal Activism for post-Socialist Legal Reform

Why is individual legal activism of importance in post-Socialist societies undergoing legal reform? For reasons stated above in Chapter 5 of Part I, analysis of legal reform in post-Socialist societies will benefit from drawing a distinction between legal transition and legal transformation. *Legal transition* refers to the adoption of a new legislative framework, a framework that will both contribute to the establishment of new institutions and processes as well as to the renewal of the substance of the law - thus resulting in changes in what Tuori calls the surface level of law. *Legal transformation* on the other hand can result in changes in the legal culture (in terms of actions and attitudes) and in the long run in the deep structure of law. Above it has been argued that external factors and support structures can have an impact on the interaction between the surface level of law and the level of legal culture. The existence and effective use of the support structure increases the likelihood of individual legal activism, which in its turn can contribute to changes in the legal culture. Individual legal activism is of importance in societies undergoing post-Socialist legal reform, since the dynamic link between the surface level of law and the legal culture in a broad sense consists of individuals (who are the 'containers' of the legal culture) that in one way or another relate to and make use of the surface level of law.

Countries, The Hague, Martinus Nijhoff Publishers, 2002; *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in post-Communist Europe in A Comparative perspective*, ed. Wojciech Sadurski, the Hague, Kluwer Law international, 2002; Caroline Taube, *Constitutionalism in Estonia, Latvia and Lithuania*, Uppsala, Iustus, 2001; *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, eds. Jochen Abr. Frowein and Thilo Marauhn, Berlin, Springer, 1998, etc.

²⁸⁷ See for example Peter H. Solomon, Jr. and Todd S. Foglesong, *Courts and Transition in Russia. The Challenge of Judicial Reform*, Boulder, Westview Press, 2000; Jane McGregor, "Dealing with Citizens' Complaints against Public Bodies. The Approach in New Russia", in *The Legal Foundations of the New Russia*, ed. Brynjulf Risnes, Oslo, Nupi, 1998; Denis J. Galligan and Daniel M. Smilov, *Administrative Law in Central and Eastern Europe, 1996-1998*, Budapest, Central European University Press, 1999.

6.2.1 Trust – in Short Supply?

Trust between state authorities and its citizens is of significant importance for the stability of a society, and the degree of vertical trust is closely related to the perception of the legitimacy of a state in general and of the legal system in particular.²⁸⁸ Legitimacy can be seen as a function of the possibility to exert popular control, through free and fair elections, over governing authorities. The possibility to apply to a court of law in order to protest against a decision or action by a state authority or civil servant is another.²⁸⁹ Of course, neither is exclusive in relation to the other; rather, they complement each other, as has been discussed above. However, trust in institutions such as the legal system tends to be low in ‘new’ democracies such as the European post-Socialist states. And if trust in the legal system is low, is it likely that individuals will use the judicial procedure in order to protest against violation of individual rights and freedoms?

The short supply of trust in, for example, post-Socialist states caused Mishler and Rose to ask the question *how does political trust begin?* According to them, there are two competing explanations to the origins of trust – the cultural and the institutional explanation. The starting point for the cultural explanation is that trust in political institutions is rooted in cultural norms, which are communicated in early-life socialization. From the cultural explanation perspective, trust in political institutions is an extension of interpersonal trust learnt early in life and then projected onto political institutions. According to institutional theories, trust is a consequence, not a cause, of institutional performance.²⁹⁰ However, institutionalists agree that culture can condition institutional choices, as well as the past performance of institutions, but underlines that neither is deterministic.²⁹¹ The cultural and institutional explanations to the origin of political trust will not be discussed further here. It suffices to conclude that there are competing explanations, and that both agree that citizens of post-Socialist states are likely to

²⁸⁸ See for example, Bo Rothstein, *Sociala fjällor och tillitens problem*, Stockholm, SNS Förlag, 2003.

²⁸⁹ On democracy and the role played by the judiciary see Thomas Bull, “Om domstolarnas roll i demokratin – fågel, fisk eller mittemellan?” *JT*, part 1 1999-2000, No. 4, part 2 2000-01, No. 1. For a Russian example see the Pensioners Court Campaign. See further Cashu and Orenstein, “The Pensioners’ Court Campaign: Making Law Matter in Russia”, *East European Constitutional Review*, fall 2001, (67-71).

²⁹⁰ William Mishler and Richard Rose, “What are the Origins of Political Trust? Testing Institutional and Cultural Theories in post-Communist Societies”, *Comparative Political Studies*, vol. 34, no.1, February 2001, (30-62), p. 31.

²⁹¹ *Ibid.*, p. 36.

manifest low trust for democratic institutions initially and that trust is closely connected to experience.²⁹²

The same line of reasoning could be applied to the legal system and issues of trust in relation to it. Institutional performance, in most cases (probably not in totalitarian and to some degree in authoritarian systems), requires that the service performed by the institution in question is in demand, hence a need for activism. Personal experience, requiring personal individual activism or activism by someone close, is particularly vital for the legal system. Thus arises the need for an actor perspective. However, whether the use of the judicial procedure is a *sign* of deeper belief in it or not is not of main importance initially. The *effect* of the instrumental use of the law in the short and long run is of greater importance.

One often-expressed opinion about Russia is that trust in the legal system is too low for it even to be of relevance to talk about legal activism on an individual level. Often-heard explanations as to the low demand for law in order to protect rights and interests in Russia, besides absence of property rights, are the poor quality of the law, corruption, and the politicization of legal institutions.²⁹³ It is a general assumption that demand for law will be articulated first and most frequently by economic actors.²⁹⁴ A belief that the legal system will deliver a beneficial outcome, in terms of material interests, should then for a rational actor create the incentive to use the judicial procedure. But is trust a necessary prerequisite for instrumental use of the judicial procedure? Can there be another incentive than the material to make use of the judicial process? Cashu and Orenstein have presented examples showing that antipathy towards law by Russians is overstated.²⁹⁵ In addition, research by Hendley shows that attitudes and behavior diverge and that resignation about the legal system does not

²⁹² The institutional explanation of the origin of trust (a function of institutional performance) is, according to Mishler and Rose, stronger than cultural. *Ibid.* pp. 37, 56.

²⁹³ Kathryn Hendley, "Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law", in *Contemporary Russian Politics*, ed. Archie Brown, Oxford, Oxford University Press, 2001, (131-138). See also Katharina Pistor, "Supply and Demand of Law in Russia", *East European Constitutional Law Review*, Fall 1999, Vol. 8, No. 4, (105-109) and Kathryn Hendley, "Demand" for Law in Russia – A Mixed Picture", *East European Constitutional Review*, fall 2001, (72-77).

²⁹⁴ Hendley defines economic actors as individuals or legal entities using law in order to realize material, as opposed to ideal, interests. See Hendley, "Demand" for Law in Russia – A Mixed Picture, p. 72.

²⁹⁵ Cashu and Orenstein, "The Pensioners' Court Campaign: Making Law Matter in Russia".

necessarily correlate with litigation behavior.²⁹⁶ Statistical data up till today shows a steady increase in the number of judicial reviews of administrative acts²⁹⁷, while *arbitrazh* courts are being used with greater frequency.²⁹⁸ Thus, we have to draw the conclusion that individual legal activism in Russia is on the increase. The subsequent question should then be: has trust in the Russian legal system increased as well? These questions will be dealt with more thoroughly below in Part III of this dissertation.

²⁹⁶ Hendley reached this conclusion by complementing studies of caseload with in-depth interviews. Collected data showed an increasing caseload, while in-depth interviews showed apathy regarding the law. Hendley, “Demand for Law in Russia – A Mixed Picture”, pp. 74-75.

²⁹⁷ For example, from 2, 869 in 1988 to 53, 659 in 1997 and from 122, 000 in 1995 to 1,237,000 in 1997 concerning payment of salaries from both private and state employers. Solomon and Fogelsong *Courts and Transition in Russia*, pp. 69, 76.

²⁹⁸ Hendley, “Demand for Law in Russia – A Mixed Picture”, p. 75.

7. Summary and Conclusions

This part of the dissertation has presented the theoretical framework to be used in analysing judicial protection of individual rights and individual legal activism in Russia. After describing different modes of governance in terms of separation of powers and functions from a principal-agent perspective, judicial control of political and administrative powers has been examined and discussed. It has been suggested that constitutional judicial review and judicial review of governmental action can function as a complement to traditional channels of citizens' control such as voting, lobbying, and demonstrating.

Different modes of governance permit diverse channels for the primary principals to exercise control of political and administrative powers and this is especially so concerning the role played by the courts. In constitutional democracies, courts usually have a larger impact on both the macro and the micro level than compared to the case in parliamentary democracies. In an authoritarian mode of governance, the courts can be allowed to have an impact on the micro level as long as there is no impact, undesired by the ruling elite, on the macro level. The latter conclusion constitutes a strong argument for building and maintaining not only strong institutions but also strong support structures. In this sense, the role of the courts in parliamentary democracies and in authoritarian states have more in common, the difference of course being manifested by the substance of the policy to be enforced and the process by which it is adopted and the general degree of freedom in society.

Common for all three modes of governances is the growth of the administrative state. More powers are delegated or otherwise acquired by the state administration, often on behalf of the representative assemblies. There are various alternatives of how to control the state administration. These have been examined above. The study focuses on judicial control. A model has been developed in order to problematize the nature of administrative law adjudication. The character of public law adjudication can be described and analysed by considering three stages of the adjudicative process: standing rules, the court proceeding *per se*, and the character of court decisions. By making this distinction, we achieve a clearer understanding of public law adjudication and its impact on the rule of law in

general. For example, if a constitution contains protection of social and economic rights as well as collective interests, then it is reasonable that it is reflected in the rules of *locus standi* by allowing group actions. Without taking any position at this point as to whether this should be the case or not, it can be concluded that the analytic framework can help in understanding and analysing the nature of public law adjudication and how it can be connected to the strengthening of democracy in both “old” and “new” democracies.

This analytic framework is important when it comes to legal reform in general, but it is particularly interesting in considering legal reform in post-Socialist states or states otherwise engaged in a legal transition away from a non-liberal legal order. The reasons are several, some of them mentioned above when citing Freeman, for example to increase the common conception of justice, elucidate the underlying values of rule of law principles established in constitutions. An additional reason has been put forward in this dissertation: that is, individual legal activism can be considered an alternative to political participation.

We reached the conclusion that public law adjudication is of such a nature that a wide scope of judicial review of legislative acts and governmental action on the one hand and a wide scope of standing on the other can be justified. This is due to, for example, the potentially heavy resulting burden on the individual and the decreasing possibility to exercise efficient control of the legislature and the executive in the traditional way. Then, Epp’s theory about rights revolutions has been complemented by the concept of individual legal activism. The prerequisites of the latter have been examined and the pros and cons discussed, leading to the conclusion that judicial review in combination with individual legal activism and a vibrant support structure can theoretically strengthen democratic institutions and hence is good for democracy. The concept of individual legal activism as presented in this thesis further develops Epp’s support structure explanation in the sense that judicial-technical solutions concerning standing and legal assistance are included. In addition, this Part of the dissertation shows that Epp’s theory on rights revolutions is not only applicable to common law, but also to civil law, legal orders. The following questions will be dealt with in Part III: How is public law adjudication to be described in the Russian legal order? What are the possibilities to engage in individual legal activism? Taken together, what is the potential effect of judicial review in combination with individual legal activism on the conception of justice and democracy in the Russian Federation?

PART THREE

RUSSIA

1. Introduction

The theoretical framework presented in Part II will be applied to the political and legal system in Russia as it has developed between 1993 and 2003. Focus will be on electoral and judicial control of Russian political and administrative powers, judicial protection of individual rights, and individual legal activism. Chapter Two examines the separation of powers and functions in Russia. The CRF and other relevant laws will constitute the starting point for this analysis. In addition, practical and political problems experienced with the electoral process and control of the State *Duma* and the President will be examined. Thus, in order to conclude what mode of governance best describes contemporary Russia, attention will focus on both *de jure* and *de facto* circumstances. This is in order to establish what channels are available for individuals to exercise control of, and influence on, political and administrative powers. Chapters Three and Four examine judicial review of political and administrative powers and the preconditions for individual legal activism in Russia in depth.

2. Governance in Russia

2.1 Separation of Powers and Functions

Vile's "*pure doctrine*" constitutes the starting point for examining separation of powers in the Russian Federation.¹ The "*pure doctrine*" consists of three elements:

1. Division of the agencies of government into three categories, enabling internal checks and balances.
2. The assertion that there are three functions of government: the legislative, executive, and judicial functions.
3. The separation of persons.

In Russia, state power on the federal level is exercised by the President, the Government, the two chambers of the Federal Assembly, and the courts.² The separation of powers between the legislative, executive, and judicial powers is established in Article 10 CRF. These bodies are to be independent from each

¹ As discussed above. See Part II, Chapter 2.1 where Vile's "*pure doctrine*" is accounted for.

² According to Article 11 CRF.

other. According to the CRF and Russian legal doctrine, the President stands above the separation of powers and he is not part of any of the branches mentioned in Article 10. Rather, he is the head of state, with an integrative and coordinating role to play.³ Still, as will be shown below, the President does have powers and functions that are executive in character. Thus, Russian agencies of government are divided into three categories, which do not include the presidency. We will return to the question of how this affects internal checks and balances in the Russian governmental system. The following sections describe the powers of the President, Executive, Federal Assembly and Judiciary.

2.1.1 Separation of Powers

2.1.1.1 The President

The competitive situation between the President and the Parliament leading up to the shooting at the White House in 1993 came to play an important role for the separation of powers as stipulated in the CRF adopted December 12, 1993.⁴ The power struggle, in combination with an unstable political and economic situation, contributed to the establishment of a strong presidency.

The President is directly elected for a period of four years. The same person can only be re-elected once and the election procedure is to be established by federal law.⁵ It is stipulated in the CRF that the President is the head of state, and guarantor of the CRF, including the rights and freedoms of individuals.⁶ Additionally, he should take measures to protect the sovereignty of the Russian Federation and coordinate the interaction between all state bodies. Clearly, these tasks of the President may clash, as has been the case concerning Chechnya.⁷ Within the President's duties also lies the setting up of guide-lines for foreign and

³ *Konstitutsiya Rossijskoy Federatsii. Kommentarii*, ed. V.V. Lazarev, Moscow, Spark, 2001, pp. 67, 71. Articles 10, 11 and 80 are read in combination in order to reach this conclusion.

⁴ The Parliament with its speaker Ruslan Khasbulatov acted in strong opposition to President Yeltsin. At that time, Yeltsin stood for a new democratic Russia and he was, by foreign as well as by domestic liberal politicians and human rights activists, considered the only alternative. See Part I, Chapter Four.

⁵ According to Article 81 (1), (3-4) CRF.

⁶ See Article 80 CRF.

⁷ See for example, Anna Politkovskaya, *A Small Corner of Hell. Dispatches from Chechnya*, Chicago, Chicago University Press, 2003. The war in Chechnya was initially motivated by the protection of the integrity of the Russian state. Thereafter it has been expanded to include the fight against international terrorism.

domestic policies - the content to be in congruence with the CRF and federal law.⁸

In addition, the President⁹:

- calls the elections to the State *Duma*;
- dissolves the State *Duma* in cases, and according to the procedure, provided for by the CRF;
- calls referenda according to the procedure provided for by federal constitutional law;
- submits bills to the State *Duma*;
- signs and promulgates federal laws;
- addresses annual messages concerning the state of the nation, and guidelines for the internal and foreign policy of the state to the Federal Assembly.

The Russian President also appoints the chairman of the government, i.e. the Prime Minister, with the approval of the *Duma*.¹⁰ He decides on matters related to the resignation of the Government as a collective. The individual ministers are appointed and dismissed by the President upon recommendations from the Prime Minister.¹¹ Proposals concerning judges for the higher courts and the position of General Procurator are submitted by the President to the Federation Council. The President appoints all other judges in close cooperation with the Council of Judges, the President of the Federal Supreme Court, and the Supreme *Arbitrazh* Court.¹² In addition, the President forms and heads the Security Council¹³ of the Russian Federation, the status of which should be established by federal law. He also approves the military doctrine of the Russian Federation. Additionally, it is within the President's power to form the Presidential Administration and to appoint and release from duty Presidential Representatives. The State Council, the

⁸ See Article 80 (2) CRF and the RF Constitutional Court Decision, 31 July, 1995, No. 10-P on the Constitutionality of Measures Taken by the President to Solve the Crisis in Chechnya.

⁹ According to Article 84 CRF.

¹⁰ Article 83 CRF. See also, Article 111 CRF.

¹¹ See, Article 112 (3) CRF.

¹² See Part I, Chapter Four on the procedure. See also, *Konstitutsiya Rossiskoy Federatsii. Kommentarii*, p. 424.

¹³ The role to be played by the Security Council has varied considerably since the early 1990s. Its main task is to prepare presidential decisions on security, co-ordinate security agencies, and to implement executive policy. Richard Sakwa, *Russian Politics and Society*, London, Routledge, 3d ed., 2002, pp. 108-109.

President's representatives to the seven federal districts,¹⁴ and the Security Council all lie under the Presidential Administration. In addition, the President appoints and releases from duty the High Command of the Armed Forces of the Russian Federation, and re-calls diplomatic representatives of the Russian Federation to foreign states and international organizations, after consultation with the relevant bodies of the chambers of the Federal Assembly.

In case of disagreement between federal state bodies and regional state bodies, or between two or more regional state bodies, the President can use a reconciliation procedure.¹⁵ Where the parties cannot agree upon a solution, the President can refer the case to a court of law. In addition, the President has the power to suspend acts adopted by regional executive bodies (regional laws excluded) that are not in congruence with the CRF, federal laws, international obligations, or that otherwise infringe individual rights and freedoms, until the matter has been settled by a court of law.¹⁶ According to Russian legal doctrine, these powers should be interpreted and understood in the light of the President's coordinating obligations and his duty to protect the CRF.¹⁷

The President has the power, in accordance with federal constitutional law, to declare martial law immediately in case of aggression, or threat of aggression, against the Russian Federation.¹⁸ However, he must report back to the Federal Assembly instantly. The President can also declare a state of emergency, in accordance with the procedure established by federal constitutional law. Also in this case, a report should immediately be submitted to the Federal Assembly.¹⁹ The President takes decisions on Russian citizenship and grants asylum. The President also has the right to grant pardons.²⁰

In conclusion, the Presidential Administration lies directly under the President and includes several state councils, committees, and commissions, for example the Security Council, the State Council, and the Commission on the Rights of the

¹⁴ In May, 2000 President Putin divided the territory of the Russian Federation into seven federal administrative districts, with the purpose of enforcing implementation of federal law and policies in the federal subjects. *Rossiiskaya Gazeta*, 14 May, 2000.

¹⁵ See, Article 85 CRF.

¹⁶ Putin has suspended normative acts in Ingushetia, Bashkortostan, and Amur region that violated the CRF. Service, *Russia: Experiment with a People*, p. 273.

¹⁷ *Konstitutsiya Rossiskoy Federatsii. Kommentarii*, pp. 436, 438.

¹⁸ Article 87 CRF.

¹⁹ See Article 88 CRF.

²⁰ Article 89 CRF.

People.²¹ These are to prepare and support the activities of the President. Besides these bodies, the President's representatives to the seven federal districts are important for the collection of information from the regions and for implementation of federal policies in the regions.²² Due to the misuse of ministerial posts, the fragmentation, corruption and the inefficiency of the government, the Presidential Administration has come to play an increasingly important role in Russian politics. At the beginning of the 21st Century, the Presidential Administration is one of the most influential bodies of the Russian government. As of today, most reforms are prepared within the Presidential Administration and the executive power and the control function of the Presidential Administration has increased. This development can be described as necessary for the President to regain control of creation of federal policy and its implementation. The Presidential Administration derives its legitimacy from the elected President of the Federation. It is not subject to any popular or political control.

2.1.1.2 *The Executive*

Within the exclusive powers of the federal centre, and the powers shared by the federal centre and the federal subjects, federal and regional executive bodies form a single system of executive authority.²³ The structure of the executive is quite complex and contains²⁴:

- the federal government,
- federal ministries,
- state committees of the Russian Federation,
- federal commissions of the Russian Federation,
- federal services, for example the FSB (the federal security services),
- federal agencies,
- federal directorates and inspectorates, and

²¹ See Tiffany A. Troxel, *Parliamentary Power in Russia, 1994-2001*, Hampshire, Palgrave Macmillan, 2003, p. 70.

²² Presidential Decree no. 849, March 13, 2000. Matthew Hyde, "Putin's Federal Reforms and their Implications for Presidential Power in Russia", *Europe-Asia Studies*, Vol. 53, No. 5, 2001.

²³ Article 77 (3) CRF.

²⁴ For an extensive list see Krasnov, *Gosudarstvennoye Pravo Rossii*, pp. 473-475.

- other federal bodies of executive powers, for example, the State Technical Commission of the President of the Russian Federation.

In general, the bodies mentioned here answer to the Government. Exceptions include, *inter alia*, the Ministries of Foreign Affairs, Defense, and Internal Affairs, and the FSB. These bodies answer directly to the President.

The executive power is vested in the Government.²⁵ The Government is headed by a Prime Minister and composed of several federal ministries. It is essentially non-partisan and is best described as a Government composed of bureaucrats. It does not reflect the composition of the *Duma*, although, formally, the Government owes its legitimacy to the *Duma*, to which it is, at least nominally, accountable.²⁶

The Government has the following powers²⁷:

- work out and submit to the State *Duma* the federal budget and ensure its enforcement;
- submit to the State *Duma* a report on the performance of the federal budget;
- ensure a uniform financial, credit, and monetary policy in the Russian Federation;
- ensure a uniform state policy in the field of culture, science, education, health care, social security and ecology in the Russian Federation;
- carry out the management of federal property;
- take measures to ensure national defense, state security, and realization of the foreign policy of the Russian Federation;
- take measures to ensure legality, rights and freedoms of citizens, protection of property, maintenance of public order, combating crime;
- implement other functions as entrusted to it by the CRF, federal laws, and decrees of the President of the Russian Federation.

²⁵ According to Article 110 CRF. See also, *the Federal Constitutional Law on the Government of the Russian Federation*. SZ 1997. no. 51, item 5712 (as amended).

²⁶ Eugene Huskey, *Presidential Power in Russia*, Armonk, M.E. Sharpe, 1999, p. 101. The possibility of invoking a vote of no confidence in the government will be examined below. See, Chapter 2.1.5.1.

²⁷ According to Article 114 CRF.

Should the Russian President have to step down from office prematurely, the Prime Minister becomes acting president, as happened on December 31, 1999. A new election has to be held within three months. The powers of the acting president are circumscribed in the sense that he may not dissolve the *Duma*, hold referenda, or suggest amendments or revisions of the CRF.²⁸ Following a presidential election, the Government should step down according to the CRF.²⁹

The Russian executive is gigantic in size³⁰ and is hard to overlook. It suffers from inefficiency and corruption, and is used to advance specific personal, economic, and regional interests. The Prime Minister does not oversee the ministries directly himself. A range of first deputy- and deputy prime ministers are responsible for contact and control of the ministries. The loyalty of deputies does not necessarily lie with the Prime Minister.³¹ The system severely undermines the influence and power of the Prime Minister and the Government as a collective. It has also slowed down the speed of – especially – economic reforms, and severely hampered implementation of federal laws and policies throughout the country. And that is one reason for its being under constant reform – trying to make it more efficient.³²

According to Eugene Huskey, the most remarkable feature of the Russian Government is its “*fragmented power*”, which means that each minister establishes his own power centre within the part of the bureaucracy that he controls. From this platform, personal institutional interests, hence not political goals as defined

²⁸ See Article 92 (3) CRF.

²⁹ See Articles 111 and 116 CRF. In 1996 Viktor Chernomyrdin was re-appointed as Prime Minister by Yeltsin. He was first appointed Prime Minister in 1994 and remained in office until March 1998. In 2000 Mikhail Kasyanov was appointed by President Putin. In the election cycle 2003/2004 President Putin appointed a new government just days *before* the presidential election, stating that this was the government that would enforce his politics should he be re-elected. The process started with Putin, by decree, dismissing the Government on the 24th of February 2004. The purpose of dismissing the Government was, according to Putin, “*to make clear once again which course (the country will follow) after March 14*”. Johnson’s Russia List, #8082, 24 February, 2004, citing ITAR-TASS. On March 1, 2004 it was announced that Putin had named a new Prime Minister, Mikhail Fradkov. According to Articles 83 and 117 CRF, the President does have the right to dismiss the Government. However, in this case the President was using the appointment of a new Government as a means of election campaigning.

³⁰ In 2001 the executive had 30,273 civil servants in Moscow, and 374,426 in the federal subjects. This amounts to 88.5 percent of the total amount of civil servants. In comparison, the judiciary has 9.9 percent. Eugene Huskey and Alexander Obolonsky, “The Struggle to Reform Russia’s Bureaucracy”, *Problems of Post-Communism*, vol. 50, no. 4, July/August 2003, (22-33), p. 24.

³¹ Huskey, *Presidential Power in Russia*, p. 107.

³² For an overview of the reform process and problems encountered, see Huskey and Obolonsky, “The Struggle to Reform Russia’s Bureaucracy” and Huskey, *Presidential Power in Russia*.

by the Prime Minister or the President, are striven for.³³ Since coming to power, President Putin has striven to change this situation. With the appointment of Mikhail Fradkov as Prime Minister in February 2004, and the consecutive transfer of extensive powers and large resources to the Presidential Administration, he seems to have made some progress.

2.1.1.3 *The Legislature*

The representative state organ, the Federal Assembly, consists of two chambers, the Federation Council (the upper house) and the *Duma* (the lower house). The Federation Council is composed of two representatives from each of the federal subjects.³⁴ The jurisdiction of **the Federation Council** includes:³⁵

- Approval of alternation of borders between the federal subjects.
- Approval of a presidential decree imposing martial law.
- Approval of a presidential decree imposing a state of emergency.
- Decisions on using federal armed forces outside the territory of the Russian Federation.
- Setting election of the President of the Russian Federation.
- Removal of the President of the Russian Federation from office.
- Appointment of judges of the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, and the Higher *Arbitrazh* Court of the Russian Federation.
- Appointment and dismissal from office of the General Procurator of the Russian Federation.
- Appointment and dismissal from office of the Vice-Chairman and half the auditors of the Accountants' Chamber.

The powers of **the Duma** include:³⁶

³³ Huskey, *Presidential Power in Russia*, p. 103.

³⁴ In May 2000, President Putin presented a draft law to the *Duma*, altering the way that members of the Federation Council are selected. Earlier, the chairman of the regional legislative assembly and the chief of the regional executive became *ex officio* members of the Council. After the law entered into force, members of the Federation Council were to be nominated by the head of the executive and appointed by the regional legislative assembly. *SZ*, 2000 No. 32, item 3336.

³⁵ Article 102 CRF.

³⁶ Article 103 CRF.

- giving its consent to the President of the Russian Federation for the appointment of the Prime Minister;
- decisions on a vote of confidence in the Government of the Russian Federation;
- appointment or dismissal from office of the Chairman of the Central Bank of the Russian Federation;
- appointment or dismissal from office of the Chairman and half the auditors of the Accountants' Chamber;
- appointment or dismissal from office of the Human Rights Commissioner;
- declaration of amnesty;
- bringing charges against the President of the Russian Federation or his removal from office.

The functions and the electoral control of the Federal Assembly will be further examined and discussed below.

2.1.1.4 *The Judiciary*

Another institution with the potential to contribute to checks and balances in Russia is the judiciary. The structure of the Russian judiciary is explained in Part I, Chapter Four. This section focuses on the Constitutional Court of the Russian Federation and its mandate to exercise abstract constitutional review. Judicial control of political and administrative powers initiated by *inter alia* individuals will be examined in Part III, Chapter Three.

Although abstract constitutional review *per se* is not the subject of analysis in this dissertation, an overview will be provided since it constitutes a vital part of horizontal checks and balances. The RF Constitutional Court practices abstract constitutional review *a posteriori*, except for the review of international treaties when it exercises an abstract review *a priori*.³⁷

Abstract constitutional review can be initiated at the request of the President, the Federation Council, the State *Duma*, one fifth of the members of the Federation Council or the State *Duma*³⁸, the government, the Supreme Court, the Supreme

³⁷ Issues to be considered by the RF Constitutional Court are stipulated by Article 125 (2) CRF and Article 3 *Federal Constitutional Law on the Constitutional Court*.

³⁸ As was done recently concerning the amendments made to the Media Law in the summer of 2003. 100 members of the *Duma*, including representatives from the SPS and the Communist

Arbitrazh Court, and bodies of legislative and executive power of federal subjects. *Individuals cannot invoke abstract review.* The wide list of officials that can invoke abstract constitutional review is typical for the European model of constitutional courts, the aim being to protect the political minority against the majority.³⁹ Comparatively, the number of requests for constitutional review filed by the state bodies mentioned above and declared admissible by the RF Constitutional Court is considerably smaller than cases initiated by individuals and concerned with individual rights and freedoms.⁴⁰ In addition, the President, the two chambers of the Federal Assembly, the government, and legislative assemblies of the federal subjects may ask the RF Constitutional Court to give an *interpretation* of the CRF.⁴¹ Constitutional courts can be described as unconstrained or constrained actors, depending on their legal and political context. In order to conclude whether a constitutional court is a constrained or an unconstrained actor one can, as suggested by Epstein, Knight and Shevtsova, study the tolerance interval of the court and other political actors. The tolerance interval is the area around a given actor's ideal point (the most preferred position) within which that actor would be unwilling to challenge a decision rendered by a constitutional court since the benefits from attacking the court's decision would not be greater than the costs. The tolerance interval is of importance for the legitimacy of a constitutional court, assuming that the court will gain in legitimacy if it is attentive to the preferences of relevant actors, since the court decision in that case probably will be respected and enforced.⁴² This reasoning implies that sometimes it might be better to "live to fight another day" and by practicing judicial caution strengthen the judicial power in the long run.⁴³

Applying this reasoning to the RF Constitutional Court, Epstein *et. al.* model the idea of legitimacy through the concept of tolerance intervals. Tolerance intervals

Party, challenged the amendments before the RF Constitutional Court stating that the new Media Law violated freedom of speech.

³⁹ Schwartz, *The Struggle for Constitutional Justice*, p. 31.

⁴⁰ Epstein, Knight and Shevtsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government", p. 139, and Anna Jonsson, "The Constitutional Court of the Russian Federation, 1997-2001," *Working Papers*, 73, October, 2002, Department of East European Studies, Uppsala University.

⁴¹ According to Article 125 (5) CRF. To be further discussed in Chapter Three, Part III.

⁴² Epstein, *et. al.* "The Role of Constitutional Courts..", pp. 127-131.

⁴³ For an argument that this was Marshall's tactic in and following the Marbury case, see Jed Handelsman Shugerman, "Marbury and Judicial Deference: The Shadow of *Whittington v. Polk* and the Maryland Judiciary Battle", *Journal of Constitutional Law*, vol. 5:1, October 2002, (58-108).

serve as constraints on decisions rendered by the court in question. In order to examine tolerance intervals of the relevant political actors, cases dealt with by the RF Constitutional Court are divided into three categories⁴⁴:

1. Separation of Powers.
2. Federalism.
3. Individual Human Rights and Freedoms.

Epstein *et. al.* thereafter examine decisions taken by the first Constitutional Court (1992-1993) and the RF Constitutional Court between 1995-1996. They show that the tolerance interval of the President on the one hand, and the Federal Assembly and the RF Constitutional Court on the other, was small and not overlapping concerning the separation of powers. This means that there is an incentive for the RF Constitutional Court to keep a low profile in cases involving issues of separation of powers. The tolerance interval, during 1992-1993, and 1995-1996, for cases dealing with individual human rights and freedoms was wider and overlapping for all political actors.⁴⁵ In this context it is interesting to note that approximately fifty percent of the Constitutional Court decisions during this time dealt with individual human rights and freedoms, while twenty five percent each dealt with federalism and separation of powers.⁴⁶

The second Constitutional Court has acted in a more constrained manner than the first, and has proved unwilling to take decisions in favor of the Federal Assembly, resulting in a presidential-friendly interpretation of the CRF, of which the *Chechnya*⁴⁷ and *Kirienko* cases⁴⁸ can be seen as examples. Russian legal doctrine

⁴⁴ Epstein, *et. al.* "The Role of Constitutional Courts..", pp. 138-139.

⁴⁵ *Ibid.*, p. 142.

⁴⁶ *Ibid.*, p. 139.

⁴⁷ In 1995 members of the Federal Assembly asked the RF Constitutional Court to consider the constitutionality of the use of armed forces in Chechnya as ordered by Yeltsin. The Federation Council claimed, among other things, that the use of armed forces was not possible without its sanction. First, the RF Constitutional Court ruled that there was no support in the CRF for a unilateral right to secede and that state integrity was a necessary prerequisite for the constitutional order. Second, since there was no martial law or law on state of emergencies, and the CRF has direct effect, the President had the power to issue a decree on the use of armed forces in Chechnya in order to protect the sovereignty, integrity, independence, and security of the Russian Federation. The decision was based on Articles 13 (5) and 78 (4) CRF. Several justices dissented on the grounds that human rights should take priority, that the ICPCR does not contain any reservations or restrictions, and that Yeltsin's decree on the use of force was therefore unconstitutional. The Chechnya case has been widely discussed and the common opinion is that the decision of the Constitutional Court was a result of pragmatic reasoning, in order to avoid being drawn into a political struggle. However, by comparing the way that the Russian Constitutional Court dealt with the Chechnya case with the US Supreme Court during the

recognizes at least four methods of interpretation: grammatical, logical, systematic, and historical.⁴⁹ Article 74 of the *Federal Constitutional Law on the Constitutional Court* stipulates that the RF Constitutional Court should consider not only the literal meaning of the contested legislation, but also how enforcing officials have interpreted it, and their practice. In addition, the Court should use a systematic method of interpretation and the Court is obliged to assert the constitutionality of the contested legislative act from the viewpoint of the separation of powers.⁵⁰ The RF Constitutional Court can only consider questions of law.⁵¹ Applying a teleological interpretation of Article 111 (4) CRF in the *Kirienko* case could lead to the conclusion that the President should present a new candidate to the *Duma* in order for the *Duma* to have a real say in the process without the threat of dissolution, which would also be in congruence with the principle of separation of powers established in Article 10 CRF. The separation of powers is stipulated in Chapter One CRF, which establishes the very foundations of the constitutional system of the Russian Federation.⁵² No other provision of the CRF should contradict the foundation for the constitutional system as established in this Chapter. Hence, both a systematic and a teleological interpretation could lead to a different interpretation than that of the Constitutional Court's – an interpretation that would uphold a spirit of separation of powers and checks and balances.

Vietnam War, referring to the political question doctrine, Schwartz broadens the perspective. Schwartz, *The Struggle for Constitutional Justice*, p. 149.

⁴⁸ Another example of politically sensitive cases is the 'Kirienko'-case from 1998. Yeltsin submitted Sergei Kirienko as his candidate to the post of Prime Minister. The *Duma* did not agree to the President's choice and rejected Kirienko twice. If the candidate of the President is rejected three times the President may dissolve the *Duma*, appoint the Prime Minister, and call for a new election. In order not to be dissolved, the *Duma* appointed Kirienko. One of the questions raised before the RF Constitutional Court concerned whether the President could submit the very same person as a candidate to the post of Prime Minister three times in a row, enabling the President to provoke dissolution of the *Duma*. According to the RF Constitutional Court, the President was empowered to do so. The disputed Article was Article 111 (4) of the CRF. The Court concluded that this Article should be interpreted as including a triple rejection of one candidacy, as well as a triple rejection of several candidacies within one 'appointment procedure'. The decision has been subject to criticism, *inter alia* on the basis that the court decision is in contradiction with the separation of powers as defined by Article 10 CRF. See for example, Yuri Luryi, "The Appointment of a Prime-Minister in Russia: The President, the *Duma*, the Constitutional Court", *Review of Central and East European Law*, Vol. 25, No. 4, 1999, (585-610).

⁴⁹ *Civil Law*, ed. Sergeeva, Moscow, 2001, pp. 53-54. See also, Strashun, "Constitution as the Main Source of Law".

⁵⁰ Article 86 *Federal Constitutional Law on the Constitutional Court*.

⁵¹ According to Article 3 (2) *Federal Constitutional Law on the Constitutional Court*.

⁵² According to Article 16 CRF.

Something Similar to A Political Question Doctrine?

As a comparison, the U.S. Supreme Court and its *political question doctrine*, meaning that matters essentially political in nature are best resolved by politically responsible branches of government, deserves to be mentioned, when discussing the political sensitivity of the RF Constitutional Court.⁵³ In the U.S., the separation of powers is the starting point for deciding whether a question should be considered a political question, i.e. a non-legal matter, or not. More correctly, a political question could be described as a non-legal matter, and not be made subject to consideration by a court of law. In the U.S. the political question doctrine has been applied *inter alia* in the following areas: foreign affairs, Congress's ability to regulate its internal processes, the process of ratifying amendments to the constitution, and the impeachment process. It should be noted that the content of the doctrine is not static and that its content and sphere of application seems to be a function of the composition of the Supreme Court and the sensitivity of the specific question that is to be dealt with. For example, judicial self-restraint is not exercised to the same extent when dealing with cases related to the Bill of Rights. Thus, the protection of individual rights has been prioritized over the functional arguments on which the doctrine of political questions is based.⁵⁴ This could be compared to the wider and overlapping tolerance interval of Russian political actors concerning questions of individual rights.⁵⁵ Issues of individual rights usually do not interfere with, or need an assessment of, the functions and powers of different state organs in relation to each other. Thereby the chances increase that the tolerance level of the political actors will be wider and to some degree overlapping.

Through practicing judicial restraint in politically sensitive cases, the RF Constitutional Court might be in the process of establishing its own political question doctrine. If so, what is the effect of this process on the judicial protection of rights of individuals? Will it, as suggested by Epstein *et. al.*, contribute to an increased respect for the Court's decisions if the tolerance

⁵³ In this context it is also interesting to reflect upon the approach adopted by the German Constitutional Court, which does not employ a political question doctrine. One explanation to this approach is the experience of Nazism. von Beyme, "The German Constitutional Court in an Uneasy Triangle between Parliament, Government and the Federal Laender", p. 117.

⁵⁴ Thomas Bull, *Mötes och demonstrationsfriheten. En statsrättslig studie av mötes och demonstrationsfrihetens innehåll och gränser i Sverige, Tyskland och USA*, Uppsala, IUSTUS, 1997, pp. 82-83.

⁵⁵ Epstein, *et. al.* "The Role of Constitutional Courts..", p. 142.

interval of the different political actors is respected? And could that, in its turn, strengthen the legitimacy of the RF Constitutional Court in the eyes of the public? During the 1990s, an increase was visible in the number of final decisions rendered by the RF Constitutional Court dealing with individual human rights and freedoms. One way of interpreting this trend is to confirm the thesis of Epstein *et. al.* that a constrained constitutional court will render decisions within the tolerance interval of other political actors in order to accumulate legitimacy.⁵⁶ Tolerance intervals of the political actors in the Russian Federation concerning individual human rights and freedoms were wide and they did coincide during the period 1992-1996, which was not the case concerning separation of powers and federalism.⁵⁷ It might be reasonable to suspect that the tolerance intervals of the Russian political actors concerning individual human rights and freedoms were relatively wide and coinciding up til 2003.

2.1.2 Separation of Persons

The CRF stipulates that no single person can simultaneously be a member of the Federation Council and the *Duma*, while a *Duma* member cannot at the same time be a member of any other representative state organ or body of local self-government.⁵⁸ In addition, deputies of the *Duma* cannot hold government posts⁵⁹ or be engaged in other activity except for, e.g., lecturing and research. *The Federal Constitutional Law on the Government of the Russian Federation* stipulates what positions a minister in the federal Government may not hold at the same time as being a member of the Government. Among other things, members cannot be representatives of the Federal Assembly, of regional representative assemblies, or of election commissions in local self-governments.⁶⁰ Still, Boris Gryzlov was appointed Minister of Internal Affairs on March 28, 2001. At that time he had been an elected member of the *Duma* since the 1999 elections. He was later

⁵⁶ Alternative or parallel explanations might include increasing awareness on the part of Russian citizens of the right to turn to the RF Constitutional Court, and a more restrictive use of the Court by political actors.

⁵⁷ Jonsson, "The Constitutional Court of the Russian Federation, 1997-2001," p. 22.

⁵⁸ Article 97 CRF.

⁵⁹ See also, *the Federal Constitutional Law on the Government of the Russian Federation*.

⁶⁰ Article 11 *Federal Constitutional Law on the Government of the Russian Federation*. There is also evidence that civil servants in regional executive bodies have been elected to local legislative assemblies. Huskey and Obolonsky, "The Struggle to Reform Russia's Bureaucracy", p. 25.

elected chairman of the Yedinstvo faction of the *Duma*. Gryzlov is currently chairman of the Russian State *Duma*. He is no longer a member of the Russian Government, having left his position on December 28, 2003. He is, however, still an important person, close to Putin. Thus, for a period of two years and nine months Gryzlov was both a member of the *Duma* and Minister of Internal Affairs.⁶¹ The Gryzlov episode illustrates how personal contacts, trust, and efficiency, in contemporary Russia, can precede respect for the CRF and other laws that aim to guarantee checks and balances and separation of powers.

2.1.3 Separation of Functions

Vile argues that the main idea of separation of functions is that “*Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches.*”⁶² However, this rather abstract approach has been modified by the idea of *partial separation of functions*, illustrated by:

- the power of impeachment enjoyed by the legislature,
- a shared legislative function but all other functions kept separate, and
- a veto power of the executive branch over legislation.

According to *partial separation of functions*, the power to intervene is limited, and although all branches can exercise some authority in the sphere of all three functions, the separation of functions is still upheld in principle.⁶³ We will now examine the functions of the President, the Federal Assembly and the executive using the idea of *partial separation of functions* as our starting point. For the purpose of this study the vote of confidence in the government will be added to the section on the impeachment procedure. Both procedures, although differing as to

⁶¹ Gryzlov, originally from St. Petersburg did head Yedinstva’s regional branch there before becoming a member of the State *Duma*. The creation of Yedinstva was one of the initial steps preparing the succession of power from Yeltsin to Putin. At the beginning of his first term, President Putin set out to consolidate his powers by replacing the persons closest to him. The Ministry of Internal Affairs is one of the most important ministries in Russia. See, Pavel K. Baev, “The Evolution of Putin’s Regime. Inner Circles and Outer Walls”, *Problems of Post-Communism*, Vol. 51, No. 6, November/December, 2004, pp. 3-13. Baev shows how one of Putin’s primary goals after being elected President was to take control of the Ministry of the Interior. The FSB was used to fight corruption within the Ministry and individuals loyal to Putin were appointed to higher positions. Gryzlov, being from St. Petersburg and of the same generation as Putin, fitted well into this picture. Baev also points to there being an intricate link between “United Russia” and the Ministry of Interior.

⁶² Vile, *Constitutionalism and the Separation of Powers*, pp. 7-8, 13-19. See also, Part II, Chapter One.

⁶³ See Part II, Chapter 2.1.

the severity of what triggers them, aim to provide the legislature with measures to control the executive.

2.1.3.1 Impeachment and Vote of No Confidence

Impeachment of the President

The President can be subjected to an impeachment procedure. The request for an impeachment procedure should be initiated by at least one third of the members of the *Duma*. The *Duma* must then find a charge of treason or some other serious crime in order to continue the process. Preparations for this decision are organized by a parliamentary commission. Thereafter, a decision to continue the impeachment procedure must be taken by two-thirds of the *Duma* members. If the Supreme Court finds the President guilty of the charges and the RF Constitutional Court finds that the obligatory procedures have been respected, then the matter is referred to the Federation Council. The final decision to remove the President from office will be taken by the Federation Council by a two-thirds majority of its members.⁶⁴ The decision to remove the President from office has to be taken by the *Duma* within three months from when the charges were brought against the president. If not, the charges will fail.⁶⁵

The President's right to dissolve the *Duma* does not apply when an impeachment procedure has been initiated and until the Federation Council has taken its decision on the matter.⁶⁶ In addition, the *Duma* cannot be dissolved in cases of state of emergency, when martial law is enforced in the whole territory of the federation, or six months before the ending of the presidential term.⁶⁷ Reaching the conclusion that the impeachment procedure is rather complicated and detailed in combination with the short amount of time available to realize it, we now proceed to examine the vote of no confidence in the government.

Vote of No Confidence in the Government

⁶⁴ Article 93 CRF.

⁶⁵ On the impeachment of Yeltsin in 1995 and 1999, see Kaj Hobér, *The Impeachment of President Yeltsin*, Huntington, Juris Publishing, 2004. In June 1995, after a hostage situation in Southern Russia, preparations were initiated for an impeachment procedure of Yeltsin. However, sufficient support in the *Duma* could not be obtained in order to continue the process, which was also the case in the 1998-1999 preparations for an impeachment procedure against Yeltsin. *Ibid.*, pp. 15-17.

⁶⁶ According to Article 109 (4) CRF.

⁶⁷ Article 109 (5) CRF.

The state *Duma* can initiate a vote of no confidence in the Government. As a reaction to this, the President can choose either to declare the resignation of the Government, or not to accept the vote of no confidence. Should the latter be a fact, then the *Duma* can reconsider the vote of no confidence; and should it come to the conclusion that the vote of no confidence still remains and the President still does not agree, then the President can dissolve the *Duma*.⁶⁸ However, the *Duma* cannot be dissolved on these grounds within a year from its election.⁶⁹ It is ultimately the President that takes the decision on whether the Government should resign or not, even though both the Government itself and the *Duma* can ask for resignation.⁷⁰ Additionally, the President can dissolve the *Duma*, and call for new elections, should the *Duma* reject the President's candidate for the prime ministerial post three times.⁷¹ Thus the Government is more or less in the hands of the President, so that parliamentary control of the Government is weak. In addition, the Government should surrender all its powers to a newly-elected President and the nomination of a new Prime Minister should be made within two weeks after the newly-elected President has taken office.⁷²

With the help of a systematic method of interpretation of the CRF, we can conclude that the CRF protects the President from the influence of the *Duma*, and puts the Government out of the reach of the *Duma*. At the same time, the threat of dissolution of the *Duma* makes the latter open to influence from the President.⁷³ This, in combination with a detailed and complicated impeachment procedure, which has to be ended within an unreasonably short period, is why the Russian Federation is called a super-presidential system.⁷⁴ Still, the fact that the President cannot dissolve the *Duma* during its first year in session, when martial

⁶⁸ According to Article 117 (3) CRF. In June 1995, after a hostage situation in Southern Russia, the *Duma* passed a vote of no confidence in the Russian Government. The President asked the *Duma* to hold one more vote on the matter, and at the same time declared that he would dissolve the *Duma* if it gave a vote of no confidence. The *Duma* voted a second time but did not gain a no-confidence majority. Hobér, *The Impeachment of President Yeltsin*, pp. 15-16.

⁶⁹ See Article 109 (3) CRF.

⁷⁰ Article 117 CRF.

⁷¹ Article 111 (4) CRF.

⁷² According to Articles 116 and 111 (2). See above, in Chapter 2.1.1.2.

⁷³ The 1993 CRF resembles more a Latin American constitution than the American based on checks and balances due to the strong power conferred on the President. Rose and Munro, *Elections without Order*, p. 30.

⁷⁴ See for example, Michael McFaul, "Political Parties", *Between Dictatorship and Democracy. Russian post-Communist Political Reform*, Washington D.C., Carnegie Endowment for International Peace, 2004, (105-134), p. 127.

law or a state of emergency is imposed, if the *Duma* has initiated an impeachment process against the President, and finally, during the last six months of a presidential term⁷⁵, formally strengthens the *Duma* in relation to the president by creating an operational balance in sensitive times.

2.1.3.2 *Legislative Functions and Veto Rights*

The right to initiate legislation is vested in the President of the Russian Federation, the Federation Council, deputies of the Federation Council, deputies of the State *Duma*, the Government of the Russian Federation, and legislative (representative) bodies of the subjects of the Russian Federation.⁷⁶ The right to initiate legislation is also vested, within their jurisdiction, in the RF Constitutional Court, the Supreme Court of the Russian Federation and the Higher *Arbitrazh* Court of the Russian Federation.

All bills are submitted to the *Duma*, the primary legislative body of the Russian Federation. The Council of the *Duma*, which is composed of leaders of political parties, factions and constellations, decides when and what bill to send to the *Duma* committees for consideration.⁷⁷ The *Duma* has a number of permanent standing committees that debate and consider draft legislation before it is submitted for a first reading by the *Duma*. A bill must pass three readings. Should amendments be necessary before the second reading, then they will first be considered by a committee. During the 1990s, members of committees did have a rather large influence since they were able to postpone debates on drafts that they disagreed with.⁷⁸ This possibility is especially effective in areas where the President cannot issue decrees.⁷⁹

The procedure for adopting laws illustrates one of the checks that the *Duma* can exert on the President, as well as its potential for agenda setting – it can delay the adoption of legislation and the ratifying of treaties. This is also one of the incentives for the President to create a controlling majority in the *Duma*, which Putin has done, weakening the balance of power and potential checks by the

⁷⁵ See Articles, 109, 111, 117 CRF.

⁷⁶ According to Article 104 CRF.

⁷⁷ Troxel, *Parliamentary Power in Russia*, p. 75.

⁷⁸ Troxel draws the conclusion that the budget resources in combination with the internal expertise of the committees enabled them to act independently from the executive. *Ibid.*, pp. 59, 68.

⁷⁹ For example, the President cannot ratify treaties by decree. *Ibid.*, p. 75.

Duma.⁸⁰ In addition, bills on financial matters such as revoking taxes, issuing state loans, or that otherwise aim to change the financial obligations of the state, can be introduced only if a relevant decision is taken by the Government.⁸¹

Thus, federal laws are adopted by the *Duma*.⁸² A majority of the total number of the members of the *Duma* is required if not otherwise stipulated by the CRF. Laws adopted by the *Duma* are submitted for consideration to the Federation Council within five days. A law is adopted if a majority of the Council's members have endorsed it, or if it has not been examined by the Council within fourteen days. Should a disagreement arise between the two chambers, then a conciliation committee can be established. Thereafter, the bill will be considered anew by the *Duma*. The *Duma* can override a veto by the Federation Council by a vote of not less than two-thirds of the total number of members of the *Duma*. The Federation Council is obligated to consider laws that have been passed by the *Duma* and that deal with:

- the federal budget; federal taxes and collections;
- regulation of finances, foreign currency, credits and customs as well as with issues of monetary emission;
- ratification and denunciation of international treaties of the Russian Federation;
- status and defense of state borders;
- war and peace.

Federal laws are to be signed and promulgated by the President within fourteen days from their adoption.⁸³ The President has power of veto, although it is not absolute. Even if the President refuses to sign a law, the law can be adopted by a qualified majority of the total members of both chambers in its original wording. Should the veto of the President be overridden, then the law has to be signed and

⁸⁰ Committee positions used to be distributed in relation to the percentage of the seats a party won in elections. That is why it also contributed to checks and balances between different political parties and coalitions in the 1990s. Expertise and seniority influence appointment to the committees and what post will be granted to what person, i.e., chairman, vice-chairman, or member. *Ibid.*, pp. 60, 63.

⁸¹ Article 104 (3) CRF.

⁸² As stipulated in Article 105 CRF.

⁸³ For a clarification of Article 107 (1) and what constitutes an adopted law, see RF Constitutional Court Decision, 22 April, 1996, No. 10-P.

promulgated within seven days.⁸⁴ Federal constitutional laws should be adopted by three-quarters of the members of the Federation Council and two-thirds of the members of the *Duma* - and the President does not have a right of veto.⁸⁵

Sub-statutory legislative acts can be issued by the President, both chambers of the Federal Assembly, and the Government. The President issues decrees and orders that are valid throughout the country. These can be both normative and non-normative but may not contradict the CRF and federal laws.⁸⁶ During the 1990s, of all the normative decrees issued by Yeltsin, the greater part dealt with administrative reorganization, economic policy, and social welfare.⁸⁷ The number of normative decrees issued decreased towards the late 1990s due to increasing activity on the part of the *Duma* - the more laws adopted by the *Duma*, the more restricted becomes the President's possibility to issue decrees.⁸⁸ From the perspective of the individual, statutes are preferable to decrees, taking into account predictability, continuity, and stability, and especially considering that decrees are not made subject to an open debate, whereas statutes are. Troxel's study shows that the vast majority of the decrees adopted by President Yeltsin were non-normative decrees and she draws the conclusion that the extent of executive dominance over the *Duma* has therefore been overrated, especially since almost as many normative decrees as federal laws were issued each year.⁸⁹ On the other hand, President Putin issues decrees in order to swiftly initiate reforms. Often, the decrees are later adopted into federal law, without considerable difficulties. In the light of what seemed to be a positive development in terms of checks and balances in the 1990s, the manipulation of *Duma* elections and the successful constellation of a "Party of Power" after Putin's coming to power, is indeed unfortunate for the upholding of checks and balances and for democracy at large.

⁸⁴ According to Article 107 CRF. For example, Troxel shows that in 1998, when Kirienko was Prime Minister, the *Duma* and the Federation Council used its possibility to overturn vetoes as an effective means in the power struggle with the President. The President and the two chambers of the Federal Assembly all used their veto right quite often between 1996-1998. In 1998, 50 percent of the President's vetoes were bypassed. Troxel, *Parliamentary Power in Russia*, pp. 97, 103-104.

⁸⁵ See Article 108 CRF and *Konstitutsiya Rossiskoy Federatsii. Kommentarii*, p. 432.

⁸⁶ Article 90 CRF. See above Part I, Chapter 4.4.3.

⁸⁷ According to calculations made by Troxel, between 1994-1998 Yeltsin issued 1404 non-normative decrees each year, as compared to 1420 normative decrees in total for the same period. Troxel, *Parliamentary Power in Russia, 1994-2001*, pp. 79-83.

⁸⁸ *Ibid.*, pp. 83-86.

⁸⁹ *Ibid.*, pp. 89-90.

The Federation Council adopts resolutions on matters that according to the CRF fall under its jurisdiction.⁹⁰ Unless otherwise stipulated, these resolutions are adopted by a majority vote. The same is valid for the *Duma*.⁹¹ The Government issues decisions and orders, to be binding throughout the whole territory of the Russian Federation. They have to be in congruence with the CRF, federal laws, and Presidential decrees.⁹² Should this not be the case, then the President can revoke the decisions and orders.

2.1.4 Conclusion

As mentioned above, Vile's pure theory on separation of powers includes: three categories of power providing internal checks and balances; three functions; and separation of persons. According to the CRF, the Russian state is composed of three categories of power. Actually, Russia has a fourth category of power, since the President is not considered part of the executive. Rather, he stands above the other branches of state power and should ensure the application of the CRF throughout the country, leading and co-ordinating the Government and other state administrative bodies.

The means available for exercising checks and balances have been examined above. It can be concluded that it is difficult for the Federal Assembly to impeach the President; that the *Duma's* control of the Government is combined with a threat of dissolution of the *Duma*, should the President and the *Duma* disagree; and that as a result the Government is more in the hands of the President. The RF Constitutional Court provides checks and balances by exercising abstract constitutional review. Its judges are nominated by the President and appointed by the Federal Assembly, which is one of the powers that strengthens the Federal Assembly in relation to the President. Another is the legislative procedure. Since federal laws overtake presidential decrees, in combination with the non-absolute veto power of the President - and considering the relatively high activity of the *Duma* in the 1990s - we can conclude that the *Duma* did provide checks and balances in relation to the President in the 1990s. Thus the CRF provides for a presidency with strong executive powers, a government controlled primarily by the President, and a Federal Assembly with strong legislative powers. Taken together, this should contribute to checks and balances. However, as has been

⁹⁰ According to Article 102 (2-3) CRF.

⁹¹ See Article 103 (2-3) CRF.

⁹² According to Article 115 CRF.

shown above, the separation of persons has been disrespected at least on one occasion, which of course undermines the likelihood of checks and balances being enforced.

Although the formal powers awarded to Yeltsin and Putin are the same, the actual power of the two presidents has varied to a rather large extent. After Putin's coming to power, the federal centre has been strengthened, checks and balances weakened as will be examined below, and the power and influence of the Presidential Administration has increased at the expense of the Government. This, in combination with the creation of a political party that now dominates the *Duma* (to be discussed) and which is loyal to the Kremlin, means that there is a weak *de facto* separation of powers. To summarize, the current trend shows a centralization of power, a weakening of the separation of powers and hence of checks and balances, and an increasing influence of the President and the Presidential Administration on all aspects of political life. Having examined the separation of powers and functions as provided for by the CRF, the next step is to examine the principal-agent relationship of each of the state bodies examined above, with a focus on the possibility to exercise electoral control of political and administrative powers.

2.2 The Principal-Agent Relationship

2.2.1 The Federation Council

The Federation Council is composed of two members from each federal subject – one from the executive and one from the representative state body. The CRF does not stipulate how these representatives are to be appointed, only that it is to be regulated by federal law.⁹³ Up till 1995 regional leaders were appointed by the President. They were often former Party leaders, who in their turn appointed heads of administration in cities and districts. When elections of regional leaders were introduced in 1995, the majority of these leaders remained in power and hence they became members of the Federation Council, which provided them with their own power base in relation to the President.⁹⁴ Since 1995, as a compromise between the President and the *Duma*, members of the Council were *ex officio* the heads of the executive and the representative state body.

⁹³ Articles 95 (2) and 96 (2) CRF.

⁹⁴ Sakwa, *Russian Politics and Society*, pp. 225-227.

Throughout the 1990s the part-time Federation Council was a forum in which regional interests were forwarded, for example, the Council used its veto-right to alter legislation. Nevertheless, during the 1990s it also acted as support for the President in his struggle with the *Duma* when it had a Communist majority.⁹⁵ Taken together, this situation made it possible for individual members of the Federation Council to negotiate special deals for their regions.⁹⁶ This is just one example of how the weak presidency of Yeltsin was further weakened due to its need to strike deals with special interests instead of developing and implementing a sustainable and unified national policy.

When coming to power, Putin changed the procedure for appointing representatives to the Federation Council. The new Federation Council is a full-time state body. Putin's reform was met with resistance from the Federation Council, which used its veto right. A conciliation commission was created after the Council's initial refusal. The new law was eventually passed by the Federation Council on July 26, 2000. According to the new law, representatives to the Federation Council are nominated by the heads of the executive and representative bodies of the federal subjects. The nominees are to be approved by the regional legislature by a simple majority or rejected by a two-thirds majority.⁹⁷ They are not allowed to hold any other form of state employment. The purpose of this reform was to restrict the use of the Federation Council as a lobby forum for regional interests and to make sure that regional leaders devote their time and effort first and foremost to regional politics. In parallel to this reform, a State Council was established. The State Council is an advisory body under the President. Several of the most influential regional leaders are members of this body.⁹⁸ Thus, their influence on regional politics has not necessarily decreased, although the channel has been altered. This also means that they are no longer directly involved in the formal legislative process.

Further reforms as to the appointment of regional leaders have been presented by President Putin, suggesting that the President nominates, and the regional legislative body appoints, the regional head of the executive. Should the regional legislative body reject the President's nominee twice, then it can be subject to dissolution by the President. Clearly, this further weakens electoral control of the

⁹⁵ *Ibid.*, p. 136.

⁹⁶ Hyde, "Putin's Federal Reforms...", p. 728.

⁹⁷ *Ibid.*, p. 729. See also, *SZ* 2000, No. 32, item 3336.

⁹⁸ *Rossiskaya Gazeta*, 8 August, 2000.

regional executive in the sense that it will be indirect, and especially taking into account the threat of dissolution. Being a member of the regional legislative assembly is likely to generate power and influence, but not least, it will provide immunity. Indeed, the actual electoral control in the regions is already weak. Regional legislative bodies are often controlled by the regional executive, and the same persons can be members of the legislative assembly while working in the executive apparatus. Voting turnout is low, as is trust in regional state bodies.⁹⁹ Thus, the separation of powers, functions, and persons is hardly obtained. Nevertheless, it is clear that the presidential vertical power is being strengthened. The question is at whose cost – the regional economic and political élites' or the people's? Electoral control will be further weakened at both the regional and federal level to the benefit of the President's influence. It will also, in practice, restrict federalism - the *de facto* separation of powers between the federal centre and the regional subjects will be weakened. Still, the fact that the regional legislative assembly is to appoint the President's nominee does leave the door open for negotiations between pluralistic interests within what is supposed to be an open institution striving for deliberating democracy.

In conclusion, Putin's reforms create a potentially larger role for regional legislative assemblies to play since they are to appoint both representatives to the Federation Council and regional leaders. Still, the fact that a two-thirds majority is required to refuse a nominee or to call back a representative to the Council, and that an assembly can be dissolved should it reject the President's nominee for governor or president, clearly restrict this potential. In addition, regional legislative assemblies are still often under the control or influence of strong regional leaders. And even though political and electoral processes in the regions leave a lot to be wished for, Putin's reforms do intervene in and restrict the electoral and democratic process in the regions. It remains to be seen to what end regional legislative assemblies are put in the middle between regional leaders and the President of the Russian Federation.

2.2.2 The Duma

The period between 1993-2003 brought with it four *Duma* elections (1993, 1995, 1999, 2003). The elections took place as scheduled. And the basic electoral laws have not changed dramatically since 1993, when President Yeltsin issued a decree stating the *Duma* should have 450 seats - half of them to be determined by a single

⁹⁹ Sakwa, *Russian Politics and Society*, p. 230.

member districts system,¹⁰⁰ and the other half by a system of party list proportional representation.¹⁰¹ Parties had to win at least five percent nationwide in order to win seats. In 2003, the threshold was changed from five to seven percent.¹⁰² The next parliamentary election will take place in 2007 and then the new threshold will be applicable.

Even though elections in Russia have become institutionalized, the current trend is unfortunate. Putin's concentration of power since being elected President made it more difficult for opponents to compete on equal terms in the 2003 *Duma* election.¹⁰³ The first two *Dumas* were characterized by their weak support for the President and his policy. This trend shifted, however, in autumn 1999, when a new party constellation called *Yedinstvo* (Unity) was established. At this time Putin was Prime Minister and he openly endorsed *Yedinstvo*. *Yedinstvo* - established only three months before the 1999 *Duma* election - came in second after the Communist Party. This was an astonishing result, which would not have been possible without the support of the popular Prime Minister and the Kremlin.¹⁰⁴

Before the *Duma* elections in 2003, the presidential office had further strengthened its grip on the *Duma*. The party backed by the President and the Kremlin, United Russia, had the same apparatus at its disposal as did *Yedinstvo* before the 1999 elections and could easily outmanoeuvre the Communist Party and thus became the largest party in the *Duma*. United Russia is a compilation of

¹⁰⁰ The single member district system has benefited independent candidates. Independent candidates can be nominated by a group of individuals or by themselves. Rose and Munro, *Elections without Order*, p. 104. This system might be changed, so that all the *Duma's* 450 seats will be filled by candidates from political party lists.

¹⁰¹ According to this system, Russian voters have the alternative to vote for a party, vote against all parties or to abstain from voting. Thus they cannot express their support for one person in particular. *Ibid.*, p. 105.

¹⁰² Michael McFaul and Nikolai Petrov, "Russian Democracy in Eclipse. What the Elections Tell Us", *Journal of Democracy*, Vol. 15, no. 3, July 2004, p. 20.

¹⁰³ According to the OSCE/ODIHR Election Observation Mission Report, *Russian Federation; Election to the State Duma, 7 December 2003*, Warsaw, 27 January 2004, the election campaign suffered from several serious irregularities. The report states that the elections failed to provide unimpeded access to the mass media on a non-discriminatory basis. There was no clear separation between the State and political parties, especially as concerns United Russia and the state administration, and there were no guarantees to enable parties to compete on equal terms. Voters' access to information and equal conditions for opposition parties to disseminate information to voters was seriously restricted. The advantages of the incumbency seriously distorted the election process.

¹⁰⁴ The Kremlin intervened and actively supported *Yedinstvo* as strongly as it opposed and obstructed the election campaign of Fatherland-All Russia. Timothy J. Colton and Michael McFaul, "Russian Democracy Under Putin", *Problems of Post-Communism*, vol. 50, no. 4, July/August 2003, (12-21), p. 12.

Yedinstvo and the All Russia-Fatherland Party constellation, among others. Interestingly, it also has support from political organizations controlled by regional leaders such as the powerful President of Tatarstan. Thus, political constellations that earlier were opposed to the Kremlin have now joined forces, hence the former opposition has been integrated with the “Party of Power”. Thereby it could be argued that political pluralism has been severely weakened.

Functioning political parties are a precondition for electoral control and accountability of the *Duma* and the political party structure in Russia is best described by:

- its weak grassroots support,
- the existence of “Parties of Power”¹⁰⁵, and
- its floating system of political parties.¹⁰⁶

In addition, political parties are the least trusted of all Russian political and state institutions.¹⁰⁷ Taken together, these characteristics of the political party structure in Russia contribute to weak electoral control and hence the impact of political participation through traditional channels decreases.

To start with, the heritage from the Soviet Union and the total hegemony of the Communist Party has made it difficult for any other parties to establish an effective grass roots movement. The Soviet Communist Party was run top-down, hence leaving no room for grassroots initiative or activity, which in its turn has had an impact on the level of democratic training that individuals have obtained through the years. Secondly, *de facto* obligatory membership of the Soviet Communist Party contributed to the aversion that today exists concerning membership in political parties. A third problem is connected to the phenomenon of “Parties of Power”. Although both President Yeltsin and President Putin have run as independent presidential candidates, they have benefited from support of

¹⁰⁵ Political parties that are established for the purpose of supporting the incumbent.

¹⁰⁶ Characterized by the fact that the parties change from one election to the other. They either disappear altogether, change names, or merge with other parties and create new constellations. The effectiveness of electoral control can clearly be questioned when voters cannot reaffirm or withdraw support from the party that they have supported earlier on. The opposite to a floating party system is an accountable party system in which the supply side of political parties remains relatively stable. In the 1999 *Duma* election, eighteen of the twenty-six parties on the ballot list were new parties. Rose and Munro, *Elections without Order*, pp. 118, 121.

¹⁰⁷ After the 1999 *Duma* election, nine percent expressed trust in political parties, while 75 actively distrusted political parties. *Ibid.*, p. 123.

“their” political parties.¹⁰⁸ Since the establishment of the Russian Federation there has, constantly, been at least one party loyal to the Kremlin, i.e. a “Party of Power”. The election cycle is such that elections to the *Duma* have been held in December every fourth year. The presidential elections have been held shortly after that, often in March the following year. Elections to the *Duma* function more or less as a test election and an opinion poll – the outcome signals where the people put their votes, who is stronger and what the electorate is discontented with. For the 1999/2000 election cycle, a new “Party of Power”, *Yedinstvo*, was established. The ambition was to create a power base and popular support for Putin for the presidential election in March, 2000. Actually, this could be considered the first time that the strategy of a “Party of Power” succeeded. Earlier “Party of Power” constellations had been too closely aligned with Yeltsin and his economic reformers and therefore discredited in the eyes of the public.¹⁰⁹ As a result, these parties have not been particularly successful in the elections and hence the President did not have the support of a majority in the *Duma*. However, due to the outcome of the 1999 *Duma* election, Putin has been enjoying the support of the *Duma*. Fourthly, accountability is hampered by the fact that members of parliament change political party affiliation, sometimes several times, during the four-year term of the *Duma*.¹¹⁰ And accountability is further weakened by the fact that several of the Russian political parties are “one shot wonders”.¹¹¹ In the 2003/2004 electoral cycle, the trend of “Party of Power” and increasing presidential control of the *Duma* reached its crescendo, thus far.

From a principal-agent perspective, this development allows a quite pessimistic conclusion regarding the means available to the primary principal (i.e. the citizen) to exercise electoral control and to claim accountability of its agents.¹¹² Richard

¹⁰⁸ Presidential candidates need not be party nominees. An independent candidate is most likely to attract enough votes to win, considering the low level of political party attachment in contemporary Russia. *Ibid.*, pp. 103-104.

¹⁰⁹ Our Home is Russia led by Viktor Chernomyrdin received 10.1 percent of the votes in the 1993 *Duma* election. *Ibid.*, p. 110.

¹¹⁰ Between the *Duma* elections in December 1995 and the swearing in of the new *Duma* in January 1995, 105 members of parliament had switched parties. More than a quarter of the members of the *Duma* changed their party affiliation between 1995-1999. At the end of the *Duma's* mandate period, 90 deputies represented parties that did not exist when they were elected. *Ibid.*, pp. 106-108.

¹¹¹ In 1993 thirteen parties contested the *Duma*. Only four of these still existed in 1999. *Ibid.*, p. 108.

¹¹² One could argue that Russian citizens are not, and have never been, principal agents. However, our starting point is taken in an abstract reasoning about the channels available for exercising control. This starting point is based on the normative assumption that the individual

Rose and Neil Munro, who have studied elections and popular attitudes in post-Soviet Russia for a decade, conclude that Russia's fluctuating political party system severely hampers individuals' exercise of electoral control.¹¹³ In addition, the rather low trust in political parties and in the *Duma* on the part of Russian citizens, in combination with their weak powers, both *de jure* and *de facto*, do not provide Russian citizens with a strong incentive to use the electoral procedure to voice discontent with state policies or as a means of controlling the political and administrative power. The degree of representativeness of the *Duma* could also be questioned, in the light of the weakness of the grassroots movements in general. The strong presidency, provided for by the CRF, contributes to making elections in Russia a "winner takes all" game. Thus, the effect of the election cycle and the winner-take-all approach leads to an increased urge to influence and manipulate the outcome of *Duma* elections.

2.2.3 The President

The Russian president is directly elected by the people. In theory, this establishes a direct link between the principals and the agent. However, in the Russian case, objective information is a scarce resource and it might be difficult for citizens to independently value each of the candidates. Another complicating factor is the election cycles described above. If a political party that is closely connected to one of the presidential candidates obtains little support from the people, then that presidential candidate is likely to either step down or to change their campaign strategy. Experience from the elections in the 1990s has contributed to a more successful establishment of "Parties of Power" in the sense that the "Party of Power" and the president are seen as a "package deal", each strengthening the other.

The first presidential election in Russia was held in 1991. Boris Yeltsin was at that time extremely popular. That would, however, change. Several years of economic reforms and political turmoil left the Russian people disappointed and with low trust in the President. Crime and corruption increased while ordinary citizens

should be the primary principal and that the primary principal is the only starting point when developing and assessing a regime.

¹¹³ For additional arguments about the declining impact of elections in contemporary Russia see, Michael McFaul and Nikolai Petrov, "Elections", *Between Dictatorship and Democracy. Russian post-Communist Political Reform*, Washington D.C., Carnegie Endowment for International Peace, 2004, (23-55).

became poorer and a notable few became richer - much richer. State finances were poor, the war in Chechnya raged and the Communist Party grew stronger. It was therefore highly uncertain whether President Yeltsin would be re-elected in 1996. The Kremlin was undecided on whether the presidential election in 1996 should be held: postponement was discussed. The war in Chechnya and the economic turmoil were used as possible arguments for postponement.¹¹⁴ Nevertheless, Yeltsin started his presidential election campaign. He invited the notable few, i.e. the so-called oligarchs, to the inner circle of power. The oligarchs consequently came to play an important role for the re-election of Yeltsin in 1996.¹¹⁵

The 1996 election was held in two rounds. Yeltsin won the first round, although only with a third of the votes, hence the second round, in which Yeltsin won 53.8 percent of the votes.¹¹⁶ A Russian president has probably never been as weak, either physically, economically, or politically, as Yeltsin was at this time, and would remain for the coming years.

The next presidential election was to be held in 2000 and the presidential office was up for grabs. Yeltsin's entourage had to fight the Communist Party with Gennady Zyuganov as its front man, as well Moscow's mayor Yury Luzkov and Yevgeny Primakov. Various candidates were tried by the Kremlin but none could reach the same level of support as Zyuganov, Luzhkov¹¹⁷, and Primakov. All candidates that could be connected to Yeltsin and his policies failed. Time was

¹¹⁴ Yeltsin had told his aides to prepare decrees banning the Communist Party, dissolving the *Duma*, and postponing the election. Rose and Munro, *Elections without Order*, p. 84.

¹¹⁵ According to international election observation reports, the media was biased in favour of Yeltsin. The financing of Yeltsin's campaign violated the election laws. In addition, funding in large part originated from funds outside of Yeltsin's campaign organization, which meant that they were not subjected to control or accountability. In addition, the advantage of being in office was misused and members of the Presidential Administration actively campaigned for Yeltsin, in violation of the election laws that prohibited partisan involvement by state officials. *International Observation Mission, Election of President of the Russian Federation 16th June 1996, and 3rd July 1996, Report on the Election*, Michael Meadowcroft, p. 5. Available at http://www.osce.org/documents/odihhr/1996/07/1453_en.pdf, (2004-11-09).

¹¹⁶ Rose and Munro, *Elections without Order*, p. 84.

¹¹⁷ Luzhkov established his own political party called the Fatherland Party. The party was later joined by a movement composed of several regional governors called All-Russia. Together they created the OVR-bloc. However, before that Primakov had joined the Fatherland Party. The OVR was gaining support and people in the Kremlin needed to act in order to counter this development. Hence, the establishment of a Kremlin-friendly constellation that later turned into a political party called Unity. Its first conference was held ten weeks before the 1999 *Duma* election. *Ibid.*, pp. 113-114.

running out and Yeltsin was not well informed about the situation until August 1999.¹¹⁸

In late August, Vladimir Putin was appointed Prime Minister. Putin had no officially known track record of corruption or tight affiliation with Yeltsin and his entourage. This, in combination with his history as a KGB officer and Director of the FSB, made him an eligible candidate. Yeltsin stepped down from office on New Year's Eve 1999, leaving Prime Minister Putin to become Acting President. The process could be described as a succession of power from Yeltsin to Putin - when the president prematurely retires, the prime minister becomes acting president. The first decree issued by Acting President Putin was a decree awarding Yeltsin and his closest collaborators immunity from legal prosecution. An amended version of the decree was later adopted as a federal law.¹¹⁹

In March 2000, Putin was elected President of the Russian Federation, with unprecedented support from the Russian people. Voter turnout was 68.6 percent and support for Putin strong. Putin won 52.9 percent of the votes.¹²⁰ This election was followed with great anxiety since Yeltsin could not be re-elected and the CRF and the electoral laws were to be put to the test. Although criticism was voiced due to the special treatment and advantageous position of the incumbent, the 2000 presidential election was described by international election observers as "...conducted under a constitutional and legislative framework that is consistent with internationally recognized democratic standards..." although the media's strong pro-government bias was criticized.¹²¹ Putin was re-elected in 2004 in an election without surprises. The OSCE stated that the election "*did not adequately reflect principles necessary for a healthy democratic election*", due to state control of the media, lack of meaningful pluralism and discriminatory treatment of candidates in favor of the incumbent.¹²²

¹¹⁸ *Ibid.*, p. 94.

¹¹⁹ See Decree no. 1763, December 31, 1999, and SZ 2001, no. 7, item 617.

¹²⁰ Rose and Munro, *Elections without Order*, 176-177.

¹²¹ There were concerns concerning indirect control of the media, declining political party pluralism, exploitation of the advantage of incumbency, etc. *Russian Federation, Presidential Election, Final Report*, OSCE/ODIHR, Warsaw, 19 May, 2000, p.3. Available at http://www.osce.org/documents/odihr/2000/05/1449_en.pdf, (2004-11-09).

¹²² The 2004 presidential election was criticized for not meeting internationally recognized democratic standards. Reports especially underlined the unfair treatment of presidential candidates by the state-controlled media, violations of the secrecy of ballots and equal opportunities for all candidates. *Russian Federation, Presidential Election, OSCE/ODIHR Election Observation Mission Report*, Warsaw, 2 June, 2004. Available at http://www.osce.org/documents/odihr/2004/06/3033_en.pdf, (2004-11-09). Putin was re-

From the perspective of the principal-agent relationship, presidential elections are the most direct way of exercising electoral control of political and administrative powers in Russia, especially taking into consideration that the Presidential Administration and the Government are increasingly controlled by the President. Nevertheless, presidential elections have to an increasing degree been subject to manipulation and infringements of fair electoral procedure. In combination with increasing state control of the mass media, this further hampers electoral control and accountability of political and administrative powers. Taking into account that the President is to be directly elected by the people and that centralizing reforms aim to strengthen his powers, the increasingly poor quality of presidential elections in Russia becomes even more harmful.

2.2.4 Conclusion

As shown above, the *Duma* and the Federation Council acted as a check on presidential powers during the greater part of the period of this study. After Putin's rise to power, the reforms initiated by him have contributed to an increased presidential influence on the Federal Assembly. That, in combination with manipulation of the election process in both the 2003 and 2004 elections, has weakened the principal-agent relationship. Electoral control, which had been weak throughout the 1990s, has been weakened even further since Putin's coming to power in the sense that Russian citizens are no longer taking part in free and fair elections. The possibility to exercise (indirect) electoral control of the Government is *de jure* almost nil, due to weak parliamentary control of the Government. In addition, the President is in control of the Government and of the Presidential Administration, the two most influential state bodies in contemporary Russia. Direct elections of the President, at least theoretically, allows primary principals to exercise electoral control of the President. However, as shown above, manipulation and irregularities in relation to presidential elections have increased. Thus, in this sense electoral control of the President (and thereby also of political and administrative powers) is weakened.

elected President in 2004 with 71.31 percent of the votes. Voter turnout was 64.39 percent. See, <http://www.rferl.org/specials/russianelection/archives/14032004.asp>, 2004-11-09. See also, Orttung, "Russia", *Nations in Transit 2004*, and *Freedom in the World 2004*, "Russia", NY, Freedom House, 2004, available at http://www.freedomhouse.org/pdf_docs/research/freeworld/2004/russia2004.pdf, (2004-01-23). The latter report concludes that Russia's development until 2003 was marked by its "*further movement toward authoritarianism...*".

Concerning control of administrative powers, it can be concluded that one of the strongest holder of administrative power in Russia today is the Presidential Administration. Thus, parliamentary and electoral control will not contribute to popular influence on the institutions that have the actual power to develop and enforce state policy. Therefore, an alternative is needed. The question is whether the judicial channel can constitute such an alternative. In Chapter Three, the possibility to invoke judicial review in order to exercise control of political and administrative powers will be examined. But before moving on to that question, Russia's mode of governance will be examined in the light of the findings presented above.

2.3 Russia's Mode of Governance

Since the dissolution of the Soviet Union and the establishment of the Russian Federation, there has been a vivid debate amongst scholars on how to define Russia and its political and societal development. At the beginning of the 1990s, Russia was described as a state in transition to democracy. However, at the end of the 1990s, when Putin came to power, new definitions were being sought and applied to describe developments in Russia - most of them aiming to describe a state which is neither democratic nor authoritarian. Definitions included, e.g.: managed democracy, electoral democracy, electoral authoritarianism, and managed pluralism.¹²³

The conclusion to be drawn from what has been examined and discussed above is that the President has increased his *de facto* influence on, and control of, the *Duma* and the Federation Council. Thus, the President has consolidated his position as the integrative and co-ordinating force of the country, which after all is in congruence with how Russian legal doctrine has interpreted the CRF. However, although Russia could be described on paper as a constitutional democracy, with a bill of rights, separation of powers, elections, and a constitutional court to uphold order, a more correct description would be an authoritarian mode of governance, as defined above.¹²⁴

According to the definition of authoritarianism presented in Part II, a characteristic of an authoritarian system is that the direction and substance of

¹²³ For an overview of the debate see, Balzer, "Managed Pluralism: Vladimir Putin's Emerging Regime". See also, Part II, Chapter 2.4.2.

¹²⁴ See Part II, Chapter 1.4.

policy is determined and controlled by a group of people that also control state institutions, such as the executive and the legislature. Some degree of pluralism is accepted. However, the role played by the individual and civil society in relationship with the state is minimal in terms of influence, due to lack of traditional participation and representation. Effective means of control of political and administrative powers are limited.

In contemporary Russia, the President and his entourage have consolidated power by increasing their influence on the Federal Assembly, the executive, the mass media, and civil society. In addition, the vertical power has been strengthened. Some pluralism does exist, both regarding political parties and actors within civil society. Still, these actors are weak and almost without efficient political participation and representation, which also has an effect on their ability to set the agenda and to exercise control (to be discussed). The direction and substance of state policy is increasingly decided by the President and the Presidential Administration – institutions that lack transparency and channels of participation available to persons and interests that are not in the immediate circle of individuals closest to the President. Even though the individual's status in relation to the state *de jure* is generous and liberal, the *de facto* situation is more restricted and not equally beneficial.

In a state with the features here accounted for, control and participation through traditional political channels are not likely to generate individual activism and to benefit a democratic principal-agent relationship. The political power in contemporary Russia is not accountable to its citizens through political parties or interest organizations to any significant extent. Neither is the spirit of the democratic process *per se* respected. The succession of power from Yeltsin to Putin is a good example of this. Putin was chosen by the old elite since he was popular, but not a perceived threat, and because he was willing to guarantee their safety and immunity. Thereafter the stage was set so that he would be elected president.

In conclusion, in Freedom House's report on *Freedom in the World 2005*, Russia was downgraded from *partly free* to *not free*, scoring six points concerning political rights and five regarding civil rights and liberties. One represents the most free and seven the least free.¹²⁵ The reasons for downgrading Russia were; the flawed nature of the election to the *Duma* in 2003 and the presidential election in 2004,

¹²⁵ *Freedom in the World, 2005*, Freedom House, available at <http://www.freedomhouse.org/research/freeworld/2005/table2005.pdf>, (2005-01-22).

further consolidation of state control over the media, and the continued curtailment of opposition political parties and groups. Russia's categorization as not free marks the lowest point since 1989.¹²⁶ Without a doubt, the Russian state needs to become stronger and more efficient in order to be able to generate social economic welfare and security to its citizens. This does not, however, mean that it has to become less transparent and less accountable.

It is clearly the case that the political elite of the Russian Federation never were sufficiently engaged in a state-building process. The development and reforms under Putin's years in power testify to this conclusion. These reforms aim to build a stronger and safer Russia - institutional reforms have focused on federal and legal issues, which might advance the state-building process. Still, the fact that these reforms are combined with an increasingly harsh policy towards civil society and an increasing control of the mass media point in a negative direction. A state's legitimacy is not likely to be lasting if it is based on a mission such as the fight against terrorism, nationalism, or establishing a new empire. Efficient and trustworthy state institutions might, on the other hand, achieve just that.

In conclusion, although several of the reforms initiated by President Putin are understandable and necessary, the context in which they are conducted and the rhetoric which is used to sell them to the people is not comforting from a democratic point of view. Most of the definitions mentioned above that are used to describe Russia today have one thing in common – they all take into consideration the direction in which Russia is considered to be moving. Therefore, whether it is becoming more democratic or authoritarian influences the terminology, such as electoral democracy or electoral authoritarianism, just to mention two. Since it is difficult to tell what the future holds, and taking into account what has been described above, for the purpose of this study it suffices to conclude that the Russian Federation in the beginning of the 21st Century is more authoritarian than democratic. The following Chapter examines how judicial review of political and administrative powers and individual legal activism fits in to this picture.

¹²⁶ "Russia Downgraded to Not Free", New York, December 20, 2004, Press release from Freedom House.

3. Judicial Control of Political and Administrative Powers

3.1 Introduction

During the 1990s the Russian judiciary came to play an increasingly important role in regulating public life in Russia.¹²⁷ Initially, mostly civil cases were brought before the courts. This trend has changed, however, as illustrated by the result of investigations conducted by Kathryn Hendley on Russian *Arbitrazh* courts. Her result shows that the number of civil cases brought before *Arbitrazh* courts has decreased, while the number of administrative cases has increased.¹²⁸ In addition, there has been a steady increase in the number of cases in which citizens have sued the Russian state before courts of general jurisdiction.¹²⁹ In the year 2000, more than 350,000 cases were connected with complaints of actions of officials.¹³⁰ And in 2002, disputes between citizens and state agencies and officials ranged up to 500,000.¹³¹ Taken together, this shows that non-state actors are using the legal system to a larger extent than before in order to manifest discontent with the state administration. At the same time, the courts have increasingly decided against political interests, state agencies, and economic organizations. Four-fifths of all demands for restitution or remedial action against acts and decisions by governmental persons or agencies are granted.¹³² However, although constantly

¹²⁷ An overview of the Russian court system including the Procuracy is provided in Part I, Chapter Four.

¹²⁸ Regions investigated by Hendley include; Moscow City, Moscow Oblast, Leningrad, Novosibirsk, Sverdlovsk, Saratov, Voronezh, Altai Krai and Jaroslavl. Kathryn Hendley, "Appellate Decision-Making in the Russian Arbitrazh Courts: A Three Year Assessment", *Review of Central and East European Law*, Vol. 25, No. 4, 1999, (465-491.), p. 482, table 6 and pp. 481-482.

¹²⁹ For example, in 1998 the number of cases was 91,300 and in 1993 9,701. In 1997 four of five requests for remedial action or restitution were supported by a court of law. Solomon and Foglesong, *Courts and Transition in Russia*, p. 68.

¹³⁰ Nikolai Ulyanov, *Court Judges in Russia Must Shed Soviet Legacy*. <http://strana.ru/state/judiciary/2000/11/27/9753227795.html>

¹³¹ Peter H. Solomon Jr., "Judicial Power in Russia: Through the Prism of Administrative Justice", *Law & Society Review*, Vol. 38, No. 3, September 2004, p. 554.

¹³² See further Foglesong, "The Dynamics of Judicial (in-)dependence in Russia", p. 63. See also Solomon, "Judicial Power in Russia: Through the Prism of Administrative Justice", p. 562. The overall rate of satisfaction for the complainant was in 1999 82.8 %. Between 1996-1999 the rate has ranged from 74.4 to 83.4 %.

increasing, the figures mentioned above might seem small compared to the number of citizens of the Russian Federation. Solomon and Fogelson mention three plausible explanations for the low level of administrative justice in Russia¹³³:

- Lack of knowledge on the part of individuals of the possibility to make a complaint to a court of law against administrative decisions and actions and of the likelihood of a favourable decision.
- The alternative possibility to complain to the Procuracy¹³⁴,
- Complicated technical questions in this area of law, for example the absence of specific provisions defining the accountability of civil servants and the unclear delimitation of jurisdiction between *arbitrazh* courts and courts of general jurisdiction.

This dissertation suggests that an additional explanation might be a weak support structure. Therefore, this part of the dissertation investigates judicial review of political and administrative powers and the preconditions for individual legal activism in Russia, following the framework presented in Part II.

3.2 A Rights-based Concept of Russian Administrative Law?

This Chapter examines the obligations on state bodies, including the President, the executive, and the courts to consider and respect the CRF and the ECHR in their activity. For the purpose of this dissertation, a rights-based concept of administrative law means that rights, as stipulated in national constitutions and in the ECHR, put limitations on the exercise of political and administrative power and can be invoked before a court of law.

Constitutions can be both power-restraining and power-conferring, as has been discussed above. Regarding the power-conferring character of the CRF, it has

¹³³ Solomon and Fogelson, *Courts and Transition in Russia*, p 70.

¹³⁴ From 1955 to 1968 the majority of procuratorial actions consisted of protests against illegal impositions of administrative fines, infringements of individuals' labour rights, or complaints regarding housing, pension and other social services. At this time, judicial review of administrative acts was not practiced. At the end of the 1970s, procurators handled 150,000 to 200,00 complaints a year. Gordon B. Smith, "The Struggle over the Procuracy", in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of the Legal Order*, ed. Peter H. Solomon, Jr. M E Sharpe 1997, (348-373), p. 352. This goes to show that the Procuracy has played an important role in Russian legal history. Besides, a Procurator's legal advice is free of charge. Taken together, this contributes to making the Procurator a beneficial alternative. The structure and task of the Procuracy has been accounted for in Chapter Four, Part I. The Procurator's role in administrative law issues will be further discussed below.

been shown above that the CRF does provide the President with rather strong powers. The President stands above the separation of powers and should be the integrative and co-ordinating force in Russia. He should also protect the CRF and make sure that individuals' rights and freedoms are respected.¹³⁵ The CRF is also formally power-restraining, which could be illustrated by the fact that the CRF and the ECHR have normative effect in the sense that they should be considered and respected by all state authorities.¹³⁶ In addition, the CRF has the highest legal force of all legislative acts in the Russian Federation.¹³⁷ It should have direct effect and should be applied throughout the entire territory of the Russian Federation. Laws and other legal acts applicable in the Russian Federation must not contradict the CRF. In addition, in case of rules - established in an international treaty to which the Russian Federation is a contracting party - that differ from those provided for by statutes, then the rules of the international treaty should be applied.¹³⁸ Thus, the CRF has higher legal force than international treaties to which Russia is a contracting party, since Article 15 (4) only mentions statutes. Rights and freedoms as stipulated in the CRF have direct effect and should determine the sense, content, and application of subordinated laws and the activity of the legislative and executive power and the activity of local-self government.¹³⁹

On October 10, 2003, the Plenum of the Supreme Court of the Russian Federation adopted a resolution on the application by courts of general jurisdiction of commonly recognized principles and norms of international law, and international treaties of the Russian Federation.¹⁴⁰ The resolution states that international treaties play an essential role in safeguarding human rights and basic freedoms. International treaties which have been published and made official have

¹³⁵ See Part III, Chapter Two.

¹³⁶ For example, see Article 3 *Federal Constitutional Law on the Government of the Russian Federation*, according to which the Government when realizing its powers is to be guided by *inter alia* the fundamental principles of the CRF, federal constitutional law, federal law, *glasnost*, federalism, separation of powers and respect for individual human rights and freedoms. See also Article 4, the same law.

¹³⁷ According to Article 15 (1), (2) CRF.

¹³⁸ Article 15 (4) CRF.

¹³⁹ According to Article 18 CRF.

¹⁴⁰ The RF Supreme Court's Plenum's Resolution No. 5, 10 October, 2003, on Application by Courts of General Jurisdiction of the Commonly Recognized Principles and Norms of International Law and the International Treaties of the Russian Federation. Available in English at the official web-page of the Supreme Court <http://www.supcourt.ru/index.php?Key1=English%20version&Key2=English%20version&Value2=http://www.supcourt.ru/en/index.htm>, (2004-12-03).

direct effect.¹⁴¹ Therefore, it is of great importance, according to the Plenum, to improve judicial activities concerned with implementing regulations of international law at the domestic level.¹⁴² In order to ensure a correct and unified application of international law - especially the ECHR - by Russian courts of general jurisdiction, the Plenum has issued a list of clarifications. These state, among other things, that individual rights and freedoms, decided by commonly-recognized international principles and norms of international law, and international treaties of the Russian Federation, have direct effect within the jurisdiction of the Russian Federation. They determine the meaning, content, and application of Russian laws, the activities of federal, regional, and local branches of executive powers, and are to be secured by the Russian judiciary.¹⁴³

When hearing civil, administrative, and criminal cases, courts should directly apply international treaties that have entered into force and are binding on the RF, when they do not require national law for its application, and when they stipulate rights and obligations for national law entities.¹⁴⁴ International treaties that have direct effect should be applied by the courts (including military courts) in civil, administrative, and criminal cases, especially if the national material and procedural law is not in congruence with international law. An incorrect application by a court of internationally-recognized principles or norms of international law and international treaties of the RF, might lead to the court decision being overturned or amended. Incorrect application refers to failure to apply, or misinterpretation of, international principles, norms, and treaties, or when a non-applicable international principle, norm, or treaty has been applied although it should not have been.¹⁴⁵

The Plenum points out that Russian courts are obliged to take the jurisprudence of the ECtHR into consideration in order to avoid violations of the ECHR, since Russia recognizes the jurisdiction of the ECtHR as mandatory in terms of application and interpretation of the ECHR. Thus, decisions by the ECtHR are mandatory for all Russian state bodies, including the courts, and the courts should,

¹⁴¹ They are published in *SZ RF*, in the Bulletin of International treaties. Treaties ratified by the USSR are published in official publications of the Supreme Soviet and the Council of Ministers.

¹⁴² Compare, *Recommendation Rec(2004)6 of the Committee of Ministers to the Member States on the Improvement of Domestic Remedies*, 12 May, 2004.

¹⁴³ The Plenum refers to Articles 15 (4), 17 (1), 18, and 46 (1) of the CRF.

¹⁴⁴ The Plenum refers to Article 15 (4) CRF, Article 5 (1), (3) *Federal Law on International Treaties of the Russian Federation*, and 7 (2) CPC.

¹⁴⁵ Article 15 (4) CRF and Articles 330, 362-364 CPC.

within their sphere of competence, act so as to ensure the obligations of the Russian Federation. Therefore, Russian courts are encouraged to highlight circumstances and facts that clearly violate the ECHR, if they should identify or establish such circumstances. They can also require that necessary measures be taken.

In conclusion, the CRF does have direct effect, and the principles laid down in Chapter Two of the CRF are framed in terms of rights of citizens and organizations. Russian constitutional law legal doctrine puts emphasis on the individual and its well being and underlines the purpose of constitutional law, which is to achieve a balance between individual freedom and state power.¹⁴⁶ In addition, Russian legal doctrine within the sphere of administrative law underlines norms of international law and national law as stipulating individual rights and freedoms as the highest value in society. It is the state's obligation to declare, observe, and protect these rights.¹⁴⁷ This, in combination with the binding force of the ECHR and the ECtHR's case law, allows the conclusion that the concept of administrative law in the Russian legal order is, at least formally, rights-based. It should be noted that the description of the Russian legal order and its notion of public law as being rights-based finds itself on Tuori's surface level of law. It would be too early to conclude that changes have been consolidated on the level of expert legal culture. Although we can see changes concerning legislative framework, the legal doctrine, and the recognition of ECHR and ECtHR as legal sources within the Russian legal order, the depth of legal analysis, the development of legal principles, and the weak capacities to enforce these as well as court decisions, point in the direction of changes being mostly, but not only, of a formal and rhetorical character.

3.3 Judicial Review as Rights Enforcement in Russia?

Focus in this section will be on the formal structure that provides the framework for judicial review in Russia. Although focus will be on *judicial review*, let us first conclude that the CRF stipulates the right to administrative review; citizens of the

¹⁴⁶ See Part I, Chapter 4.4.1.

¹⁴⁷ Kunin, *Administrativnoye Pravo Rossii*, p.69.

Russian Federation have the right to appeal to state agencies and to agencies of local self-government, both individually and collectively.¹⁴⁸

According to the CRF, every person should be guaranteed legal protection of their rights and freedoms. Individuals can initiate constitutional review of statutes before the RF Constitutional Court. Sub-statutory acts, when challenged by individuals, are to be considered by courts of general jurisdiction or the *arbitrazh* courts. Decisions, actions, and inactions on the part of state bodies, local self-government bodies, public associations, and their employees can be appealed before a court of law. The right to appeal to an international body, if all national remedies have been exhausted, is also stipulated in the CRF.¹⁴⁹ The following Sections examine constitutional judicial review, to be followed by a more extensive discussion on judicial review of governmental actions in courts of ordinary jurisdiction.

3.3.1 Constitutional Judicial Review

3.3.1.1 Introduction

Questions concerning the RF Constitutional Court's mandate to hear abstract cases *a priori* and *a posteriori* have been dealt with above in Chapter Two. Here, focus will be on constitutional complaints that can be filed by individuals on the one hand, and inquires of ordinary courts concerning the constitutionality of statutes on the other. Although the latter category of cases is not invoked by individuals before the RF Constitutional Court, they emanate from an actual case in which constitutional rights of an individual are to be assessed.

Each application for constitutional judicial review has to go through a three-step procedure before the RF Constitutional Court will actually begin its constitutional review. Initially, the application must be *registered* by the Secretariat of the Court.¹⁵⁰ The Secretariat will not register applications that obviously do not fall within the jurisdiction of the RF Constitutional Court, that do not meet the formal requirements, that are filed by a person/institution that does not have *locus standi*,

¹⁴⁸ Article 33 CRF.

¹⁴⁹ See Article 46 CRF.

¹⁵⁰ According to Article 40 *Federal Constitutional Law on the Constitutional Court*.

and when the state fee (*gosudarstvennaya poshlina*)¹⁵¹ has not been paid. Still, the applicant must be given the opportunity to correct mistakes of a formal character.

Following registration, the application is subjected to a *preliminary consideration*, by one or more judges, in order to decide its admissibility. This should be done within a time limit of two months from registration of the application. The result of the preliminary consideration is then reported to a *plenary session*. A decision whether to accept an application or not, is taken by the RF Constitutional Court in plenary session within one month from the conclusion of the preliminary examination of the application. The Court can refuse to consider an application if¹⁵²:

- the question to be considered does not fall within the jurisdiction of the RF Constitutional Court¹⁵³,
- the application does not fulfill the requirements established in the present law, and
- if the Constitutional Court has already rendered a decision on the very same issue and that decision still remains its force.

The Court can terminate abstract constitutional review before a final decision has been rendered if the contested act has been withdrawn or lost its force. This is not the case, however, when constitutional rights and freedoms of individuals have been violated by the operation of the contested legislative act. Still, an applicant may withdraw his/her application.¹⁵⁴

¹⁵¹ A State fee to be paid by the applicant. For private persons filing a complaint to the RF Constitutional Court the State fee is 300 Rubles, according to Article 333.23 Article 333.19 *Tax Code of the Russian Federation*, as amended November, 2, 2004, N 127-F3. The RF Constitutional Court may exempt a citizen from the payment of the State fee, or reduce the amount, taking into account the economic and material position of the applicant, according to Article 39 *Federal Constitutional Law on the Constitutional Court*.

¹⁵² According to Articles 41-43 *Federal Constitutional Law on the Constitutional Court*.

¹⁵³ See further Article 125 CRF and Article 3 *Federal Constitutional Law on the Constitutional Court*.

¹⁵⁴ According to Articles 43 (2), and 44 *Federal Constitutional Law on the Constitutional Court*. In the Chechnya case (discussed above) the RF Constitutional Court did not consider the constitutionality of Presidential Decree No. 2137 since the Decree was declared void by Decree No. 2169. Decree No. 2137 was never implemented and thus it did not cause restrictions or violations of citizens' rights and freedoms. Ruling of the Constitutional Court of The Russian Federation "On the Constitutionality of the Presidential Decrees and Resolutions of the Federal Government concerning the situation in Chechnya, 31 July, 1995". Ref: s:\cdl\doc\96\cdl-inf\chechnya. In the Udmurtia case the RF Constitutional Court stated that since the provision under review was still in effect, and since the individual claimants maintained that the contested provisions violated their constitutional right to exercise local self-government, the request by the regional *Duma* to terminate the proceeding, based on Article 43 (2) could not be satisfied. Ruling

3.3.1.2 Constitutional Complaints

The RF Constitutional Court exercises constitutional review in concrete cases. Citizens, associations of citizens, and other agencies and persons specified in federal law have the right to petition the RF Constitutional Court in cases when a law applicable to, or subject to application in, a specific case violates constitutional rights and freedoms of citizens. This recourse can be both individual and collective.¹⁵⁵ The plaintiff has the burden of proof concerning the applicability in a specific case of the law that is said to violate their constitutional rights and freedoms. Thus, for admissibility it is required that the law whose constitutionality is questioned affects constitutional rights and freedoms of the claimant¹⁵⁶, that the law is subject to application in the specific case, and that it is, or has been, under consideration by a court of law or another agency.¹⁵⁷

Public associations may have standing before the RF Constitutional Court in connection with a concrete case. An association will have standing when, according to the claimant, a law supposedly violates individual or collective constitutional rights of its members or of the association *per se*.¹⁵⁸ In addition, legal

of the RF Constitutional Court on the Constitutionality of the Law of the Udmurt Republic of April 17, 1996 "On the System of Governmental Bodies in the Udmurt Republic", January 24, 1997.

¹⁵⁵ According to Article 125 (4) CRF and Article 96 *Federal Constitutional Law on the Constitutional Court*, In the Udmurtia case a group of individuals filed a complaint, claiming that a regional law violated their constitutional rights. The RF Constitutional Court decided to treat it as an individual complaint since the application was founded on an application of the reviewed law in a specific case, involving one of the claimants only. Thus, it is required that all claimants affected by the application of the law to be reviewed should have filed a complaint before a court of general jurisdiction for the RF Constitutional Court to consider it a collective application. In order to enjoy standing before the RF Constitutional Court, individuals should prove that the law to be reviewed by the RF Constitutional Court is applicable to their case through being a party in the original court proceedings. See also, *Konstitutsiya Rossiskoy Federatsii*, p. 604.

¹⁵⁶ See, for example the RF Constitutional Court decisions from 11 March 1996 "on the Constitutionality of Article 1 (3) Federal Law from May 20, 1993, on Social Protection of Citizens...". Available at http://ks.rfnet.ru/postan/p7_96.htm, (2005-02-11). In this case the claimant argued that his constitutional right to a decent environment and social protection had been violated.

¹⁵⁷ According to Article 97 *Federal Constitutional Law on the Constitutional Court*.

¹⁵⁸ In the Union of Advocates Decisions from 29 March 1995 the RF Constitutional Court ruled that a public association, in this case the Union of Advocates, did not have standing before the Court unless its complaint was related to a concrete case. The decision is unpublished. For a compilation see, "Russia's Constitutional Court: A Decade of Legal Reform. Part 1, Summaries of Judicial Rulings", compiled by Ger P. van den Berg, *Review of Central and East European Law*, vol. 27, nos. 2-3, 2001, pp. 222-223.

persons created for the purpose of realizing constitutional rights has standing before the Constitutional Court.¹⁵⁹ However, the Court has ruled that a charitable fund does not have standing if the contested law cannot be applied to it.¹⁶⁰ The RF Constitutional Court has examined an application filed by the Ombudsman in the interests of a citizen.¹⁶¹ In addition, public interest litigation has been ruled out by the Court, in the sense that if a plaintiff has initiated abstract judicial review in a court of general jurisdiction before turning to the RF Constitutional Court, then the contested norm cannot be considered to have been applied in a specific case, and hence the RF Constitutional Court will not hear the case.¹⁶² In conclusion, the RF Constitutional Court is not concerned with the actual application of the contested law and whether it infringes human rights and freedoms. That is an issue for the courts of general jurisdiction.¹⁶³

Admissibility is only accepted concerning statutes (*zakony*)¹⁶⁴, thus review of non-normative and sub-statutory acts does not fall within the competence of the RF

¹⁵⁹ The question was whether a legal person established for the purpose of safeguarding individual rights and freedoms as protected by the CRF would have standing before the RF Constitutional Court. The RF Constitutional Court found that legal persons established for the purpose of realizing constitutional rights and freedoms, in this case the right to entrepreneurial activity and the right to private property as both an individual and collective right, have standing before the RF Constitutional Court. This case concerned *inter alia* a joint-stock company. Decisions from 24 October 1996, “on the Constitutionality of Article 2 (1) of Federal Law from March 7, 1996, on..”, available at http://ks.rfnet.ru/postan/p17_96.htm, (2005-02-11).

¹⁶⁰ A non-commercial organization was denied standing before the RF Constitutional Court on the grounds that the contested law was not directly applicable to the organization *per se*. Decisions from 1 March 2001, not published. For a compilation see, “Russia’s Constitutional Court: A Decade of Legal Reform. Part 1, Summaries of Judicial Rulings”, compiled by Ger P. van den Berg, *Review of Central and East European Law*, vol. 27, nos. 2-3, 2001, p. 450.

¹⁶¹ Decisions from 17 October 2001. Published in *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii*, 2002, no. 2. The Federal Commissioner for Protection of Human Rights (ombudsman) has standing before the RF Constitutional Court. See Article 29 (5) *Federal Constitutional Law on the Commissioner for Human Rights*, SZ 1997, no. 9, item 1011.

¹⁶² An individual had addressed a general court in order to protect a public interest. He did not claim violations of his constitutional rights and freedoms. Decisions from 4 December 1997, not published. see, “Russia’s Constitutional Court: A Decade of Legal Reform. Part 1, Summaries of Judicial Rulings”, compiled by Ger P. van den Berg, *Review of Central and East European Law*, vol. 27, nos. 2-3, 2001, p. 294.

¹⁶³ RF Constitutional Court decisions from 5 June 1997, unpublished. See, “Russia’s Constitutional Court: A Decade of Legal Reform. Part 1, Summaries of Judicial Rulings”, compiled by Ger P. van den Berg, *Review of Central and East European Law*, vol. 27, nos. 2-3, 2001, pp. 279-280.

¹⁶⁴ Excluding normative acts, which are not statutes, for example normative acts of the President, the Federal Assembly, and the Government. These acts can only be challenged in the RF Constitutional Court by the organs mentioned in Article 125 (2) CRF. Individuals will have to turn to a court of general jurisdiction in order to achieve judicial review of normative acts of *inter alia* the President. (To be discussed.)

Constitutional Court. This falls under the jurisdiction of courts of general jurisdiction, which will be further discussed below. When declaring a constitutional complaint admissible, the RF Constitutional Court must notify the court that is considering the specific case on the merits. This notification does not mean that the procedure in the court of general jurisdiction will be suspended, although the court does have the right to suspend the procedure, awaiting the decision of the Constitutional Court.¹⁶⁵

The RF Constitutional Court is obliged to render a decision on the constitutionality of the statute in question. Should the Constitutional Court find that the statute wholly or partly violates the CRF, then the case in which that statute has been applied will be reviewed by a competent court. Court expenses of individuals or associations whose rights have been violated by the unconstitutional statute should be reimbursed.¹⁶⁶

3.3.1.3 Inquires of Ordinary Courts Concerning the Constitutionality of Statutes

If a court of general jurisdiction should find that a statute to be applied in a specific case is unconstitutional, then it must¹⁶⁷ ask the RF Constitutional Court to *assess the constitutionality* of that statute.¹⁶⁸ A court's decision to ask the RF Constitutional Court to verify the constitutionality of a statute should be based on a conviction that the statute in question does not conform to the CRF. Further, the question must have been raised in a specific case.¹⁶⁹

The RF Constitutional Court only considers requests if uncertainty regarding the constitutionality of a specific statute has been manifested and when that statute,

¹⁶⁵ Article 98 *Federal Constitutional Law on the Constitutional Court*.

¹⁶⁶ Article 100 *Federal Constitutional Law on the Constitutional Court*.

¹⁶⁷ Whether ordinary courts have a right to ask the RF Constitutional Court or if it is obliged has been the subject of a vivid debate between the Federal Supreme Court and the RF Constitutional Court, and in legal doctrine. See, Angela di Gregorio, "The Evolution of Constitutional Justice in Russia: Normative Imprecision and the Conflicting Position of Legal Doctrine and Case-Law in the Light of the Constitutional Court Decision of 16 June 1998", *Review of Central and East European Law*, Vol. 24, Nos. 5/6, 1998/1999, (387- 419).

¹⁶⁸ Federal law establishes the procedure for this recourse. Article 125 (4) 1993 CRF. Article 101 *Federal Constitutional Law on the Constitutional Court*.

¹⁶⁹ A recourse to the RF Constitutional Court has to be filed in written form, stating the name of the applicant, the name and address of the state body that issued the act, the precise name, number, date of adoption and source of publication of the act subject to reconsideration, as well as Articles of the CRF that are subject to interpretation. Further, the application must state the position of the applicant with regard to the question put by him and the legal substantiation thereof with a reference to relevant Articles of the CRF. Article 37 *Federal Constitutional Law on the Constitutional Court*.

according to the RF Constitutional Court, is being applied or is subject to application in the specific case considered by the referring court.¹⁷⁰ Proceedings in a court of general jurisdiction are to be suspended from the court's decision to refer the case to the RF Constitutional Court, until the latter has adopted a decision on the issue.¹⁷¹ By contrast, if a citizen invokes the right to initiate concrete constitutional review, then the proceedings in the general court may, but need not, be suspended.¹⁷² If the Constitutional Court finds that the appealed statute is not in conformity with the CRF the Court sends the case back to the court or agency for a review in accordance with the usual procedure.¹⁷³

3.3.1.4 The Direct Effect of the CRF and the Assessment of Constitutionality of Statutes: Its Impact on the Relationship between the RF Constitutional Court and Courts of General Jurisdiction

In 1995, the Plenum of the Supreme Court of the Russian Federation issued a Resolution saying that the fact that the CRF has direct effect means that courts of ordinary jurisdiction can apply the CRF when it is obvious that the law applicable to a specific case is unconstitutional.¹⁷⁴ Still, ordinary courts cannot alter the legal force of a statute and thereby secure a unified 'legal sphere' and predictability. They can only put the statute aside in one specific case. According to a decision by the RF Constitutional Court in 1997, only the Constitutional Court is empowered to interpret the CRF.¹⁷⁵

The delineation of power between the RF Constitutional Court on the one hand and the RF Supreme Court on the other was clarified by a RF Constitutional Court decision from 1998. In this decision, the Court stated that it follows from Articles 15, 18, and 46 CRF that the obligation to apply the CRF directly applies to all courts; that only the CRF regulates the mandate to establish the

¹⁷⁰ Articles 36 (2) and 102 *Federal Constitutional Law on the Constitutional Court*. See also Article 125 (4) CRF.

¹⁷¹ According to Article 103 *Federal Constitutional Law on the Constitutional Court*.

¹⁷² A court of general jurisdiction or other agency applying the appealed statute does have the right to suspend its proceedings according to Article 98 (2) *Federal Constitutional Law on the Constitutional Court* while the constitutionality of the statute is being considered by the RF Constitutional Court. However, it is not obliged to do so.

¹⁷³ See Article 104 *Federal Constitutional Law on the Constitutional Court* which refers to Articles 86 and 100 of the same law.

¹⁷⁴ *BVS*, No. 2, 1996.

¹⁷⁵ Decision of the RF Constitutional Court on the 30th of April, 1997, No. 7-P on the Constitutionality of Presidential Decree No. 315, March 2, 1996. Available at http://ks.rfnet.ru/pos/p7_97.html, (2005-01-25).

constitutionality of legislative acts, and that the CRF only refers to the Constitutional Court for this purpose; that a ruling by the RF Constitutional Court declaring a law unconstitutional has legal force, while decisions from other courts do not; and that decisions by ordinary courts are not obligatory for other courts and their publication is not mandatory. In conclusion, decisions by ordinary courts are not formally a source of law in the Russian legal system, while decisions of the RF Constitutional Court are. Further, according to the CRF only the Constitutional Court can assess the constitutionality of the legislative acts enumerated in Article 125 of the CRF¹⁷⁶, and hence only the Constitutional Court can declare such an act null and void due to its unconstitutionality. However, in its 1998 decision, the Court also stated that the CRF *per se* does not forbid the legislature from providing general courts with the power to declare normative acts void in an abstract norm-control in the framework of administrative proceedings, if such a mandate has been established by a federal constitutional law.¹⁷⁷

In conclusion, predictability and the achievement of a unified and common 'legal sphere' - necessary conditions for the legal certainty of individuals - are strong arguments for an obligation of courts of general jurisdiction to ask the RF Constitutional Court to consider the constitutionality of a statute, should there be any doubt as to its constitutionality. Still, a court of general jurisdiction can choose whether to apply a statute or not, depending on its constitutionality.¹⁷⁸ However, although the case law of ordinary courts is of importance for the development of a common legal sphere, it is not formally binding; hence, uniformity cannot be secured this way. Decisions of the RF Constitutional Court do have legal force. Taken together, this should justify an obligation for courts of general jurisdiction to refer a statute to the RF Constitutional Court for an assessment of its constitutionality.

If it is *clear* that a statute violates the CRF, then that statute should be declared null and void, and it is within the powers only of the RF Constitutional Court to

¹⁷⁶ That is, federal statutes, normative acts of the President, the Federation Council, the State Duma, and the government; constitutions or charters of federal subjects; regional statutes and normative acts that fall under the jurisdiction of the federal centre or under joint jurisdiction between the federal centre and the federal subjects; agreements between the federal centre and federal subjects on the one hand or agreements between two, or more, federal subjects; international treaties which have not entered into force.

¹⁷⁷ Decision of the RF Constitutional Court on the 16th of June, 1998, No. 19-P on the Interpretation of Articles 125-127 CRF. Available at http://ks.rfnet.ru/pos/p19_98.html, (2005-01-25). See also, Decision of the RF Constitutional Court on the 11th of April, 2000, No. 6-P.

¹⁷⁸ BVS, No. 2, 1996.

perform that task. If it is *unclear* whether the statute in question violates the CRF or not, then the first task of an ordinary court would be to assess the legal position as regards the CRF, with respect to the case law of the RF Constitutional Court. Reasonably, should the legal position of the CRF be undisputed and the statute in question is congruent with that, then a situation in which ordinary courts will have to independently interpret the CRF will be avoided. The ordinary court can continue its proceeding after reaching a conclusion as to the constitutionality of the statute in question and the direct effect of the CRF is respected. In addition, according to the RF Constitutional Court, courts of general jurisdiction do have the power to confirm the invalidity of statutes that have already been declared unconstitutional by the Constitutional Court.¹⁷⁹

On the other hand, should the *legal position* of the CRF be *unclear*, or if it is clear but the court of ordinary jurisdiction should find that a statute, which has not already been declared unconstitutional by the Constitutional Court, is in violation of the CRF, then an obligation to refer the case to the RF Constitutional Court seems reasonable, even though the CRF has direct effect. This proposition takes into account the following factors:

- the need to create a unified legal space;
- the case law of ordinary courts does not have legal force;
- only the RF Constitutional Court makes authoritative interpretations of the CRF; and
- it is still the court of ordinary jurisdiction that will deliver the final decision on the merits - hence its mandate and jurisdiction have not been infringed.¹⁸⁰

¹⁷⁹ See RF Constitutional Court *Opredelenie* from 5 November 1998, *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii*, 1999, no. 1. Also available at http://ks.rfnet.ru/opredpdf/o147_98.pdf, (2005-02-11). Compare with the RF Constitutional Court decision from April 11, 2000. According to the Court, should a general court reach the conclusion that a regional law is in violation of the CRF, then the court cannot apply the regional law and it is obliged to refer the case to the RF Constitutional Court. However, ordinary courts do have the power to confirm the invalidity of regional laws that have already been declared unconstitutional by the RF Constitutional Court. RF Constitutional Court Decision from 11th of April, 2000, No. 6-P, on the constitutionality of Articles 1 (2), 21 (1), 22 (3) *Federal Law on the Procuracy*. Available at http://ks.rfnet.ru/pos/p6_00.html, (2005-01-25).

¹⁸⁰ See for example Article 126 CRF.

3.3.1.5 Conclusion

Concerning constitutional judicial review, the impact on the individual whose constitutional rights have been violated will depend on whether the matter has been referred to the RF Constitutional Court by a constitutional complaint, or by a court of ordinary jurisdiction. In the case of a constitutional complaint, the court of ordinary jurisdiction is not obliged to suspend its proceedings while the constitutionality of the statute is considered by the Constitutional Court. Should the general court choose not to suspend its proceedings, then the court is required to take a decision in accordance with the law. The CRF does have direct effect, thus it has to be considered and all courts are obliged to apply the higher law whenever there is a conflict between two legal norms of different levels.¹⁸¹ Thus, any judge reaching the conclusion that a federal law violates the CRF is obliged to apply the latter *and* refer the case to the RF Constitutional Court according to the Constitutional Court.¹⁸²

Naturally, a judge may also find that the statute in question is not unconstitutional. Should the RF Constitutional Court later find that the statute is unconstitutional, then the case will be reopened and considered in the light of the findings of the decision of the Constitutional Court. But, at least theoretically, if an ordinary court should find that a statute is unconstitutional and the RF Constitutional Court should come to another conclusion, then affected individuals could find themselves in a difficult situation - especially taking into account that the decisions of the RF Constitutional Court have legal force. On the other hand, according to *the Federal Constitutional Law on the Constitutional Court of the Russian Federation*, a review of the case takes place *only* if the Constitutional Court should find that the applied law is unconstitutional. Still, this might just be a problem in theory taking into account that, should the court deciding the case on the merits hesitate as to the constitutionality of the statute in question, then chances are that it would ask the RF Constitutional Court to assess constitutionality. In conclusion, if it is a court that refers the case to the Constitutional Court asking for an interpretation of the constitutionality of a statute, then that court is obliged to suspend its

¹⁸¹ See, Resolution No. 23 on Court Decisions issued by the Plenum of the Supreme Court of the Russian Federation on December 19, 2003. Available at <http://www.supcourt.ru/solution/current.php?id=116>, (2005-01-26). The Resolution states that all court decisions should take the case law of the RF Constitutional Court, Resolutions issued by the Supreme Court Plenum, and the ECtHR's case law into account when rendering a decision.

¹⁸² Decision of the RF Constitutional Court on the 16th of June, 1998, No. 19-P. See also, Decision of the RF Constitutional Court on the 11th of April, 2000, No. 6-P, and Solomon and Fogelson, *Courts and Transition in Russia*, p. 77.

proceedings. Thus, this procedure is more likely to provide a unified legal space and it will provide a final decision in congruence with the findings of the Constitutional Court; hence, it should be more beneficial to the individual. Thus far, the assessment of constitutionality of statutes has been examined. Normative acts other than statutes¹⁸³ can be declared inapplicable by courts of general jurisdiction, should the act under consideration violate a higher legislative act.¹⁸⁴ Review of *the legality* of normative and non-normative acts will be examined in the following sections.

3.3.2 Judicial Review of Governmental Action

3.3.2.1 Introduction

The aim of this Section is to examine the legislative framework that regulates judicial review of governmental actions.¹⁸⁵ According to the CRF, everyone is guaranteed judicial review of their rights and freedoms.¹⁸⁶ Decisions, actions, or omissions to act of agencies of state power, agencies of local self-government, public associations, and officials may also be appealed before a court of law. In addition, each person enjoys the right, in accordance with international treaties of the Russian Federation, to apply to inter-State agencies for the defense of their rights and freedoms if all domestic means of legal remedies have been exhausted.¹⁸⁷ Thus, the right to file a complaint to the ECtHR also enjoys constitutional protection. Judicial review of governmental actions is exercised by the RF Constitutional Court (as has been discussed above) and courts of general jurisdiction in accordance with the rules stipulated in the CPC. At the beginning of 2005 Russia did not have any administrative courts.

¹⁸³ Article 251 (1) CPC mentions normative acts adopted by state bodies, etc. According to Article 27 CPC, normative acts by the President, Government, and regional state bodies are to be reviewed by the Supreme Court acting as first instance.

¹⁸⁴ Article 253 CPC.

¹⁸⁵ For the definition of governmental actions in this dissertation see, Part II, Chapter 3.3.4.2.

¹⁸⁶ Article 46 (1) CRF.

¹⁸⁷ According to Article 46 (2) CRF. In *Shupanko v. Government of St. Petersburg* the Supreme Court underlined that complaints against inactions on behalf of administrative authorities can be invoked before a court of law. *BVS* 1996, No. 5, pp. 2-3. Mr Shupanko, a war veteran, was according to law, entitled to benefits which could not be realized due to the inaction of regional authorities (failure to issue license).

Remembering the definition of governmental action given in Part II, governmental action in a broad sense comprises any action of one or more persons fulfilling a public function, including both government officials and private persons. Governmental actions may have both an individual and a general character.¹⁸⁸ Regarding administrative acts, the definition presented above refers to any governmental action that is neither exercise of judicial functions nor parts of legislative and governmental policy. Thus, the definition of administrative acts refers to governmental action that is directed to the realization, implementation, and further development of that policy. These acts may be both normative and non-normative, i.e. decisions (*resheniye*) or actions (*deistviye*). The following section examines procedural laws providing for judicial review of both normative and non-normative acts.

3.3.2.2 Civil Procedural Law and Administrative Law - General Rules

In Russia, courts of general jurisdiction consider cases emanating from public legal matters. They exercise judicial review of normative and non-normative governmental actions.¹⁸⁹ Norms of administrative procedural law can be found, besides in the CPC, in a number of material laws, for example, *the Law on the Procuracy of the Russian Federation*, the Civil-, Administrative-, and Criminal Procedural Code. In addition, the Labor Code, Housing Code, Law on the Defense of the Rights of Consumers, among others, contain procedural rules.¹⁹⁰ In the following, focus will be on the CPC and the federal law on *Appealing to a Court of Law Actions and Decisions Infringing the Rights and Freedoms of Citizens* (hereinafter “the Law on Appeal”)¹⁹¹ – hence, on administrative procedural rules

¹⁸⁸ Compare with Kunin, *Administrativnoye Pravo Rossii*, pp. 24-28.

¹⁸⁹ See, Article 245 CPC, adopted on November 14th, 2002 and entered into force on February 1, 2003. See also, The Supreme Court’s Plenum’s Resolution No. 2, 20 January, 2003, “On questions related to the adoption and entering into force of the new CPC”. The CPC is also applicable to cases of judicial review of administrative decisions, acts or omissions, according to Article 6 of *the 1993 law on Appealing to a Court of Law Actions and Decisions Infringing the Rights and Freedoms of Citizens*. Courts of general jurisdiction also consider cases concerning decisions and acts or omissions of bodies of local self-government, see Article 52 *Federal Law on General Principles of the Organisation of Local Self-Government in the Russian Federation*, SZ 1995, no. 35, item 3506.

¹⁹⁰ See, the Supreme Court Plenum Resolution “On questions related to the adoption and entering into force of the new CPC”.

¹⁹¹ *The Law of the Russian Federation on Appealing to a Court of Law Actions and Decisions Infringing Citizens’ Rights and Freedoms*. Adopted April 27, 1993 and amended in December 14, 1995, SZ 1995, no. 51, item 4970.

as part of civil procedure. Administrative procedure law is recognized in Russian legal doctrine as a special branch although it has not been codified as yet.¹⁹²

In the 2002 CPC, administrative procedure is dealt with in Chapters 23-26. Chapters 24-25 will be examined below.¹⁹³ Chapter 23 of the CPC stipulates the general procedural rules applicable to legal proceedings emanating from public legal matters. It is stipulated that courts of general jurisdiction consider administrative cases¹⁹⁴:

- initiated by citizens, organizations, and procurators contesting the legality of normative acts, or parts thereof, if another court according to federal law is not to consider the complaint,
- concerning complaints of decisions, actions, or inactions of state bodies, bodies of local self-government, civil servants and state and municipal officials,
- concerning the protection of election rights and participation in popular referendums,
- other cases related to public law matters which according to federal law fall under the jurisdiction of courts of general jurisdiction.

Administrative cases are usually considered and decided by a single judge. However, if prescribed by federal law the case will be considered and decided by a collegium. Administrative cases are, as a general rule, not to be considered in the absence of the plaintiff.¹⁹⁵ There are, however, exceptions to this rule, as will be shown below. The court can order the obligatory presence at the court session of representatives of state or local self-government bodies, or civil servants. If a person whose presence has been ordered by the court does not show, he or she can be fined.¹⁹⁶

Judicial review of normative and non-normative acts is instigated by a complaint from a concerned party and a court cannot initiate a case *ex officio*. However, the

¹⁹² Elena Aleksandrovna Vinogradova, "Procedural Law in Russia. Judicial Procedures of Resolving Disputes in the Economic Field", *Legal Foundations of Russian Economy*, eds. Juha Tolonen and Boris Topornin, Kikimora Publications, 2000, p. 206.

¹⁹³ Chapter 26 stipulates procedural rules applicable to protection of the right to take part in elections. This will not be dealt with here, due to lack of time and space. In addition, this very interesting and important Chapter of the CPC and its case law merits a study of its own.

¹⁹⁴ See Article 245 CPC.

¹⁹⁵ According to Article 246 (1), (2) CPC. Thus, Chapter 22 CPC, which regulates court proceedings *in absentia* is not applicable to administrative cases.

¹⁹⁶ According to Article 246 (4) CPC.

court is not bound by the arguments put forward in the complaint.¹⁹⁷ The complaint has to contain information about the decision, action, or inaction that should be declared illegal, and what rights and freedoms have been violated by the decision, action, or inaction. Judicial review of non-normative acts includes review of both facts and law.¹⁹⁸ It is not required that a complaint has been subject to administrative review for a court to consider the complaint.¹⁹⁹

Regarding judicial review of normative acts, the burden of proof concerning the circumstances, justified grounds for taking the normative act, and questions concerning its legality falls on the state body or body of local self-government responsible for adopting the normative act. Concerning decisions, actions, or inactions by the bodies mentioned above, civil servants, or state and municipal officials, the responsibility falls on the persons or bodies who took the decision or conducted the action. When considering and deciding an administrative case, the court may *ex officio* demand that information of relevance to the case be delivered by the bodies or persons mentioned.²⁰⁰ Civil servants who do not respect this demand can be subject to fines.

If, when a complaint has been filed, it is to be established what court has jurisdiction, then the judge can halt the proceeding and demand that the complaint be rewritten so that it complies with the requirements stipulated in Article 131 and 132.²⁰¹ If rules of jurisdiction have been violated, then the judge will dismiss the complaint.²⁰² Additionally, the judge will refuse a complaint if a court decision has already been rendered on the same merits and that decision has entered into legal force.²⁰³ Thus far, these are the general principles that are to guide the administrative judicial process. We will now turn to Chapter 24 of the CPC, in which judicial review of normative acts is regulated.

¹⁹⁷ According to Article 246 (3) CPC.

¹⁹⁸ Burnham, Maggs, and Danilenko, *Law and Legal System of the Russian Federation*, p. 621.

¹⁹⁹ According to Article 247 CPC. See further Article 4 (1) “the Law on Appeal”.

²⁰⁰ According to Article 249 (1), (2) CPC.

²⁰¹ These Articles stipulate what information a complaint must contain and what documents should be attached to the complaint.

²⁰² According to Article 247 (3) CPC.

²⁰³ According to Article 248 CPC. See also Article 250, which stipulates that after the court’s decision has entered into legal force the case cannot be retried on the same grounds.

3.3.2.3. *Judicial Review of Normative Acts*

The question of what court had the mandate to review what legislative acts was all but clear before 2002.²⁰⁴ The new CPC, adopted in 2002 and entering into force in February 2003, clarifies the jurisdiction of review of normative acts.²⁰⁵ Previous to this law entering into force there was a lacuna in the law which *inter alia* meant that individuals could not initiate judicial review of normative acts adopted by the President.

Today, citizens and organizations who consider that their rights and freedoms as stipulated in the CRF, laws, and other normative acts, have been violated by normative acts adopted by state bodies, bodies of local self-government, or civil servants can complain before a court of law and ask that the normative act be declared, in whole or in part, in violation of the law and hence inapplicable (*nedeystviyushchiy*), not null and void (*nedeystvitelnyy*).²⁰⁶ In addition, a procurator does have the right to initiate a case before a court within the limits of his competences, as established in the CPC and *the Federal law on the Procuracy*.²⁰⁷ In addition, the President, Government, legislative assemblies of federal subjects, the highest civil servants of the federal subjects, local self-government bodies and heads of municipalities, can ask a court of ordinary jurisdiction to establish the legality of the questioned act if they consider that their competence has been violated by a normative act adopted in the prescribed order by another state body.²⁰⁸

In order to assess what court has jurisdiction, paragraphs three to six of Article 251 CPC will be consulted. This Article also stipulates what information the complaint must contain. References are made to Articles 24, 26, 27 and 131 CPC.

²⁰⁴ See Solomon, "Judicial Power in Russia: Through the Prism of Administrative Justice", pp. 557-559.

²⁰⁵ Normative acts are acts adopted by the bodies mentioned above, and that are applicable to an indefinite group of people, subject to application more than once and independently from having once initiated or halted a specific legal relationship. See, the Supreme Court Plenum Resolution "On questions related to the adoption and entering into force of the new CPC." Section 12. Normative acts are to be registered with the Ministry of Justice. E.P Danilov, *Grazhdanskiy Professionsalny Kodeks Rossiskoy Federatsii*, Moscow, Prospekt, 2003, p. 426.

²⁰⁶ See the Section above on the division of powers between the RF Constitutional Court and courts of general jurisdiction.

²⁰⁷ According to Article 251 (1) CPC. See also, Article 45 CPC and *Federal Law on the Procuracy*.

²⁰⁸ According to Article 251 (2) CPC. The *Duma* is not mentioned in this context. Of course, the *Duma* is the legislative assembly and considering the hierarchy of legal norms it may be superfluous to mention it in this context - it can adopt a legislative act that will supersede a normative act by, for example, a state body. However, the *Duma* also has the power to issue sub-statutory acts regarding questions that fall within its jurisdiction according to the CRF. See Article 103 (2) CRF.

Article 24 deals with the jurisdiction of city courts. The city courts have a negatively defined competence. Everything that does not fall under the competence of the Peace Courts²⁰⁹, the military courts, or higher instances falls to the city courts. Article 26 deals with the jurisdiction of the highest courts of general jurisdiction of the federal subjects and Article 27 with the jurisdiction of the Supreme Court of the Russian Federation.

The RF Supreme Court acts in the capacity of first instance in cases concerning non-normative legal acts issued by the President of the Russian Federation, the Federal Assembly, and the federal Government. This will also be the case concerning normative legal acts issued by the President of the Russian Federation, the federal government, and other federal state bodies that affect citizens' and organizations' rights, freedoms, and legal interests.²¹⁰ Moreover, courts of general jurisdiction consider the legality of normative acts other than those accounted for in Article 251, if the competence does not fall exclusively on the RF Constitutional Court.²¹¹ Abstract constitutional judicial review, exercised by the RF Constitutional Court, of normative acts issued by the President, *Duma*, Federation Council, and the Government cannot be invoked by individuals, only by the actors listed in Article 125 (2) CRF. Thus, individuals only have standing before the RF Constitutional Court to contest *statutes* in concrete cases. In conclusion, filing a complaint does not mean that implementation of the contested normative act will be suspended.²¹²

As to the time limit, the case should be considered within one month from the day that the complaint was filed. The plaintiff and the persons or bodies responsible for adopting the contested act must be informed about the time and place of the court session. The person who filed the complaint and a representative for the body that adopted the questioned normative act should attend the proceedings. Depending on whether the absence of an interested party can be subscribed to a legitimate excuse, the court may consider the complaint in the absence of one of the parties, provided that information on the time and place of the court session has been adequately delivered.²¹³

²⁰⁹ For a description of the jurisdiction of Peace Courts see Part I, Chapter Four.

²¹⁰ According to Article 27 CPC. According to Article 125 CRF individuals' cannot initiate abstract or concrete judicial review of sub-statutory acts before the RC Constitutional Court.

²¹¹ According to Article 251 (3) CPC.

²¹² According to Article 251 (7) CPC.

²¹³ Article 252 (2) CPC.

The court's refusal of a plaintiff's demands (*trebovaniye*) does not mean that the review of the contested act is refused as well. The legality of the contested act can still be assessed by the court. In these cases, the court does not depend on recognition from the body or person responsible for the act for it to proceed.²¹⁴

If the court recognizes that the questioned normative act does not violate federal law or other normative legislative acts with higher legal force, then it will decide not to uphold the considered complaint.²¹⁵ However, should the court find that the questioned act is not in congruence with federal law or other normative legislative acts with higher legal force, then the court will declare the whole or parts of the act inapplicable starting from the day it was adopted, or starting from another day decided by the court. A court decision declaring a normative act wholly or partly inapplicable enters into legal force when the time limit for appeal has expired and an appeal has not been filed.²¹⁶ The contested normative act, and other normative acts based on or implementing it, also become inapplicable. Such a court decision, or the notification of such a decision which has already entered into legal force, is to be published in an official journal which usually publishes normative acts.²¹⁷ A court decision declaring a normative legal act invalid cannot be overruled by a subsequent similar normative legal act.²¹⁸

3.3.2.4. *Judicial Review of Non-Normative Acts*

Judicial review of non-normative, administrative acts is governed by “the Law on Appeal” and the 2003 CPC. In this Section, focus will be on the CPC. “The Law on Appeal” will be examined in the following section.

Citizens and organizations have the right to file a complaint against decisions, actions, and inactions of state bodies, bodies of local self-government, civil servants, and state and municipal officials that violate their rights and freedoms. Citizens and organizations have the right to initiate both judicial and administrative review.²¹⁹ Should judicial review be initiated, then the complaint can be filed either in a court of law where the plaintiff lives, or in a court of law where the body or person responsible for the decision, action, or inaction is

²¹⁴ Article 252 (1) CPC.

²¹⁵ According to Article 253 (1) CPC.

²¹⁶ See further on the rules of appeal in Article 209 CPC.

²¹⁷ See further Article 253 (3) CPC.

²¹⁸ According to Article 253 (4) CPC.

²¹⁹ According to Article 254 (1) CPC.

located.²²⁰ This solution has the potential to enhance access to justice and it is quite important for a country of Russia's size and taking into account the poor socio-economic situation of many individuals living in Russia. Complaints by military personnel against administrative decisions by army units or its officers are filed in a military court.²²¹ A court has the right to suspend enforcement of a contested decision until the court's decision has entered into legal force.²²²

The court considers collegial and individual administrative acts, that:

- violate the rights and freedoms of citizens,
- hinder citizens in their exercise of rights and freedoms, or
- illegally impose obligations on citizens, or
- illegally make a citizen subject to some kind of responsibility.²²³

Citizens have the right to file a complaint in a court of law within three months from the day that they became aware that their rights and freedoms have been violated. Omission to consider the three-month time limit is not in itself grounds for the court to refuse the complaint.²²⁴ However, the reasons for violating the time limit, further developed in the preparations for the court session or during the court session, can cause the court to dismiss the complaint.

The complaint is to be considered by the court within ten days and in the presence of the complaining citizens, and the head or representative of the body or person responsible for the decision or actions being contested. Should any of these parties fail to appear, and if they have received the necessary information about the time and place for the court session, then the court can still consider the complaint.²²⁵

Should the court find that the above bodies or persons are responsible for violating a citizen's rights and freedoms, then the court will order the violation of

²²⁰ Questions of which court has jurisdiction are dealt with in Article 24-27 CPC. Complaints over permission denied to leave Russia are filed in the highest regional court of general jurisdiction of the federal subject in which the decision to leave the country has been refused. See Article 254 (2) CPC. This rule is applicable when the person whose request to leave the country has been refused on the basis of that person having spread information constituting state secrets.

²²¹ Article 25 CPC.

²²² According to Article 254 (4) CPC.

²²³ According to Article 255 CPC. Compare with Article 2 (1) "the Law on Appeal".

²²⁴ According to Article 256 (1), (2) CPC.

²²⁵ See Article 257 (1), (3) CPC. Compare with Article 252 (2) CPC concerning judicial review of normative acts which are to take place within one month from filing a complaint.

the rights and freedoms to be fully terminated, and all obstacles to the citizen's exercise of rights and freedoms to be removed.²²⁶ The court decision ordering the violation to be terminated should be communicated to the bodies concerned within three days from the court decision entering into legal force. Within not more than one month from the court decision becoming known to the responsible persons or bodies, the same must report back to the court, and the citizen concerned, about implementation of the court decision.

The court decision should be implemented in accordance with Article 206 (1) CPC.²²⁷ This Article stipulates that when adopting a court decision that obliges the defendant to take action in order to realize the decision, the court may, in the same decision, stipulate that if the defendant fails to act in congruence with the decision within the established time limit, then the plaintiff has the right to implement the decision and to refer to the defendant for all expenses involved.

The next section examines the “the Law on Appeal”. Some repetition is unavoidable, taking into account that Chapter 25 of the CPC has integrated some of the Articles in “the Law on Appeal”. Nevertheless, the federal law is more detailed, and provides additional rights, as will be examined in the following Section.

3.3.2.5. The Law of the Russian Federation on Appealing to a Court of Law Actions and Decisions Infringing the Rights and Freedoms of Citizens (“the Law on Appeal”).

According to “the Law on Appeal”²²⁸, citizens of the Russian Federation have a right to complain to a court of law if they consider that their rights and freedoms have been violated by an act or a decision by a State body, a body of local self government, establishments, enterprises, and their associations, public associations, official or civil servants.²²⁹ Thus, if compared to the CPC, this law includes a wider number of bodies and organizations against whose decisions or actions complaints can be filed before a court of law. The CPC does not include establishments, enterprises, and their associations, and public associations. According to the RF Supreme Court's Plenum “On questions related to the adoption and entering into force of the new CPC”, questions of law that arise in

²²⁶ According to Article 258 (1)-(2) CPC.

²²⁷ Article 258 (3) CPC.

²²⁸ For an overview of the history of the right to appeal administrative decisions in Russia, see Part I, Chapter Four.

²²⁹ Article 1 “the Law on Appeal”.

relation to establishments, enterprises, and their associations, and public associations should be resolved as private law legal matters, not as questions of public law.²³⁰

The new federal law on appeal remedied several of the weaknesses of Soviet laws and edicts.²³¹ Not only can actions and decisions be challenged, but also omissions on the part of the bodies and persons mentioned above. Further, the applicability of the law was extended to include public bodies that are not state bodies, for example trade unions and political parties. In addition, according to the amendments made in 1995, employees of municipal authorities are considered as state employees for the purpose of this law. The question of responsibility of state employees is regulated by *the Federal Law on the Basis of the Public Service of the Russian Federation*.

What Acts can be Challenged?

Actions, decisions, or inactions by a State body, a body of local self government, establishments, enterprises, and their associations, public associations, state officials or civil servants (including municipal employees) can be challenged – jointly or individually when²³²:

- rights and freedoms of citizens are violated by actions or decisions taken by the bodies mentioned above, or
- citizens are hindered in their exercise of rights and freedoms due to obstacles created by actions or decisions on the part of the bodies mentioned above, or
- an obligation has illegally been imposed on a citizen, or a citizen has illegally been made subject to some kind of responsibility.

²³⁰ Still, the organizations mentioned here could have power, through delegation, to fulfil state/ or administrative tasks. And if this should be the case, it is not unlikely that the relationship between the individual and the organization performing the task must be considered as an administrative law relationship. However, the Resolution is not clear on whether the CPC, Chapter 23-25 and "the Law on Appeal" apply to private bodies engaging in activities that substantially are to be described as state administrative law activities. The RF Constitutional Court has ruled that the state may transfer parts of its public functions to a public association with obligatory membership, for example notaries and lawyers, without violating the CRF. Decision of the RF Constitutional Court, May 19, 1998, 15-P. Available at http://ks.rfnet.ru/postan/p15_98.htm, (2005-03-10).

²³¹ See above, Part I, Chapter Four.

²³² According to Article 2 (1), (2) "the Law on Appeal".

In this context, it is interesting to note that during the 1970s when an extension of judicial review was subject to academic debate, administrative failure to act was especially considered. In particular, the debate referred to omissions to act related to the award and size of pensions, violations of the waiting list to receive housing, providing places for children in nurseries, kindergartens. In the 1970s, Barry stated that “*It seems probable that if broadening of judicial review is to come in the future, it will be with regard to some of the items on this second list*” [that is, refusal of permission by administrators, or administrative failure to act].²³³

Not only can the decision, action, or omission *per se* be challenged, but also the official information constituting the basis for the decision or action. Thus, the extent of judicial review of administrative acts in Russia is rather wide in the sense that it involves not only legality, since the facts of the case will also be considered anew.²³⁴ The decision or action, and the information constituting its basis, can be challenged separately or at the same time. The information referred to is written or verbal official information that has had an effect on the realization of citizens’ rights and freedoms and that has been addressed to:

- a State body,
- a body of local self government,
- an establishment or enterprise, and their associations,
- a public association,
- a state official or civil servant responsible for the action or omission,

if it can be decided who is responsible for the information. And most importantly, the court must accept the information as constituting the basis for the questioned decision or action.²³⁵

In order to for individuals to be able to realize this rather generous right to also contest the basis for the decision, citizens claiming that their rights have been infringed should have the possibility to familiarize themselves with documents and other materials directly concerning that right or freedom.²³⁶ Civil and state servants are obliged to make this material available, if the distribution of information in these documents and materials is not made subject to regulation by federal law. The information that must be available includes notices, reports, and

²³³ Barry, “Administrative Justice and Judicial Review in Soviet Administrative Law”, p. 255.

²³⁴ Burnham, Maggs, and Danilenko, *Law and Legal System of the Russian Federation*, p. 621.

²³⁵ See Article 2 (4), (5) “the Law on Appeal”.

²³⁶ According to Article 2 (3) “the Law on Appeal”. Compare with Article 24 (2) CRF.

representations made to the public body, official, or state employee. This Article specifies the right to information stipulated in Article 24 (2) CRF, according to which agencies of state power and agencies of local self-government and their officials are obliged to ensure to all the opportunity to familiarize themselves with documents and material directly affecting their rights and freedoms, unless otherwise provided for by law.

Jurisdiction, Time Limits, and Standing

Complaints filed according to “the Law on Appeal” are considered by courts of general jurisdiction under civil procedural law, with special attention paid to “the Law on Appeal”. Courts of general jurisdiction consider all complaints concerning violations of citizens’ rights and freedoms except for those falling under the exclusive competence of the RF Constitutional Court according to federal law, and when otherwise stipulated by law.²³⁷ Army employees have the right to file complaints with Military Courts if an action or decision by Army organs or employees has violated their rights.²³⁸ Thus, citizens of the Russian Federation have the right to turn directly to a court of law in order to file a complaint against a decision, action or inaction of a state body. However, they can also choose administrative review. If a plaintiff chooses administrative review, then it is required by law that the complaint be considered within one month. If the complaint is refused or an answer has not been received within this time limit, then the plaintiff has the right to address a court of law with the complaint.²³⁹ Still, it is not required that administrative review precedes judicial review.

The complaint must be filed with a court of law within three months from the day that the plaintiff became aware that his or her rights and freedoms had been infringed. In cases when the citizen chooses administrative review by addressing the body or person responsible for the action or decision causing the violation, the time limit expands to:

- one month from the citizen receiving, in writing, a negative decision or a refusal to consider the matter, or
- one month from the expiry of the one-month time limit within which the body or official should have rendered a written answer.

²³⁷ According to Article 3 “the Law on Appeal”.

²³⁸ Article 4 (5) “the Law on Appeal”.

²³⁹ Article 4 (1), (2) “the Law on Appeal”.

The court can prolong the term of submission of a complaint, if valid reasons are presented. According to an amendment made in 1995, any circumstances that have complicated the reception of information on the appealed decision or act and which should be made available to the plaintiff according to Article 2, may constitute valid reasons.²⁴⁰

Standing is rendered to citizens whose rights have been infringed, or a representative. Further, on the request of a person subjected to maltreatment, standing can be given to authorized representatives of public organizations and labor collectives.²⁴¹ Jurisdiction is decided by the residence of the plaintiff, or by the location of the body or person accused of infringing rights and freedoms of the plaintiff.²⁴² Once a court has ruled the complaint admissible, the court has the right to suspend the contested administrative act, either at the request of the plaintiff or *ex officio*.²⁴³ When filing a complaint in a court of law, the plaintiff is obliged to pay a State fee. However, the court can release the plaintiff from this obligation or reduce the size of the State fee.²⁴⁴ (To be further discussed below.)

State bodies, bodies of local self-government, establishments, enterprises, and their associations, public associations, state officials or civil servants have the burden of proof regarding the legality of the acts, decisions, or omissions in dispute. The plaintiff, on the other hand, bears the burden of proof concerning the facts causing the violation of rights and freedoms.²⁴⁵ Thus, the onus of establishing the factual basis of the claim rests on citizens invoking a violation of rights. And according to the new Article 6, the public body or civil servant should prove the legality of the decision being challenged.²⁴⁶

Legal Consequences and Legal Force of Court Decisions

On the basis of well-founded complaints, the court will declare the administrative act illegal and declare the responsibility of bodies/persons to correct the situation;

²⁴⁰ Article 5 “the Law on Appeal”.

²⁴¹ Article 4 (3) “the Law on Appeal”.

²⁴² Article 4 (4) “the Law on Appeal”. As a main rule, jurisdiction is decided by the defendant’s place of residence according to Article 28 CPC. Since it might be reasonable to suspect that the plaintiff is in a weak position and has already suffered from the alleged wrong, the exemption to the main rule makes sense.

²⁴³ Article 4 (6) “the Law on Appeal”.

²⁴⁴ Article 4 (7) “the Law on Appeal”.

²⁴⁵ Article 6 “the Law on Appeal”.

²⁴⁶ McGregor, “Mechanisms for Redress of Citizens’ Grievances in Russia”, pp. 130-131.

either by cancelling the application of the decision or the action, or by re-establishing the violated right or freedom. The court will establish what organ or person is responsible for the action or decision that violates the rights and freedoms of the citizen. Concerning the responsibility of state officials for actions or decisions declared illegal: the court will decide on the responsibility of state officials on the basis of *the Federal Law on Federal State Employees* and other federal laws until an application for dismissal has been produced. If a decision or action is declared illegal, responsibility can be found to rest on both the officials who took the decision, as well as on the public body or person who provided the incorrect information that formed the basis of the illegal decision, accounted for in Article 2.²⁴⁷ Damages - including moral harm caused by the illegal action, decision, or the incorrect information on which it was based - are regulated by the Civil Code.

Court decisions that have gained legal force are binding on all State bodies, organs of local self-determination, organizations, enterprises, public organizations, civil and state servants as well as citizens, and they are to be implemented throughout the whole territory of the Russian Federation.²⁴⁸ The decision is to be communicated to the appropriate body mentioned above not later than ten days after it has entered into legal force. Thereafter, the appropriate body is to report back to the court and citizen(s) concerned as to implementation of the decision. This is to be done within one month from the issue of the decision. In cases of non-implementation, the court can decide on measures foreseen by federal law.²⁴⁹

If the complaint has been turned down and the administrative act is legal, the plaintiff will be made responsible for the court fees. By contrast, if the court found the action or decision complained of to be illegal, then the costs will be put on the state body or person responsible for the illegal decision. In addition, the court can make these bodies or persons responsible for the court fees even if the action or decision has been declared legal, if the plaintiff has filed a complaint to the highest administrative body in accordance with Article 4 of this law and if the responsible body has not delivered an answer within the time limit laid down in Article 4, or if no answer at all has been rendered.²⁵⁰ This seems to be a fair and responsible approach. It makes sense to promote a division of labor between state administration and the courts, without restricting the individual's possibility to

²⁴⁷ Article 7 (4) "the Law on Appeal".

²⁴⁸ Article 8 (1) "the Law on Appeal".

²⁴⁹ Article 8 (2), (3) "the Law on Appeal".

²⁵⁰ Article 9 "the Law on Appeal".

choose. And it is responsible in the sense that it considers potential consequences of an inefficient administration which is not able to handle the case within stipulated time frames. If applied, it could strengthen access to justice considerably.

3.3.3 Conclusion

Judicial review in Russia is a complex matter. It can be both abstract and concrete. And as shown above, the range of *standing* in the Russian system is broad and includes governmental actors, courts, as well as individual citizens, alone or in groups. *Abstract* judicial review of: federal statutes; normative acts of the President, the Federation Council, the State *Duma*, and the Government; constitutions or charters of federal subjects; regional statutes and normative acts that fall under the jurisdiction of the federal centre or under the joint jurisdiction between the federal centre and the federal subjects; agreements between the federal centre and federal subjects on the one hand or agreements between two, or more, federal subjects, is exercised by the RF Constitutional Court and cannot be invoked by individuals. In addition, the RF Constitutional Court exercises constitutional judicial review *ex ante* only in regard to international treaties to which the Russian Federation is to become a contracting party. All other normative acts are subject to an *ex posteriori* review.

Concrete review of both normative and non-normative acts can be invoked by individuals before the RF Constitutional Court and courts of general jurisdiction. The legality of a normative act can be assessed even if a court should find that rights and freedoms of the complainant in that specific case have not been violated. Thus, challenging the legality of a normative act before a court of general jurisdiction does not require that it has been established that the normative act has violated the complainant's rights and freedoms. (To be further discussed below). In addition, it has been argued that the right violated does not have to be positively conferred upon the individual by a law or other normative act.²⁵¹ Thus, violations of negative rights stipulated in, for example, the CRF should be invocable and constitute a sufficient basis for complaints against normative and non-normative acts.

Again, returning to Tuori's multi-layered view of modern law, it can be concluded that on the surface level of law, judicial review in Russian is designed so as to promote and achieve rights enforcement. For example, the legislative framework

²⁵¹ McGregor, "Mechanisms for Redress of Citizens' Grievances in Russia", pp. 127-128.

is clearly based on “rights-language”; time limits are set so as to keep the length of the proceeding and enforcement short, especially concerning judicial review of non-normative acts; the importance of access to information is underlined; and the burden of proof is shared between the plaintiff and the responsible state body. In addition, attention is devoted to the potentially weak economic situation of a complainant in the sense that the proceeding can take place where the complainant lives even if the responsible state body is not located there. It is also possible for a court to lower the State fee, and should a complainant have initiated administrative review without any result – the failing administrative body will have to carry the costs of court proceedings even if the court decision is in its favour.

As discussed above, various definitions of administrative process were discussed in the Soviet Union during the 1970s.²⁵² Advocates for a wide definition recommended a general possibility for judicial review of administrative acts - they underlined the state’s law and right-providing functions. When reading the CRF, the CPC, and “the Law on Appeal”, it becomes clear that the wide definition of administrative process is the order of the day in today’s Russia. We can see that changes in this direction have been taking place from the adoption of the 1968 Edict to the latest amendment to the 1993 “Law on Appeal” and the 2002 CPC. Thus, there is continuity in Russian legal debate that might have had an impact on the formulation of the 1993 law and the 2002 CPC. However, even if the procedure as such has been subject to debate during several decades, most of the rights, i.e., the substantive law, to be enforced using this procedure have only been part of the Russian legal order for little more than a decade.

After reaching this conclusion concerning Russian legislative acts stipulating judicial protection of individual rights and freedoms, we proceed to examine the ECtHR’s case law in relation to Russia, keeping focus on judicial protection and rights enforcement.

3.4 The ECtHR’s Case Law in Relation to Russia

3.4.1 Introduction

By 31 December 2003, Russia had been found by the ECtHR to be in violation of the ECHR seven times.²⁵³ During 2004, fourteen decisions by the ECtHR in

²⁵² Part I, Chapter Four.

²⁵³ *Survey of Activities*, European Court of Human Rights, 2003. Available at <http://www.echr.coe.int/Eng/EDocs/2003SURVEYCOURT.pdf>, (2005-01-19).

relation to Russia were rendered and the ECtHR found violations of the ECHR in twelve cases. These judgments reflect several of the greatest problems and challenges for the legal system of today's Russia.²⁵⁴ They deal mainly with enforcement of judgments, supervisory review, lengthy proceedings, and lack of efficient remedies.

3.4.2 Enforcement of Judgments

In the first decision against Russia, the applicant, Anatoly Burdov, had participated in the cleanup after the Chernobyl accident. Burdov worked with the cleanup for a year, and received serious radiation injuries. A medical examination demonstrated that Burdov's injuries were a direct consequence of the cleanup work. In 1991, a Russian court ordered the Russian state to pay Burdov compensation for his injuries. By 1997, when compensation had still not been paid, Burdov filed a complaint with a Russian court against the governmental social authority that was to pay him compensation. The authority was ordered to pay the compensation immediately, with, in addition, the same amount by way of a fine as a penalty for the delay. However, when the judgment was to be executed the social authority stated that it did not have the monies to pay either the compensation or the fine. According to the ECtHR, implementation of a judgment falls within Article 6 ECHR. The ECtHR held that the right to a court trial would be illusory if the member state's legal system allowed final and binding judgments to remain not implemented based on the defense that monies were lacking. It follows, therefore, according to the ECtHR, that enforcement of a judgment is an integral part of a trial as envisioned by Article 6 ECHR. Consequently, a defense of lack of funds is not valid. The Court ordered the Russian state to pay damages to Burdov in the amount of 3 000 EURO.²⁵⁵

Another Russian complainant, Timofeyev, filed a complaint to the ECtHR, arguing that failure to execute a decision in his favour was a violation of Article 6 (1) ECHR and of Article 1, Protocol No. 1. The Court confirmed its earlier case law that the execution of a judgment is considered an integral part of trial as it is understood in Article 6. Thus, Russia was found to have violated Article 6 (1) and

²⁵⁴ According to Russian lawyers handling Russian complaints to the ECtHR, the decisions rendered by the ECtHR reflect the volume of complaints filed to the Court. For example, by May 21, 2002, the largest group of complaints consisted of those in which final judgments had not been executed. The next largest group was complaints related to criminal procedural issues and detention, to be followed by complaints related to the supervisory review procedure and the war in Chechnya.

²⁵⁵ *Burdov v Russia*, 7 May, 2002, (*Application no. 59498/00*).

Article 1, Protocol No. 1. for not having secured that a judgment debt (sufficiently established to be enforceable and hence equal to a possession) against the state had not been executed for a period of three years.²⁵⁶

3.4.3 Supervisory Review

In another decision from July 24 2003, the ECtHR found Russia to be in violation of Article 6 (1) ECHR. This decision is interesting in that it deals with the supervisory review procedure.²⁵⁷ The court found that the applicant's right to a court as protected by Article 6 had been violated by use of the supervisory review procedure and that the procedure infringed the principle of legal certainty. The court considered the right to a court to be an illusion when a final and binding court decision can be quashed in a procedure invoked by an official person. The procedure was initiated by the President of a regional court. In addition, there was no time limit as to when the challenge should be filed, which of course put the applicant in an insecure position.²⁵⁸ The relevant domestic law was the 1964 RSFSR Code of Civil Procedure.²⁵⁹ That Code is no longer in force and the new CPC has restricted the possibility to obtain supervisory review, as has been described in Part I, Chapter Four. It also stipulates a clear time limit of one year.

3.4.4 Lengthy Proceedings and Lack of Efficient Remedies

In the case of *Plaksin v. Russia*, the ECtHR found Russia to be in violation of Articles 6 and 13 ECHR, on the basis that the plaintiff's case was not heard within a reasonable time, and the lack of effective remedies available to the plaintiff to obtain a ruling enforcing his right to have the case heard within a reasonable time.²⁶⁰

²⁵⁶ See the ECtHR's decision in *Timofeyev v. Russia*, 23 October, 2003, (*Application no. 58263/00*). Russia was again found to have failed to take necessary measures to enforce a court decision and hence to be in violation of Article 6 (1) in *Wasserman v. Russia*, November 18, 2004, (*Application no.15021/02*). See also, *the Execution of Administrative And Judicial Decisions in the Field of Administrative Law, Recommendation Rec(2003)16 and Explanatory Memorandum*, adopted by the Committee of Ministers of the Council of Europe on 9 September, 2003.

²⁵⁷ For description of the procedure see above, Chapter Four, Part I.

²⁵⁸ *Ryabykh v. Russia*, July 24, 2003, (*Application no .52854/99*). This decision was later confirmed in *Pravednaya v. Russia*, November 18, 2004, (*Application no. 69529/01*). In this case, according to the court, the review procedure had been used as an appeal in disguise.

²⁵⁹ For the ECtHR's case law on supervisory review procedures in criminal law matters, see *Nikitin v. Russia*, December 15, 2004 (*Application no. 50178/99*). In this case the Court found no violation of Article 6.

²⁶⁰ *Plaksin v. Russia*, 29 April, 2004, (*Application no. 14949/02*). Concerning Article 6 see also, *Smirnova v. Russia*, 24 July, 2003, (*Application nos.46133/99 and 48183/99*), *Levshiny v. Russia*,

In the case of *Kormacheva v. Russia*, the applicant had filed a complaint to several judicial authorities, including the Regional Qualification Board. The complaint concerned an alleged violation of Article 6 (1) ECHR. The judge responsible for the excessive length of the proceeding was officially reprimanded. However, the ECtHR did not consider that this specific procedure was an effective remedy against the length of the proceeding in terms of Article 13.²⁶¹ In conclusion, the Russian Federation has on several occasions been held to be in violation of Article 13 since it has failed to make available remedies that are effective in both practice and law.

3.4.5 Implementation of ECtHR Decisions

ECtHR decisions are to be implemented by both general and particular measures. General measures include both changes to the legislative framework and enforcement of the same, and to the practice of the state apparatus. Particular measures concern paying damages to individuals whose rights have been violated. Apparently, most ECtHR decisions against Russia have been enforced in the sense that the aggrieved persons have received damages awarded.²⁶²

Regarding general measures, actions have been taken on the legislative level, as well as within the state administration and within the court system. For example, the new CPC is more restrictive concerning supervisory review. Still, the vast case law in relation to Russia, puts a heavy burden on the judiciary and substantial financial and human resources are required in order to improve the situation. As stated above, courts of general jurisdiction are obliged to consider the case law of the ECtHR, which potentially can have an impact on, for example, the speed of a court proceeding, enforcement of court decisions, and the provision of efficient national remedies. A Resolution issued by the Plenum of the Supreme Court points out that decisions by the ECtHR are mandatory for all Russian State bodies, including the courts, and that Russian courts are obliged to take the jurisprudence of the ECtHR into consideration in order to avoid violations of the

November 9, 2004, (*Application no. 63527/00*), *Yaroslavtsev v. Russia*, December 2, 2004, (*Application no. 42138/02*) in which Russia was found to be in violation of Article 6 (1) due to lengthy proceedings.

²⁶¹ *Kormacheva v. Russia*, 29 January, 2004 (*Application no. 53083/99*), (para. 62). See also, *Yemanakova v. Russia*, 23 September, 2004, (*Application no. 60408/00*), and *Klyakhin v. Russia*, November 30, 2004, (*Application no. 46082/99*).

²⁶² After the issue of a writ of execution by a Russian court, decisions of inter-state bodies for the protection of human rights and freedoms are subject to enforcement according to Article 7 of *the Federal Law on Enforcement Procedure*, SZ 1997, No. 30, item 3591, 5901-5933, (No. 119-FZ of 21 July, 1997). See further CPC Articles 409-415.

ECHR. The courts should, within their sphere of competence, act so as to ensure the obligations of the RF are met.²⁶³

In order to make it possible for Russian judges to take ECtHR's case law into consideration, the Legal Department of the Supreme Court of the Russian Federation is translating ECtHR case-law, and CoE conventions that Russia is a contracting party to, into Russian in order to disseminate it to judges throughout the country. Still, as highlighted by the Plenum resolution, much remains to be done. The Resolution is *per se* a general measure taken to ensure the protection of the ECHR in Russia. In addition, the new CPC was worded so as to be in conformity with Article 6 ECHR and several improvements to the procedure have been achieved.²⁶⁴ Thus, both general and particular measures are being taken in order to ensure that the ECHR and ECtHR case law are enforced in Russia. Still, additional efforts are needed - especially, within the educational system and the administrative apparatus in order to enhance awareness of the ECHR and its efficient enforcement.

3.4.5 Conclusion

Taking into account the binding force of ECtHR case law, the increasing number of court decisions in relation to Russia and its impact on legal reform in Russia, it seems likely that the possibility for individuals to file a complaint with the ECtHR will also play an important role in the future development of the Russian legal system.²⁶⁵ However, the impact of the ECtHR and the ECHR cannot be evaluated taking solely the Court's decisions into account. Applications are increasingly referred to the Russian Government before they are declared admissible by the ECtHR, allowing the state to react and ultimately to redress the situation if possible.²⁶⁶ Although improvements have been achieved²⁶⁷, additional efforts are

²⁶³ See above Chapter 3.2.

²⁶⁴ Danilov, *Grazhdanskiy Protessualny Kodeks Rossiyskoy Federatsii*. For example, the procurators' right to reopen a case by filing a protest to a supervisory instance has been restricted both in substance and in time.

²⁶⁵ In 2003, fifteen applications against Russia were declared admissible, in 2002 twelve, and in 2001 two applications were considered admissible. *Survey of Activities*, 2002, European Court of Human Rights, p. 33. Available at <http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf>, 2003-06-25, and *Survey of Activities*, 2003.

²⁶⁶ J.D. Kahn, "Russia's "Dictatorship of Law" and the European Court of Human Rights", *Review of Central and East European Law*, 2004, no. 1, (1-14), p. 5.

²⁶⁷ See, William D. Jackson, "Russia and the Council of Europe", *Problems of Post-Communism*, vol. 51, no. 5, September/October, (23-33), and Kahn, "Russia's "Dictatorship of Law" and the European Court of Human Rights".

needed. Russia especially needs to improve the enforcement of judgements and the availability of domestic efficient remedies.

3.5. Russian Public Law Adjudication – An Analysis

3.5.1 Constitutional Judicial Review

The model presented in Part II for characterizing public law adjudication will first be used in order to analyze the concrete constitutional judicial review in the Russian legal order from a rights enforcement perspective. Thereafter, judicial review of normative and non-normative acts will be analyzed, applying the same model.

Individuals can turn directly to the RF Constitutional Court in order to invoke constitutional review of statutes that allegedly violate their individual rights and freedoms in a particular case. The RF Constitutional Court will not hear the case on its merits, rather it will establish the constitutionality of the contested statute. Individuals will have to prove that the questioned statute is applicable to, or has been applied to, their case in order for them to be rendered standing. No actual damage has to be shown even though the potential harm is to be individualized to groups or individuals. Thus, *the standing rules* for individuals or groups initiating constitutional review are closer to the Communitarian model of rights enforcement than to the Individual model since they include a wider group of subjects than victims in the strict sense.²⁶⁸ In addition, the Russian Federal Ombudsman can be granted standing before the Court in the interest of individuals.²⁶⁹

The court proceeding can be described as public in character since it does not concern the relationship between two parties – the case will not be decided on its merits, and since the court proceeding is concerned with establishing the constitutionality of a specific statute in the abstract. In addition, *court decisions* are expository in that it states the proper interpretation of rights and freedoms as stipulated by the CRF. The RF Constitutional Court determines the status of laws and clarifies the content of the CRF - it has a law-creating function within the framework of the

²⁶⁸ It could be argued that all individuals are potential victims concerning public law issues.

²⁶⁹ See Part II, Chapter 3.3.4.5.

CRF.²⁷⁰ Its decisions have normative effect, and are considered a source of law, hence the RF Constitutional Court is the expositor of the law and the values enshrined in it. In addition, the court decision will have a future effect on the relationship between the state and its citizens in that the contested law will be declared null and void if deemed unconstitutional.

Taking into account the model developed above, it can be argued that Russian standing rules for individuals in constitutional adjudication should be broader if we accept the statement by Miles that the character of the court proceeding and the court decision should be reflected in the standing rules. As shown above, standing before the RF Constitutional Court is not rendered to applicants in public interest cases if the matter does not emanate from a specific case to which the applicant is a party, and concrete judicial review in a court of ordinary jurisdiction. The demand for the contested law to be applicable to the person or organization filing the complaint is evident and confirmed by the case law of the RF Constitutional Court.

In conclusion, the design of the standing rules, the character of the court proceeding and the court decision allow for the character of Russian constitutional law adjudication to be described as closer to the Republican model than to the Liberal, even though, standing rules applied before the RF Constitutional Court do not accept *actio popularis* and public interest litigation in the absence of a potential and individualized damage. Organizations and groups of individuals can be granted standing before the RF Constitutional Court, but potential damage to them as subjects has to be shown. Thus, an organization cannot initiate constitutional judicial review should it not be affected by the contested law.

3.5.2 Administrative Law Adjudication

3.5.2.1 Normative Acts

According to the 2002 CPC, concerned individuals and organizations, political actors, and in some cases procurators, can initiate judicial review of normative acts before a court of ordinary jurisdiction. Political bodies such as the President, the Government, legislative assemblies of federal subjects and higher administrative bodies can also initiate judicial review of normative acts, not being statutes, which they consider violate their jurisdiction.²⁷¹ Although this is an interesting feature, it

²⁷⁰ Anders Fogelklou, "Constitutional Order in Russia: A New Territory for Constitutionalism?", *Review of Central and East European Law*, 2000, No. 3, (231-257), p. 240.

²⁷¹ Article 251 (2) CPC.

is not our main concern here, since our primary focus is on the enforcement of individual rights and not on separation of powers and functions.

In order for individuals to have standing, they have to state in their application what rights and freedoms have been violated by the normative act. The same applies to organizations.²⁷² In its Plenum Resolution, the Supreme Court refers to Articles 3 and 4 CPC. These Articles stipulate what persons have standing before a court of law in civil cases. Interested persons whose rights, freedoms, and legal interests have been infringed have the right to address a court in order to safeguard their interests. However, when stipulated by the CPC or other federal laws, civil cases can be initiated by a person acting in the interest of others whose rights and freedoms have been infringed – be it private persons, an unspecified group of people, the federal state, federal subjects, or municipal organizations.²⁷³ Besides, in cases stipulated by law, state and local-governments bodies, organizations, and individuals have the right to complain to a court of law in order to protect rights, freedoms and legal interests of other persons if so has been requested. In addition, the actors mentioned here may act to protect a legitimate interest of an undecided group of people. Applications can be filed *ex officio* in order to protect legitimate interest of incapacitated persons and minors.²⁷⁴ In addition, Procurators can initiate judicial review of normative acts of state bodies, in the interest of the public, that is in the interest of the federal centre, federal subjects, and municipal organizations. It can also initiate judicial review in the interest of individuals, either as an group whose total membership is not known, or as individual persons that due to poor health, age, or incapacity cannot themselves proceed with the case. In this context, it is also interesting to note that procurators may participate by stating views in cases where private persons are usually the weaker party and in which much is at stake for the individual. Examples include eviction cases, labor issues, and claims for damages in cases of wrongful death or bodily injury.²⁷⁵

Thus, taken together *rules on standing* concerning judicial review of normative acts are close to the Communitarian model of rights enforcement as defined above, since victim autonomy, although constituting the starting point, is not the main concern. For example, a court can continue to assess the legality of a normative

²⁷² See the Supreme Court Plenum Resolution “On questions related to the adoption and entering into force of the new CPC”, and Articles 3-4 and 251 (5) CPC.

²⁷³ Article 4 (2) CPC.

²⁷⁴ Article 46 (1) CPC.

²⁷⁵ Article 45 (1), (3) CPC.

act, even if it should find that rights and freedoms of the claimant have not been infringed. In addition, various state bodies, organizations, individuals, and procurators can initiate judicial review in the interest of the public and weaker private parties. And public interest litigation is allowed when stipulated by law.

The character of *the court proceeding* is public, not only because different officials and interest organizations can invoke it, but especially because it is the legality of the normative act which is to be assessed, not necessarily the harm actually caused by it. This is illustrated by the fact that a court of general jurisdiction can consider the legality of an act even if it should find that an individual's rights have not, in that particular case, been violated.

As regards *the court decision*, this is closer to the expository function than the reparative. A contested act that has been declared in violation with higher law will be declared inapplicable, as will acts that implement it. In addition, a court decision that has gained legal force is binding on all state bodies, organs of local self-government, organizations, enterprises, public organizations, civil and state servants as well as citizens, and is to be implemented throughout the whole territory of the Russian Federation. Thus, its impact is wider than for just the complainant. In conclusion, the character of Russian administrative law adjudication concerning judicial review of normative acts is closer to the Republican model than to the Liberal when all parts of the judicial proceeding have been considered.

3.5. 2.2 *Non-Normative Acts*

Standing rules according to the CPC and “the Law on Appeal” require that the plaintiff's rights have been infringed by the contested decision, action, or inaction. On the request of the maltreated party, standing can be transferred to authorized representatives of public organizations and labor collectives. In addition, the Ombudsman can invoke a court proceeding in order to protect rights and freedoms that have been violated by a decision, action, or inaction of state bodies and public servants.²⁷⁶ Still, the standing rules are closer to the Individualist model than the Communitarian model since personal harm or difficulties need to be shown by the claimant. Although standing can be transferred, this will only happen with the direct consent of the party concerned. Victim autonomy is thus of concern to the legislature within this framework. It could be argued that this is in congruence with the nature of the matter since this law deals with, e.g.,

²⁷⁶ Article 29 (1) *the Federal Constitutional Law on the Commissioner for Human Rights*.

decisions directed to a limited group of people or to individual persons. Thus, they do not have general application.

As concerns *the court proceeding* as such, this is primarily concerned with establishing whether the contested decision, action, or inaction is illegal in that it violates citizens' rights. The plaintiff will have to prove the factual basis of the claim, hence that his or her rights or freedoms have been violated or restricted by the decision, action, or inaction. This would imply that the proceeding is of private character as the aim is to settle a dispute arising from a legal relationship between two identified and individualized parties.

As to *the court decision*, this will have both an expository and reparative effect. Should the court find the decision, action, or inaction illegal, then the responsible bodies or persons will be ordered to correct the situation by cancelling the application of the decision or action or by re-establishing the violated right or freedom. The decision will be binding on all state bodies. Thus, the court decision is both reparative and expository, even if the court is more obviously engaged in dispute resolution. In sum, the character of administrative law adjudication as concerns non-normative acts is closer to the Liberal model of rights enforcement than the Republican.

3.5.2.3 Conclusion

In order to answer the question of how Russian public law adjudication is to be theoretically characterized, the CRF, CPC, and "the Law on Appeal" have been studied. The results are thus limited to these three legislative acts.

What is the main purpose of public law adjudication – to uphold legality concerning governmental action or to enforce rights, or maybe both? This differs, of course, from country to country. In Russia, theoretically there is clearly an emphasis on rights enforcement. This is clear from the wording of the CRF, "the Law on Appeal", and the CPC together with the right for individuals and the Ombudsman to turn directly to the RF Constitutional Court. Thus, we can conclude that the Russian legal order has quite a generous approach concerning rights enforcement on the surface level of law. In addition, the scope of judicial review, according to the Russian legislation studied here, is rather wide. Courts of general jurisdiction should not only be concerned with legality, they should also consider the facts of the case, and ultimately whether rights and freedoms stipulated in the ECHR and CRF have been or are in the risk zone of being impeded. In this sense, there is a relatively strong link between Russian constitutional and administrative law.

Standing rules are in general defined in such a way that potential restrictions of rights and freedoms on behalf of the individual have to be shown. Thus, the potential damage has to be individualized. However, violations of rights can be referable to both collective and individual interests, and collective interests can be subscribed to an unidentified group of individuals. Procurators, state bodies, and interest organizations can act on behalf of public interests, weak persons, and groups of uncertain membership, when provided for by law. Russian standing rules in public law adjudication is therefore, taken together, closer to the Communitarian approach to rights enforcement than to the Individual.

In this context, it is interesting to note that under the Soviet legal ideology there was a strong emphasis on the public character of any private dispute and the concept of public interest was interpreted broadly. Therefore, the power to initiate a judicial proceeding and to seek remedy was not only the right of persons with a direct interest in the outcome. In addition, procurators could initiate civil proceedings or intervene in a case when state and social interests had been violated or abused.²⁷⁷ In the following Section, preconditions for a rights revolution, as defined by Epp, will be examined from the Russian perspective. Although focus will be on the support structure explanation, also the conventional explanations will be applied to the Russian case.

²⁷⁷ Burnham, Maggs, and Danilenko, *Law and Legal System of the Russian Federation*, p. 380.

4. An Assessment of Preconditions for a “Rights Revolution” and Individual Legal Activism in Russia

4.1 Conventional Explanations

The conventional explanations as listed by Epp are the Constitutional-, Judge-, and Cultural-Centered Explanations. These explanation have been thoroughly discussed in Part II.²⁷⁸ In the following Sections they will be applied to the Russian case. Thereafter the support structure in Russia will be discussed.

4.1.1 The Constitutional-Centered Explanation

The Constitutional-Centered Explanation refers to structural judicial independence and the bill of rights. Formally, and on the surface level of law, the Russian judiciary benefits from judicial independence. There is a legislative framework that stipulates the fundamentals for an independent judiciary, both in terms of funding of the courts and the judges, on the one hand, and in terms of appointment of judges, on the other.²⁷⁹ Still, difficulties remaining in Russia include internal (vertical) control and influence, in combination with external pressure on judges, exerted by both political and economic actors. Nevertheless, as mentioned above, courts and judges in Russia have been awarded extended financial resources during Putin’s presidency.²⁸⁰ A continued strengthening of the economic situation, in combination with an increased respect for the independence of the judiciary, could be possible even in an authoritarian Russia. Still, the destiny of the Russian judiciary remains uncertain - the largest threat today being corruption and inefficiency - although a positive development since 1993 has clearly taken place.

Concerning the bill of rights, as stated above the 1993 CRF, at the surface level of law, stipulates adequate protection of individual rights and freedoms. The rights stipulated in the CRF can be restricted by a federal law if needed in order to

²⁷⁸ Chapter 3.2.1, Part II.

²⁷⁹ See above Part I, Chapter Four in which the structure and financing of Russian courts as well as the status and requirements of Russian judges is explained.

²⁸⁰ For an overview of Putin’s reforms see, Peter H. Solomon, “Putin’s Judicial Reform: Making Judges Accountable as well as Independent”, *East European Constitutional Review*, vol. 11, nos. 1/2. For a critical stance to the reform and its result so far, see “A Judicial Threat”, *Vremya Novostei*, January 28, 2005.

guarantee the foundations of, e.g., the constitutional system, morals, or security of the state. It could be considered a weakness of rights protection that the possibility to limit individual rights and freedoms under certain circumstances is relatively vaguely worded and is stipulated in a single Article, instead of being regulated in the very article providing the right. However, certain rights cannot be subject to any limitation. Rights benefiting from this “absolute” protection include *inter alia* the right to judicial protection and access to justice, the prohibition on torture, and the right to privacy.²⁸¹ In conclusion, on the surface level of law the foundations of the Constitutional-Centred Explanation are present. Still, enforcement of the bill of rights in the CRF is relatively weak in contemporary Russia.

4.1.2 The Judge-Centered Explanation.

The Judge-Centered Explanation focuses on judicial leadership and docket control. Internal and vertical control of the judiciary and its judges is rather strict in the Russian judicial system, which can be illustrated *inter alia* by the fact that the Supreme Court’s Plenum issues Explanations as to how to interpret and apply the law. These explanations are formally not binding, but in reality the impact is comparable to a binding body of case law and recommendations, which can be illustrated by the fact that the Supreme Court and regional courts often overturn lower court decisions that contradicts them. The Plenum, which issues these clarifications and explanations, has wide discretion and hence it is one of the most influential bodies (together with the RF Constitutional Court) within the Russian judiciary.²⁸²

Docket control in Russian courts is, as discussed above, stipulated by law. Russian courts can refuse to hear a case should the matter already be decided, or if it does not fall within the jurisdiction of a specific court. However, courts of ordinary jurisdiction can not refuse to hear a case if it falls within their jurisdiction as established by law, and if it is correctly presented. The Presidium of the Supreme Court can hear cases as the final supervision instance and it does have a wide discretion as to what cases it hears. Thus, the Presidium and Plenum of the RF Supreme Court, on the one hand, and the RF Constitutional Court on the other, are decisive for judicial leadership in Russia.²⁸³

²⁸¹ See Articles 55 (3), and 56 (3) CRF.

²⁸² Foglesong, “The Dynamics of Judicial (in-)dependence in Russia”, p. 66.

²⁸³ See Part I, Chapter Four.

Above, it has been discussed whether the Judge-Centered Explanation is likely to play an equally important role in a civil law system as it does in a common law system, taking into account that when to declare a case admissible or when to refuse to hear it is usually stipulated in a statute in civil law legal orders.²⁸⁴ Still, judges of the RF Supreme Court and the RF Constitutional Court do have some discretion when deciding what cases to hear, as is the case in most legal orders. However, there is no evidence suggesting that judges of these courts should treat cases concerning individual rights and freedoms at a disadvantage, especially if compared with cases related to issues of federalism or separation of powers. The Judge-Centred Explanation can be connected to the discussion on autonomy of judges concerning judicial behaviour.²⁸⁵ The question here is whether a judge rendered institutional independence will act independently when taking a decision? In contemporary Russia there is evidence that allows both negative and positive conclusions in this regard.²⁸⁶

4.1.3 The Cultural-Centered Explanation

The Cultural-Centered Explanation is concerned with popular culture and rights consciousness. It argues that judges are themselves shaped by the society that they are active in. Therefore, it is considered unlikely that they will question or undermine policies adopted in their time. It is also considered that judges lack the structural independence and institutional power to enforce a decision that runs contrary to popular beliefs. And finally, it is argued that the number and kinds of issues that citizens bring before a court of law depend on whether the dispute is framed in terms of rights in the society in which the controversy arises.²⁸⁷

It has been put forward as a problem that Russians are unfamiliar with their rights and that they lack knowledge or awareness of the CRF and the ECHR. However, the large number of complaints filed with the ECtHR, in combination with the activity of the RF Constitutional Court and the other courts in Russia, point in a different direction. One often-expressed opinion about Russia is that trust in the legal system is too low for it even to be of relevance to talk about legal activism on an individual level. Often-heard explanations as to the low demand for law in order to protect rights and interests in Russia, besides lacking property rights, are

²⁸⁴ Part II, Chapter 3.2.1.

²⁸⁵ See Part II, 2.4.2.

²⁸⁶ See for example Anna Politkovskaya, *Putin's Russia*, London, Harvill, 2004.

²⁸⁷ See Part II, Chapter 3.2.1.

the poor quality of the law, and the politicization of legal institutions. Hendley, for example, argues that legal reform in Russia has been too focused on the supply of law in a top-down fashion, neglecting the need of ordinary individuals and that it therefore has been inefficient – the demand for law is low partly because it does not reflect the will of the people. Katharina Pistor, on the other hand, argues that an initial top-down reform is necessary in order to create a demand for law, especially in a state going through a systemic change, and that the demand for law from below will arise thereafter.²⁸⁸ Pistor's point of view would appear to be more realistic. It should be added that once the institutional framework and necessary procedures are set, a demand for law from below may change that very framework, and the substantial law, should it not be in congruence with the will of the majority.

It seems to be a general assumption that the demand for law will be articulated first and most frequently by economic actors, and that the legal system will deliver a beneficial outcome, in terms of material interests, which should for a rational actor create the incentive to use the judicial procedure. But can there be another incentive than the material to make use of the judicial process, and is trust a necessary prerequisite for the instrumental use of the judicial procedure? Cashu and Orenstein have presented examples suggesting that the antipathy towards law by Russians is overstated.²⁸⁹ In addition, research by Hendley shows that attitudes and behaviour diverge and that resignation about the legal system does not necessarily correlate with litigation behaviour.²⁹⁰ Statistical data so far show a

²⁸⁸ Kathryn Hendley, "Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law", in *Contemporary Russian Politics*, ed. Archie Brown, Oxford University Press, 2001, (131-138). For a different view on the importance of the demand of law in legal transitions see, Katharina Pistor, "Supply and Demand of Law in Russia", *East European Constitutional Law Review*, Fall 1999, Vol. 8, No. 4, pp. 105-109, and Peter H. Solomon, "Law and Courts in post-Soviet Russia: The Progress of Legal Transition", available at <http://www.sais-jhu.edu/programs/res/papers/solomon.pdf>, (2005-03-09).

²⁸⁹ Ilian G. Cashu and Mitchell A. Orenstein, "The Pensioners' Court Campaign: Making Law Matter in Russia", *East European Constitutional Review*, fall 2001, (67-71). See also, Debra Javeline and Vanessa Baird, "Judicial Pioneers: Litigants in the Moscow Theater Hostage Case", research paper available at http://socsci.colorado.edu/~bairdv/Javeline_Baird.pdf, (2005-03-17). The authors provide evidence that a negative correlation between trust in the fairness of the court procedure and litigation can be explained by the litigants' anger with the government. The combination of the desire to express anger and the hope of winning provide hope for rights enforcement.

²⁹⁰ Hendley reached this conclusion by complementing studies of caseload by deep interviews. Collected data showed an increasing caseload, and deep interviews showed apathy regarding the law. Kathryn Hendley, "Demand" for Law in Russia – A Mixed Picture", *East European Constitutional Review*, fall 2001, (72-77), pp. 74-75.

steady increase in the number of judicial reviews of governmental actions²⁹¹ and both ordinary and *arbitrazh* courts are being used with greater frequency.²⁹² Thus, we have to draw the conclusion that individual legal activism in Russia is on the rise. In the following, popular attitudes towards the Russian courts, knowledge about the CRF, and the actual use of the judicial channel will be discussed.

Miller, White, and Heywood have made cross-national research on values and political change in post-communist Europe.²⁹³ Concerning a question on *rights of opposition or protest*, 92 percent of Russian respondents answered that if citizens felt that a law was unjust or harmful, they should be allowed to appeal through the courts.²⁹⁴ When asked about *the perceived effectiveness* of different protest methods, 29 percent of the Russian respondents were of the opinion that appealing through the courts would have a ‘very big’, or ‘quite big’ effect in enabling citizens to get a law changed. Indeed, appealing through the courts scored the highest if compared to the other alternatives of which the respondent estimated the perceived effectiveness, for example, sending letters to MPs (19 percent), working through a political party (22 percent), letters or petitions to newspapers (14 percent). Thus, the right to appeal to a court of law was highly valued, yet the perceived effectiveness was quite low even if it scored the highest.²⁹⁵

In addition, the importance of constitutional review is highlighted by the fact that 77 percent of Russian respondents thought that the RF Constitutional Court should be allowed to overrule the Government, while only 27 percent were of the opinion that the law should *not* restrict a strong leader who has the trust of the

²⁹¹ Supreme Court statistics indicate a steady rise of challenges of regulations and other administrative acts. In 1996 1,203 such cases were heard and in 2001 the number was 6,600. Burnham, Maggs, and Danilenko, *Law and Legal System of the Russian Federation*, p. 625, footnote no. 24. Concerning payment of salaries from both private and state employers, the number has risen from 2,869 in 1988 to 53,659 in 1997 and from 122,000 in 1995 to 1,237,000 in 1997. Solomon and Fogelson, *Courts and Transition in Russia*, pp. 69, 76.

²⁹² Hendley, “Demand” for Law in Russia – A Mixed Picture”, p. 75.

²⁹³ The investigation is based upon eleven public opinion surveys in the FSU and ECE carried out between the end of 1993 and the beginning of 1996. Members of the public (7,350) and members of parliament (504) were interviewed. The interviews lasted approximately for one hour. Miller, White and Heywood, *Values and Political Change in Postcommunist Europe*, pp. 1, 141.

²⁹⁴ Other alternatives were: hold protest meetings (76 percent), call nation-wide strikes (35 percent), hold protest marches and demonstrations which block traffic for a few hours (31 percent), and occupy government buildings (8 percent). *Ibid.*, p. 148.

²⁹⁵ As a comparison, in Hungary 89 percent supported the right to appeal to a court of law and 57 percent thought that it would be effective. *Ibid.*, p. 151.

people.²⁹⁶ The result shows that Russian citizens support the right to appeal to a court of law²⁹⁷ although they have doubts about its effectiveness.²⁹⁸ Still, no other protest method scored higher.

The conclusions of Miller, White and Heywood are supported by the findings of research conducted by James L. Gibson. Gibson has conducted a three-wave panel survey in order to investigate how Russian citizens regard the rule of law *in principle*. The findings show that Russians are supportive of the rule of law and it provides no evidence for legal nihilism to be widespread. The survey was conducted between 1996 and 2000. Concerning the attitude towards the rule of law, the data imply a considerable degree of stability in the sense that attitudes have not been significantly altered during this period.²⁹⁹

The results accounted for here will be supplemented by an opinion poll survey made in Russia in 2000, *the Russian Citizen Survey*.³⁰⁰ These are not comparable, in the sense that the respondents and the questions asked are not the same. The aim is not to secure statistical shifts in public opinions; rather, the results are used to show tendencies.

In the Russian Citizen Survey, respondents were asked how strongly they personally trust the courts. **71.4** percent had no trust at all or low trust in Russian

²⁹⁶ When asked the question as to who should have the final say concerning a law violating the constitution, the following two alternatives were given:

1. the government because it represents the people, or
2. the court because it is necessary to defend the constitution. *Ibid.*

²⁹⁷ See also Reisinger, Miller, Hesli, "Russians and the Legal System: Mass Views and Behaviour in the 1990s", *Journal of Communist Studies and Transition Politics*, Vol. 13, No. 3, September 1997, (24-55). This study resulted in the conclusion that the Russian public is not, comparatively speaking, hostile to the rule of law, although the variation among Russians, on a micro-level, is large and significant.

²⁹⁸ See Hendley, "Demand" for Law in Russia – A Mixed Picture". Hendley showed that litigation behaviour and expectations differ. Although expectations of a beneficial outcome are low, the caseload is increasing.

²⁹⁹ James L. Gibson, "Russian Attitudes towards the Rule of Law: An Analysis of Survey Data", in *Law and Informal Practices. The Post-Communist Experience*, eds. Denis J. Galligan and Marina Kurkchyan, Oxford, Oxford University Press, 2003, (77-91).

³⁰⁰ Russian Citizen Survey 2000 is a large-scale survey with a representative national sample of Russian citizens aged 16 and over, residing in Russia. The size of the national sample achieved was 1804. The survey was conducted by face-to-face interviews at the respondent's home by professional interviewers, trained in regional offices of VCIOM. The fieldwork took place in 2000. The data used is non-weighted data compiled by Jan Teorell, Department of Government, Uppsala University, *Methodology Report of the Public Opinion Panel Survey in Russia, Moscow 2000*, The Russian Centre for Public Opinion and Market Research.

courts.³⁰¹ The same question was asked concerning the RF Constitutional Court. **19** percent did not know and **50.7** percent had no or low trust in the RF Constitutional Court.³⁰² Thus, trust in Russian courts in general is quite low. Only **8.3** percent had very strong trust in the RF Constitutional Court, while **4.3** percent had very strong trust in courts in general.

On the question of what the Russian Constitution is about, **62.6** percent of the respondents answered “*the fundamental human and political rights of Russian citizens*”; **21** percent answered that they did not know.

On the question “*There are different ways of attempting to bring about improvements or counteract deterioration in society. During the last 12 months, have you contacted a solicitor or judicial body?*” **5.3** percent answered ‘yes’ and **94.7** answered ‘no’.³⁰³ On the question “*What were the circumstances that led you to contact a solicitor or judicial body?*” **25.3** percent of the 5.3 percent that answered ‘yes’ to the first question referred to private/family problems, **21.1** percent referred to non-payment/delay in wages, pension, scholarship, benefit. **11.6** percent answered because of a criminal case against myself/family members. **8.4** percent had done so in order to defend human rights/achieve justice, **6.3** had done so due to housing problems, **5.3** referred to labor disputes, and **5.3** percent referred to theft/hijacking/defence against hooliganism.

In addition, the respondents were asked if, according to their own opinion, they had been incorrectly or unfairly treated by any central, regional, or local government agency during the last twelve months. **11.2** percent answered ‘yes’ and **85.9** answered ‘no’. The rest did not know.³⁰⁴

³⁰¹ Answers were given on a scale from 1-11, ranging from no trust at all to very strong. 22.6 percent had no trust at all in the courts, while 48.8 percent were on a scale from 1-5, and 9 percent did not know.

³⁰² 14.5 percent had no trust at all in the RF Constitutional Court, while 36.2 were on a scale from 1-5, and 19 percent did not know.

³⁰³ It should be noted that the options available in order to gain redress are more than turning to a solicitor or a judicial body, as has been shown above. Unfortunately, the questions are not put in such a way as to provide us with answers to that question. As a comparison, the same question was raised in a Swedish citizen survey from 1997. 5.4 percent of respondents had been in contact with a solicitor or judicial body. Olof Petersson, Jörgen Hermansson, Michele Micheletti, Jan Teorell, and Anders Westholm, *Demokrati och medborgarskap. Demokratirådets rapport 1998*, SNS Förlag 1998, p. 55.

³⁰⁴ On the question “*what agency was it?*” The following answers were given: The militia (**16.3**), local/regional administration (**15.8**), department for social maintenance of local administration (**10.9**), and court/public prosecution/investigating bodies (**9.4**).

45.4 percent of the respondents who according to their own opinion had been incorrectly or unfairly treated by any central, regional or local government agency tried to gain redress. Of these, **41.3** percent answered that the case was settled in their favor. **8.7** were still uncertain concerning the outcome.

In addition, the respondents were asked: “*To what extent do you think you were treated fairly in your attempt to gain redress, regardless of the actual outcome?*” Approximately **80.5** percent considered themselves not to have been treated fairly regardless of the outcome.³⁰⁵ To the question who the respondent thought was affected by contacting a solicitor or judicial body, **71.6** percent answered “*Only my family and myself.*” **18.9** percent answered “*My family and myself as well as others like us.*”

Concerning the effects of protest, **32.6** percent thought that their efforts were not at all successful, **31.6** that they were very successful. **4.2** percent did not know.

Additional statistical information published by Russian researchers shows that Russian citizens are quite successful when litigating against the government in courts of general jurisdiction - in **81.3** percent of the cases in 2002 and in **87.5** percent of the cases in the first half of 2003. Individual taxpayers in dispute with tax authorities before a court of general jurisdiction were successful in **95.8** percent of cases.³⁰⁶

In conclusion, the surveys presented above show support for rule of law and the right to judicial review as important principles of law. It also shows a low trust in the courts, although it is interesting to note that trust in the RF Constitutional Court is higher than in courts of general jurisdiction - which is probably explained by the Constitutional Court being a post-Soviet institution. A clear majority of the respondents show knowledge of the CRF. Still, results from the Russian Citizen Survey 2000 show that a low percentage of the respondents had actually turned to a solicitor or judicial body (5.4 percent).³⁰⁷ Of those who did, approximately one-third thought that their efforts were very successful, while one-third answered that they were not at all successful. It is also interesting to note concerning personal experience, that out of the **11.2** percent of the respondents who, according to their own opinion, had been incorrectly or unfairly treated by any central, regional or

³⁰⁵ Answers were given on a scale from 1-11, ranging from not treated fairly at all, to being treated very fairly. **34.8** percent answered that they were not treated fairly at all, while **45.7** percent could be found on the scale from 1-5.

³⁰⁶ Burnham, Maggs, and Danilenko, *Law and Legal System of the Russian Federation*, p. 625.

³⁰⁷ In this context it is interesting to note that the results from a Swedish citizen survey in 1997 presented the same figure. In that survey 5.4 percent of the Swedish respondents had been in contact with a solicitor or a judicial body.

local government agency during the last twelve months, **45.4** percent tried to gain redress. **41.3** of these answered that the case was settled in their favor.

In addition, according to a Russian opinion survey conducted by Romir asking the respondent what means they would use in order to invoke their human rights and freedoms, 26 percent answered that they would turn to a court of law. 20 percent would write to the President, 18 would write to their MP, while 15 percent would write to the State *Duma*.³⁰⁸

In conclusion, the data presented above do not provide for any simple conclusions. Trust between state authorities and citizens is of significant importance for the stability of a society, and the degree of vertical trust is closely related to the perception of the legitimacy of the state. Legitimacy can be seen as a function of the possibility to exert popular control over governing authorities. Participation in open, free, and fair elections is one example of popular control, while the possibility to apply to a court of law in order to protest against governmental actions is another. Of course, neither is exclusive in relation to the other, rather they complement each other. Even though trust in institutions such as the legal system tends to be low in 'new' democracies, it is noticeable that trust in courts is often higher than trust in, for example, legislative assemblies and political parties. Finally, as the results presented above indicate, a strong relationship between trust and individual legal activism can not be taken for granted. Trust in Russian courts is still quite low, but still the caseload has increased. Whether increased use of the judicial procedure is a sign of deeper belief in it is not of main importance initially. The effect of the instrumental use of the law in the short and long run is of greater importance. Could it be that rules on *locus standi*, vibrant support structure, and awareness are more crucial for individual legal activism than historical experience, cultural background and initial trust in the legal system? In order to reflect further on this question, we will now move on to Epp's Support Structure Explanation to rights revolutions. First, let us just connect to the discussion above on the importance and meaning of the demand for law. As argued by both Pistor and Solomon, first an institutional framework is needed in order for a demand to be put forward. Thus, the fact that the legislative framework in contemporary Russia is not the result of a grass-roots movement does not exclude its use by individuals who might not have demanded it initially. Once in place, institutions will be used, and abused.

³⁰⁸ *Moskovskie Novosti*, no. 7, 18-24 February, 2005.

4.2 The Support-Structure Explanation

The Support-Structure Explanation rests on two assumptions according to Epp, namely the existence of widespread and sustained litigation, and resources to a larger extent than one individual is usually in possession of. Legal mobilization depends *inter alia* on the existence of rights-advocacy lawyers, human rights organizations, and multiple sources of financing. In the following the legislative framework concerning NGOs involved in human rights litigation will be discussed. Focus will also be on the legislative framework of relevance for individual lawyers specializing in rights litigation on the one hand, and sources available to individuals for free legal assistance and the financing thereof on the other. To the extent possible, state policy toward human rights organizations and human rights litigation will be examined.

4.2.1 Civil Society and Human Rights Advocacy Organizations

At the beginning of the 1990s, several human rights organizations were active in Russia. The prominent role that these organizations played during *perestroika* and *glasnost* has been thoroughly researched.³⁰⁹ However, the role played by human rights organizations in Russia in the late 1990s and onwards has not been given the same attention. In this Section, the legal conditions for, the activity of, and the status of human rights organizations between 1993 and 2003 will be discussed. We will take as a starting point analysis made of the legislative framework relevant for human rights organizations as part of civil society. Thereafter, focus will shift to the Russian State's increasing control of civil society in general, and human rights organizations in particular.

The CRF stipulates freedom of association for all individuals, including the guarantee of free activity for public associations.³¹⁰ Public organizations are to be equal before the law. However, they can be prohibited if they aim to violently change the constitutional system of the Russian Federation, distort the security of the state, create unconstitutional military units, breach the integrity of the Russian Federation, and if they stir up social, racial, national, and religious conflict.³¹¹

³⁰⁹ See for example, *Civil Society and the Search for Justice in Russia*, eds. Christopher Marsh and Nikolas K. Gvosdev, Lanham, Lexington Books, 2002, and Caizza, *Mothers and Soldiers*.

³¹⁰ See Article 30 (1), (2) CRF. However, freedom of activity can be restricted in accordance with Article 13 CRF. In addition, all public and social associations are bound by the CRF, see Article 15 (2) CRF. According to Article 19 (2) CRF, the equality of individual rights and freedoms is to be guaranteed irrespective of membership in public organizations.

³¹¹ Article 13 (4), (5) CRF.

Besides the CRF, the legal framework for Russian civil society is composed of *inter alia*, the Federal Law on Public Organizations,³¹² the Federal Law on Charitable Activities and Charity Organizations,³¹³ and the Federal Law on Non-Commercial Organizations.³¹⁴

In its 2003 *NGO Sustainability Index*, USAID describes the legal environment of Russian NGOs as “confusing, restrictive, and inhospitable”.³¹⁵ The organizations that are worst off due to this development are those working in the advocacy field with human and civil rights litigation. In 1998, the legal environment for NGOs in Russia was rated as 3.8 and in 2003 it was rated 4.3 on a scale that ranges from 1-7, where 1 indicates a very advanced NGO sector. Overall, Russian NGO sustainability has changed from 3.4 in 1998 to 4.4 in 2003.³¹⁶

The legal environment is described as backsliding, while further deterioration is expected in the coming years. Especially, it is difficult for organizations to establish a sufficient financial ground for self-sustainability, due to taxes on grants, a limited possibility to generate revenue tax-free, and constant surveillance by the FSB. In addition, corporate donations are not tax-deductible, although for individuals donations are. Russian NGOs working to strengthen democracy are depending on foreign resources. The Russian State does not, however, support and promote foreign funding of the Russian civil society sector. To some extent it is understandable that a state needs to control the inflow of money, for example in order to safeguard the security of the state. However, it is questionable whether this goal motives a centralised and increasingly bureaucratized control of all foreign funding of Russian NGOs. In combination with a high tax burden on

³¹² Adopted May 19 1995, No. 82-F3.

³¹³ Adopted August 11 1995, No. 135-F3.

³¹⁴ For a more extensive list, including the official name of the laws and their full text (in Russian), secondary legislation, and other information visit Legislation on Line, <http://www.legislationline.org>, (2004-11-23). *The Federal Law on Freedom of Conscience and Religious Organizations, the Federal Law on Official Support of Organizations for Juveniles and Children, the Federal Law on Employers' Union, Federal Law on Trade Unions and their Rights and Guaranteed Activities, and the Federal Law on State Registration of Legal Entities and Individual Entrepreneurs* are also included in this list.

³¹⁵ Russian lawyers active in the NGO sector, members of the *Duma*, and officials in the Ministry of Justice described the legal environment for NGOs as controversial and ineffective. “Russia”, *The 2002 NGO Sustainability Index for Central and Eastern Europe and Eurasia*, USAID, pp. 159, 161. http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2003/russia.pdf, (2004-11-25). In addition, on the disregard of the law and the weakness of state institutions supposed to enforce the legislative framework that is supposed to support NGOs, see Marcia A. Weigle, “State and Civil Society from Yeltsin to Putin”, *Demokratizatsiya*, vol. 10, no. 2, Spring 2002, (117-146).

³¹⁶ *Ibid.* and “Ratings: General Definitions”, *NGO Sustainability Index 2003*, USAID, p. 5.

NGOs receiving foreign support, this development does not contribute to the strengthening of civil society. In addition, a majority of the domestic donors are mostly interested in strengthening the infrastructure and social services in the geographical area in which they are active. However, domestic support has declined after the arrest of Mikhail Khodorkovsky.³¹⁷ In conclusion, the Russian legislative framework is not sufficiently encouraging to charity in order for national donors to fill the gap that might arise if international and foreign donors withdraw from Russia.³¹⁸ Thus, weak domestic pluralism as to funding, and complex tax laws regarding human rights organization and human rights litigation puts the Russian human rights movement in a vulnerable position.

Concerning Russian state policy toward human rights organizations, it can be concluded that the grip has tightened after Putin's coming to power, especially due to Putin's state-centric view, which has resulted in a division of most activity into perceptions of being pro- and contra the State. Putin's view is that activities within civil society should strive to strengthen the state and thus work for the same goal as the state. As a result, the activity of social aid organizations and youth organizations in favor of the state will suffer fewer difficulties than human rights organizations that see it as their task to observe and report misconduct on behalf of the state.³¹⁹ Human rights organizations critical of the Russian State are, according to several sources, subjected to harassment by the police, the FSB, and tax authorities.³²⁰ Denial of mandatory registration of NGOs and arrests of activists are examples of difficulties that human rights and environmental organizations, by definition not considered as state-friendly, are subjected to. The

³¹⁷ In addition, in June 2001, President Putin declared that there is no honor in taking money from Western foundations. The statement was addressed to Russian NGOs. McFaul and Treyger, "Civil Society", p. 165. The Russian Ombudsman Lukin welcomed a discussion on funding of civil society, and pointed at the necessity of pluralism concerning both funding and activity. "Ombudsman: Funding NGOs in Russia a Point for Debate", May 24, 2004, Moscow, Interfax, http://www.gateway2russia.com/st/art_238840.php, (2005-03-09). The debate on and the measures taken to increase the control of foreign funding is set in motion *inter alia*, by the concern that oligarchs in exile, and radical religious groups should support political activities in Russia. The fact remains, however, that such measures as suggested by the State will hit human rights- and environmental organizations hard. The question is whether the donors that the Russian State refers to in its rhetoric are likely to be affected by the suggested measures.

³¹⁸ McFaul and Treyger, "Civil Society".

³¹⁹ *Ibid.*, pp. 159-160.

³²⁰ "Russia", *The 2002 NGO Sustainability Index for Central and Eastern Europe and Eurasia*.

situation for human rights organizations working with Chechnya-related cases is particularly grave.³²¹

According to *the Law on Registration*, those organizations that were not registered by the 30th of June, 1999 could be ordered, by a court of law, to close down their activity.³²² There are several reports as to the improper and selective use of this possibility to shut down undesired NGOs, i.e., organizations that could prove problematic for the state, especially human rights and environmental organizations.³²³ Although several of the organizations that were active before the demand of re-registration are still active, the effect of the law from 1995 should not be underestimated. Those organizations that were not able to re-register are more vulnerable in their relation to the State and it is more difficult to survive financially.

In parallel to this development, there is an attempt on the Russian State's behalf to establish a civil society that is friendly to, and controlled by, the State. The method resembles the Soviet approach to non-state actors.³²⁴ Several of the NGOs included in this co-optation were created from above, and only those that are apolitical and share the State's view of what constitutes traditional Russian values will benefit from state support.³²⁵ Another tactic has been to integrate existing NGOs into centralized national structures, especially labor unions. For example, the initial intent of the Civic Forum, arranged by the Kremlin in 2001, was to centralize and organize NGOs throughout Russia into one organization. The

³²¹ McFaul and Treyger, "Civil Society", p. 161. See for example, Human Rights Watch, "Chechnya: Human Rights Defender Abducted", available at <http://hrw.org/english/docs/2005/01/21/russia10055.htm>, (2005-01-29).

³²² The procedure for registration of public organizations is now regulated by the Ministry of Justice: Prikaz No. 68, adopted March 25, 2003.

³²³ McFaul and Treyger, "Civil Society", p. 161. According to the U.S. State Department's Report on the Human Rights Situation in Russia, 2000, in its turn citing a report prepared by the Human Rights Information Center and the Center for Development of Democracy and Human Rights, 57.8 percent of NGOs managed to re-register. Several NGOs continued to work without registration and some registered under a new name. The consequence of not being registered is that the NGO can at any time lose its judicial status. <http://www.state.gov/g/drl/rls/hrrpt/2000/eur/877.htm>, (2004-11-23).

³²⁴ See Part I, Chapter Four.

³²⁵ The political party United Russia, which is closely affiliated with Putin, has established a youth organization similar to the Komsomol. In addition, Putin has taken an incentive to improve the situation and connection between some NGOs and the state by inviting these to a meeting. The NGOs that were invited are engaged in stamp collecting, gardening, and sports, just to mention a few. McFaul and Treyger, "Civil Society", p. 166.

Government had to step down from this ambition after heavy criticism.³²⁶ In conclusion, Russian civil society in general and human rights organizations in particular are in a more vulnerable position subsequent to Yeltsin stepping down from power and Putin becoming President.³²⁷ The war in Chechnya, anti-terrorist operations, and the struggle to keep oligarchs out of politics are three plausible explanations to this development. The following sections focus on the parts of the support structure not touched upon so far, that is the legal profession, legal aid, and legal representation.

4.2.2 Advocates and Bar Associations

In 2002 *the Federal Law on Advocacy and the Bar in the Russian Federation* (hereafter “the Law on Advocacy”) was adopted.³²⁸ Up till then *the RSFSR Law on the Advocacy* from 1980 was applied. According to this law the Bar was under the supervision of the Ministry of Justice. Gorbachev tried to boost the status of advocates in the late 1980s by increasing their number and informative role in society, hence they were invited to take part in the legislative process and to supervise their own professional behaviour to a larger extent than before. Still, they did not gain complete autonomy from the state. The post-Soviet Russian bar structure was compiled of both old (established in the Soviet period) and new bars. In addition, several non-profit legal aid organizations were created, which according to Pamela Jordan should be seen as an indication of advocates failing to address the poor’s need for legal assistance in civil matters.³²⁹ During the 1990s Russian advocates became more autonomous in relation to the state. Still, its influence and power did not increase to the same extent due to poor finances and internal conflicts.³³⁰ The 2002 Law on Advocacy was adopted in order to remedy

³²⁶ John Squier, “Russian Society and the Challenge of Russian *Gosudarstvennost’*”, *Demokratizatsiya*, Vol. 10, No. 2, Spring 2002, (165-182), pp. 176-177. For a description of the forum and its preparations see, Alexander Nikitin and Jane Buchanan, “The Kremlin’s Civic Forum”, *Demokratizatsiya*, Vol. 10, No. 2, Spring 2002, (147-165).

³²⁷ Nations in Transit’s rating of civil society in Russia shows a decreasing trend. In 1997 the score was 3.75, while in 2004 it had moved to 4.50. Russia’s rating worsened due to the state’s increasing hostility towards groups that seek to influence state policies, declining prospects for independent and pluralistic funding, and increasing apathy amongst the population. See Orttung, “Russia”, *Nations in Transit 2004*.

³²⁸ *SZ* 2002, no. 23, item. 2102.

³²⁹ Pamela Jordan, “The Russian *Advokatura* (Bar) and the State in the 1990s”, *Europe-Asia Studies*, vol. 50, no. 5, 1998, (765-791), p. 773.

³³⁰ *Ibid.*, p. 784.

a situation of organizational pluralism and great uncertainty concerning the regulatory framework.

Requirements for becoming an advocate, and the establishment and status of the federal and regional bars are regulated by “the Law on Advocacy”. In order to call oneself ‘advocate’ and in order to practice advocacy³³¹, one has to acquire that right by fulfilling the procedure and requirements³³² established in “the Law on Advocacy”.³³³ The powers of an advocate are stipulated in relevant procedural laws.³³⁴

A bar is a professional association of advocates that forms part of civil society and hence is not allowed to be a part of central or local government. Bars are established on both the federal and regional levels. *The Federal Bar* is an all-Russian non-governmental and non-profit organization.³³⁵ Bars of the federal subjects are compulsory members of the Federal Bar. One major task of the bars is to ensure that Russian citizens have access to legal assistance. In order to guarantee this, government agencies are obliged to:

- ensure the independence of the bars,
- finance activities of advocates that render *pro bono* legal assistance in cases when that is provided for by law,
- provide, when necessary, advocates with office premises and communications.³³⁶

In addition, the Federal Bar is assigned specific tasks. These, according to the law, are to:

- represent and protect the interest of advocates in government authorities and bodies of local self-government,

³³¹ The definition of advocacy (*advokatskaya deyatel'nost'*) is provided in Article 1 “the Law on Advocacy”. The Article accounts for what is not considered advocacy, for example entrepreneurial activity, legal assistance rendered by government agencies, individual entrepreneurs, and notaries, just to mention some.

³³² In order to be appointed advocate, one has to have higher legal training in a state-accredited higher learning institute, or an academic degree in law. Two years of working experience within the legal field, or internship in an advocacy body, is required. The “applicant” has to pass an examination, and be approved by the regional qualification committee of the bar. See further, Articles 9-12 “the Law on Advocacy”.

³³³ The powers, obligations, and restrictions on advocates are established in Article 2 “the Law on Advocacy”.

³³⁴ Article 6 (1) “the Law on Advocacy”. See also the Criminal Procedural Code Articles 49-53.

³³⁵ Article 35 (1) “the Law on Advocacy”.

- co-ordinate activities of the regional bars, and
- ensure the quality of legal assistance rendered by members of the bar.

Decisions of the Federal Bar are binding on all bars and advocates.³³⁷

The Federal Bar is to be formed by the All-Russian Congress of Advocates, which is the highest organ of the Federal Bar.³³⁸ It is subject to state registration. The executive body of the Federal Bar is the Council of the Federal Bar, which is elected by the All-Russian Congress of Advocates.³³⁹

Funding of the Federal Bar emanates from contributions from regional bar associations, and grants, donations, and charity from private and juridical persons. The Federal Bar Association is the owner of these assets, which should cover a wide range of expenses, including salaries to its staff, acquiring equipment, and most importantly, the wages of advocates that provide *pro bono* legal assistance.³⁴⁰

Regional bars are non-profit organizations whose members are advocates in the specific federal subject. Membership is compulsory for advocates. Regional bars have *inter alia* the responsibility to ensure that the population of the federal subject has access to qualified legal assistance throughout that specific territory. Only one bar may exist within each federal subject. In addition, inter-regional bar associations are prohibited.³⁴¹ The highest organ of a regional bar is the assembly of advocates, which among other things sets up the council of the regional bar (i.e. the executive organ³⁴²), elects delegates to the All-Russian Congress of Advocates, and determines the procedure for sending advocates to law centers.³⁴³

³³⁶ Article 3 (3) “the Law on Advocacy”.

³³⁷ Article 35 (7) “the Law on Advocacy”.

³³⁸ See Article 36 (2) “the Law on Advocacy”, for a list of the duties of the All-Russian Congress of Advocates. Among other things it should adopt the status of the Federal Bar, adopt the advocates’ code of ethics, and decide on budgetary issues of the federal and regional bars.

³³⁹ For a detailed list of the tasks of the Council, see Article 37 “the Law on Advocacy”.

³⁴⁰ Article 38 “the Law on Advocacy”.

³⁴¹ Article 29 “the Law on Advocacy”.

³⁴² Its composition and powers are stipulated in Article 31 “the Law on Advocacy”. The council should make sure that *pro bono* legal assistance, when required by law, is available throughout the region, by establishing functioning law centres. The council finances the law centres and remunerates advocates that provide *pro bono* legal assistance.

³⁴³ See further, Article 30 (2) “the Law on Advocacy”.

The regional bars obtain their assets from contributions paid by advocates³⁴⁴, and from charity and donations. These assets are owned by the regional bar. All donations must be in accordance with federal law and can be made by private and legal persons. These assets should cover the administrative costs of the bar, remuneration to advocates providing legal assistance *pro bono*, and wages of the bar's staff.³⁴⁵

“The Law on Advocacy” provides for four different forms of advocacy bodies;

- advocacy practice³⁴⁶,
- college of advocates³⁴⁷,
- advocacy bureau³⁴⁸, and
- law centers.³⁴⁹

It is up to each advocate to either establish or join the advocacy body of their choice. In only one circumstance can a bar take action to establish an advocacy body. That is when the total number of advocates in a judicial district amounts to fewer than two per federal judge. Should that be the case, then the relevant regional government agency can instruct the regional bar to establish a law center, in order to guarantee that free legal assistance is available. A law center is a non-profit organization set up in the form of a foundation.³⁵⁰

³⁴⁴ According to Article 25 (7) “the Law on Advocacy”, advocates should set aside, from the fee obtained for providing legal services, funds to be paid to the bar. The amount to be forwarded to the bar is decided by the assembly of advocates. Besides that, they should set aside money for their advocacy body, also the obligatory insurance and other expenses that arise in the line of their activity.

³⁴⁵ Article 34 “the Law on Advocacy”.

³⁴⁶ An advocacy practice is an advocate who has decided to practice alone. It must be registered with the council of the bar and it is not a judicial body. See Article 21 “the Law on Advocacy”.

³⁴⁷ A college of advocates is a non-profit organization, based on membership of two or more advocates operating according to statutes adopted by its founders. It is a judicial body that must be registered with the council of the bar. For a more detailed description of rights, duties, and activities see Article 22 “the Law on Advocacy”. Issues arising on the establishment, activities, and dissolution of a college of advocates are also stipulated in *the Federal Law on non-Profit Organizations*. Should there be a conflict between “the Law on Advocacy” and *the Federal Law on non-Profit Organizations*, the former prevails.

³⁴⁸ Can be established by two or more advocates, by entering into a partnership agreement. See further Article 23 “the Law on Advocacy”.

³⁴⁹ Article 20 “the Law on Advocacy”.

³⁵⁰ Article 24 (1) (2) “the Law on Advocacy”. Setting-up, activities, dissolution, etc. of the law centre are regulated by *the Federal Law on non-Profit Organizations* and “the Law on Advocacy”.

In addition, advocates are entitled to establish voluntary associations. These voluntary organizations do not have the right to perform activities of advocacy bodies, regional bars or the Federal Bar as defined in “the Law on Advocacy”.³⁵¹ The more detailed regulation on matters of legal assistance in civil- and administrative law will be examined in the following Section.

4.2.3 Legal Aid in Civil and Administrative Law Cases

The CRF stipulates judicial protection of individual rights and freedoms.³⁵² In addition, every person should be guaranteed the right to qualified legal assistance. This legal assistance is to be rendered free of charge when provided for by law.³⁵³ In addition, according to the CRF, every victim of abuse of power should be protected by law. The state is obliged to ensure access to justice and compensation for damage caused by the abuse of power.³⁵⁴ Still, it is unclear what the Russian federal state is providing in terms of financial support in civil and administrative law cases.³⁵⁵

4.2.3.1 Legal Assistance

Free legal assistance in civil and administrative cases should, according to “the Law on Advocacy”, be provided to citizens of the Russian Federation whose average personal income is below the minimum wage as established by regional law. These individuals have the right to *pro bono* legal assistance concerning demands for: maintenance payments, compensation for injury caused by death of the bread-winner, and compensation for maiming or bodily harm in connection with work activities, considered by a court of first instance. Free legal assistance is also provided to veterans of the Great Patriotic War (matters connected to entrepreneurial activities are excluded). In addition, citizens of the Russian

³⁵¹ Article 39 “the Law on Advocacy”.

³⁵² Article 46 (1) CRF. In criminal law cases, the Federal State will provide monies for legal aid. A special item exists for this in the federal budget. The size of the remuneration will be determined by the federal Government. See, Article 25 (8), (9) “the Law on Advocacy”. The responsibility for providing monies to the bar associations is shared between the Ministries of Justice and Finance, and remuneration is only provided to advocates. Author’s conversation with representatives from the Ministry of Justice of the Russian Federation, Moscow, December 16th, 2004.

³⁵³ Article 48 (1) CRF.

³⁵⁴ Articles 52, 53 CRF.

³⁵⁵ In criminal cases, the funding comes from the federal budget, see the Criminal Procedural Code Article 50 (5). See also Article 25 (9) “the Law on Advocacy”.

Federation can obtain free assistance in order to draft applications for pensions and benefits. Citizens of the Russian Federation who have been victims of political repression, are granted legal assistance in matters of rehabilitation. In addition, *pro bono* legal assistance should always be provided to minors that are kept in children's homes and borstals.³⁵⁶

In order to ensure that *pro bono* legal assistance is provided to citizens that are entitled to it, all bars must within twenty days from their registration take decisions on the procedure for rendering such assistance, and with respect to the participation of defense counsel in criminal proceedings. Until such decisions are taken, the responsibility for providing legal assistance *pro bono* falls on colleges of advocates that were formed before this law entered into force.³⁵⁷

"The Law on Advocacy" explicitly stipulates that federal monies should be provided for legal aid in criminal cases. However, the Law is quiet concerning the federal state's financing of legal aid in civil and administrative law cases. The cost of providing legal assistance in civil and administrative law cases is covered by the federal subjects and regional bar associations. For example, logistical matters, allocation of office premises, housing of advocates, and the financial assistance to bars for maintaining law centers is regulated by normative legal acts of federal subjects.³⁵⁸ In addition, the list of documents that has to be presented by an individual in order to benefit from *pro bono* legal assistance is stipulated by regional laws or other regional normative acts. Likewise, the procedure for submitting the required documents is to be established by regional law.

The fact that the preconditions, both economic and formal, are to be established by regional law might cause inequality when it comes to *de facto* and *de jure* access to justice in the Russian Federation. Several factors have to be taken into consideration, for example that the economic situation of the federal subjects varies considerably. Several federal subjects are suffering from a weak and non-progressive economy, which might have an effect on the availability of *pro bono* legal assistance. In addition, since the *regional* minimum wage determines whether someone is entitled to *pro bon* legal assistance in civil and administrative cases,

³⁵⁶ According to Article 26 "the Law on Advocacy".

³⁵⁷ Article 44 "the Law on Advocacy".

³⁵⁸ Article 24 (3) "the Law on Advocacy". Regional legislative assemblies will consider and decide how to implement the request to establish a law centre, by finding a post for it in the regional budget and follow up on the spending of allocated resources. A.P. Gulyaev, K. E. Rivkin, O. B. Saraikina, and C. M. Yudushkin, *Kommentarii K Federalnomu Zakonu ob Advokatskoi Deyatelnosti i Advokature*, Moscow, Ekzamen, 2004, p. 156.

there can be significant differences throughout the country. Additionally, the requirements of what documents have to be submitted and how can also vary to a considerable degree between different federal subjects. Complicated administrative procedures are already a problem in Russia, hence every situation that might cause additional administrative complications is undesirable.

The fact that procurators can act in the interest of the public and in the interest of weaker parties can also be considered part of the state's provision of free legal assistance. Procurators can act *ex officio* if the proceeding is initiated in the interest of the public and if he acts in the interest of a group of people whose precise composition is unknown. When procurators act in the interest of a weaker party, the case is usually initiated by that party turning to a procurator in order to obtain legal assistance free of charge. In addition, various state bodies, for example the Federal Ombudsman, and interest organizations can initiate a judicial proceeding in order to protect rights and freedoms of a specific person that turned to these bodies and organizations for help. When stipulated by law, they can act *ex officio* in order to protect rights, freedoms, and legal interest, of a group of people whose precise composition is not known, or incapacitated persons irrespective of the proceeding being requested by the party concerned or not.³⁵⁹

4.2.3.2 State Fees

State fees to be paid by the plaintiff in constitutional, civil, and administrative law litigation is a common phenomenon, which does not necessarily *per se* restrict efficient access to justice. In Russia, plaintiffs will have to pay a State fee, decided by law.³⁶⁰ Concerning complaints against decision, actions, or inactions on behalf of various public bodies, the State fee is to be set to an amount of 100 Rubles.³⁶¹ The size of the State fee will be decided in every case by a judge according to guidelines laid down by law. A judge can remove the obligation to pay a State fee. Claimants that are invoking consumer rights, or collecting social benefits can be exempted from the State fee. This is also the case for minors, and public interest litigation initiated by public bodies, organizations or individuals³⁶²

³⁵⁹ Article 46 (1) CPC.

³⁶⁰ For civil- and administrative law cases see, Article 88 (2) CPC.

³⁶¹ Article 333.19 *Tax Code of the Russian Federation*, as amended November, 2, 2004, N 127-F3. See above, Section 3.3.1.1.

³⁶² According to Article 89 (1) CPC.

Concerning judicial review of administrative acts - if the complaint has been turned down and the administrative act is legal, then the plaintiff, as a main rule, will be made responsible for the State fee. However, there is one exception: if the plaintiff has filed a complaint to the highest administrative body and if the responsible body has not delivered an answer within the time limit laid down by law, or if no answer at all has been given, the court can make the state authorities responsible for the court fee even if the action or decision has been declared legal.³⁶³ Thus, a poor plaintiff lacking access to free legal assistance is encouraged to initially use administrative review. However, the possibility to let the “respondent” state body carry the cost of judicial proceedings means that the plaintiff is not exclusively directed, out of financial considerations, to the use of the administrative procedure. This solution has the potential to promote access to justice for the poor. In addition, it might put pressure on administrative bodies to act in order to avoid additional costs for court proceedings. In conclusion, State fees *per se* do not seem to restrict access to justice in Russia.

4.2.3.3 Legal Representation

Finally, a note on legal representation, since the question whether legal representation before a court of law is mandatory or not can have an impact when assessing whether legal assistance is a prerequisite for access to justice. If legal representation is mandatory, then demands on free legal assistance are likely to be higher.³⁶⁴ The CPC states that a person may both represent himself before a court of law and use a representative. Hiring a representative does not exclude the possibility of representing oneself.³⁶⁵ In order to appear before a court of law as a representative, a power of attorney is required.³⁶⁶ As a main rule, procurators, judges, and inspectors cannot act as representatives before a court of law. Exceptions are possible if provided for by law or if their organization should need a representative.³⁶⁷ The CPC recognizes certain persons as representatives by force of law. For example, parents, foster parents, or trustees can protect rights

³⁶³ Articles 4 and 9 “the Law on Appeal”.

³⁶⁴ See above Part II, Section 5.4.2.1. Especially, the *Airey v. Ireland* case.

³⁶⁵ Article 48 (1) CPC.

³⁶⁶ Article 49 CPC.

³⁶⁷ Article 51 CPC.

and freedoms of incapacitated persons before a court of law, or appoint a representative to conduct the case.³⁶⁸

4.2.4 Conclusions

Pluralistic funding of Russian civil society in general and human rights organizations in particular has decreased over the years. This is partly explained by increased state intervention in Russian private entrepreneurship, but it is also a result of foreign donors withdrawing from the country and a harsh state policy towards foreign donors.³⁶⁹ A major part of human rights organizations involved in human rights litigation depends on foreign donors.³⁷⁰ The economic situation is thus difficult for several organizations, which potentially contributes to fragmentation of civil society due to competition for funding. This is especially the case regarding the relationship between regional and federal NGOs. NGOs in the regions sometimes feel disadvantaged in relation to NGOs in, for example, Moscow. This development might have severe consequences for NGOs providing legal aid and engaging in rights litigation, taking into consideration that their activities are not prioritized by the Russian state.

“The Law on Advocacy” provides for free legal assistance in the civil- and administrative cases listed above. The law consequently uses the term *pro bono*. This might be misleading in the sense that it does not, at least not formally, include voluntary work of advocates. Those advocates that provide free legal assistance to their client will be reimbursed by the regional bar association, which in its turn should receive funding from regional state authorities according to the law. Thus, there is a cost to be born by state bodies, which is not usually the case when the term *pro bono* is being used. Nevertheless, the amount received, if any, is so low that the work provided might very well be regarded as *pro bono*.

“The Law on Advocacy” does not regulate matters relating to the logistical problems of setting up a law centre, nor does it provide for financial assistance from *the federal state* to bars for running the law centre. These issues are to be regulated by the federal subjects.³⁷¹ The purpose of a law centre is to ensure that

³⁶⁸ Article 52 CPC.

³⁶⁹ See, “Russia”, *The 2002 NGO Sustainability Index for Central and Eastern Europe and Eurasia*.

³⁷⁰ See for example Anders Uhlin, *Post-Soviet Civil Society. Democratisation in Russia and the Baltic States*, London, RoutledgeCurzon, (forthcoming 2005). Uhlin shows that human rights organizations constitute a large part of Russian civil society and that they are dependent on foreign funding.

³⁷¹ Article 24 (3) “the Law on Advocacy”.

there are advocates available to citizens that according to law have the right to legal assistance. Access to justice and fair trial is a function of the availability of legal aid. In regions where the need might be the highest, i.e., in regions with poor public finances, high unemployment, or malfunctioning social services, access to legal aid is to be stipulated and implemented by regional law. This is a weakness in the law that might lead to inequality and poor quality of legal aid and hence access to justice. Although an assembly of advocates determines the budget needed to keep the law centre running³⁷², financial resources from the federal subject will be of great importance for the actual functioning of the law centre.

Apparently, there is a bar association in every federal subject of the Russian Federation.³⁷³ Still, it is hard to tell whether they are contributing to the establishment or maintenance of a unified body of human rights lawyers. The funding seems to be poor and as discussed above, sources available, both human and financial, vary considerably throughout the country. Besides the federal and regional bar associations, there are, as discussed above, human rights organizations. These provide legal information services, community legal education, counselling and advice for individuals, representation in court, support in public-interest litigation, and appellate court advocacy. Several of them have advocates working for them both as in-house lawyers and as voluntary workers. In addition, the larger Western firms active in Russia have *pro bono* divisions.³⁷⁴

The fact that the reimbursement provided to advocates who provide free legal assistance is so low also means that the majority of advocates try to avoid it. Advocates not wishing to provide free legal assistance can pay money to the regional bar association. In 2004 the amount was 700 rubles a month in Moscow. That money will then be used to reimburse advocates that are providing free legal aid. Business lawyers, who are not advocates, are not affected by “the Law on Advocacy” and they are not obliged to contribute to the fund, which is unfortunate since it is within this sector that larger amounts of money are circulated.³⁷⁵ Neither are they obliged to provide free legal assistance.

Taking into consideration that bar associations are responsible for providing legal assistance, which is guaranteed by the CRF and ultimately a state responsibility, it

³⁷² See Article 24 (4) “the Law on Advocacy”.

³⁷³ Author’s conversation with representatives from the Ministry of Justice of the Russian Federation, Moscow, December 16th, 2004.

³⁷⁴ Burnham, Maggs, and Danilenko, *Law and Legal System of the Russian Federation*, p. 148.

³⁷⁵ *Ibid.*

is remarkable that the Russian federal state only provides monies for legal assistance in criminal law cases. This is especially the case, taking into consideration the strong tradition of individuals turning to a procurator in order to obtain free legal assistance. It could be argued that this traditional behavior needs to be altered, especially taking into account the politicization of the Procuracy, and the limited role to be played by the Procuracy in civil and administrative law issues, according to the 2002 CPC. Information campaigns in combination with additional resources will be needed in order to strengthen the position of advocates and human rights organizations in relation to the Procuracy.

In conclusion, it seems unclear how much funding will be provided by regional authorities for legal assistance in civil and administrative law cases. It is ultimately a decision for regional legislative assemblies. As stated above, the CRF stipulates a right to access to justice in cases of abuse of state power. However, if this right is to be more than a paper tiger it is likely that positive action on the part of the state will be needed, alternatively that a new federal law on legal aid be adopted that ensures equal protection throughout the Russian Federation. In addition, the state-civil society relationship in Russia is still weak to the disadvantage of individuals. And *pro bono* work among lawyers is still underdeveloped, reimbursement is small and even uncertain. Human rights organizations concerned with rights litigation are in large part dependent on foreign support, while state finances available for rights litigation in civil and administrative law cases are limited. In addition, they have difficulties in engaging young people.³⁷⁶ And most importantly, by putting the responsibility for providing legal assistance on the bars, without providing sufficient means for reimbursement the State is weakening the bar, since it becomes more attractive to practice law in private law firms or in large companies, which are not obliged to provide free legal aid. Therefore, the support structure in Russia must be considered as relatively weak and fragmented, although it has been improving compared to the situation during the Soviet period.

The model chosen by Russia for providing legal aid, i.e., relying on bar associations, is by Cappelletti and Garth considered to belong to the first wave of legal aid. The first wave is recognised by the recognition and partial support of legal aid, although without affirmative actions on behalf of the state to guarantee

³⁷⁶ Ivan Pavlov, "Human Rights Activism in Putin's Russia", *East European Analytical Case Reporter*, http://www.eeacr.org/Articles/0404_pavlov.htm.

it.³⁷⁷ This might put unwarranted restraints on access to justice in civil- and administrative cases. This, in combination with the fact that approximately seventy percent of Russia's inhabitants are below the poverty line as it has been defined by the UN, i.e., sixty USD per month³⁷⁸ justifies the question whether the Russian state actually fulfils the CoE's *Recommendation on Legal Aid* and *the Recommendation on Effective Access to the Law and to Justice for the Very Poor*.³⁷⁹

4.3 Individual Legal Activism in Russia

Individual legal activism has both a legal-technical and a societal feature to it. This means that we are not only concerned with rules on standing and support structures, but also with the actual use of the right to initiate a process of public law adjudication. Although reaching the conclusion that the preconditions for a rights revolution in Russia are weak and have substantial problems, this study enables a more diversified picture of developments through the 1990s. To start with, and as has been shown above, the number of public law cases initiated by individuals before a court of law are increasing. In addition, the legislative framework has improved substantially concerning, e.g., bill of rights, independence of judges, standing rules before a court of law. Russia has, more or less, adopted a communitarian approach to rights enforcement, although it does not allow for *actio popularis*. Nevertheless, it is equally clear that the legislative framework of relevance for human rights NGOs has changed for the worse, which is also the case of the State's attitudes toward human rights organizations. In addition, Russian bar associations, that are responsible for providing free legal aid in public law cases are still experiencing organizational and economic problems as has been discussed above. Due to the low and uncertain remuneration offered to lawyers that provide free legal aid they try to avoid it. The fact that members of the bar can avoid having to provide free legal aid by paying a certain amount to the bar may also in the long run create an incentive for lawyers not to become members of the bar.

Still, Russian individuals can turn to a procurator or the Federal Ombudsman with their complaints, both of which do have the right to initiate a case before a court

³⁷⁷ Mauro Cappelletti and Bryant Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective", *Buffalo Law Review*, 181, 1977.1978, (181-292), p. 197.

³⁷⁸ Jan Leijonhielm *et. al.*, *Rysk milit ry f rm ga i ett tio rspespektiv: Tendenser och problem 2004*, Stockholm, FOI, (forthcoming 2005).

³⁷⁹ See above, Part II, Chapter 5.4.2.1.

of law. A procurator may initiate proceedings on behalf of weak parties and on behalf of diffuse interests and unidentified groups. The Ombudsman will act due to a complaint being filed to the Ombudsman if he should find that a violation of rights and freedoms has occurred. In addition, the possibility to bring a complaint to the ECtHR has provided Russian citizens with a possibility to invoke external legal sanctions. This is a unique development in Russia, which has contributed to an increasing activism and awareness amongst both human rights organizations and individuals. Taken together, this puts an increasing pressure on the Russian State to live up to its national and international obligations to protect and enforce individual human rights and freedoms.

In conclusion, individual legal activism in Russia is increasing. Still, its impact on the lives of individuals and on society as a whole is hard to establish at this point, although the prospect does not seem too good. The restrictive policy towards human rights organizations has not, thus far, been supplemented by more generous rules on state funding of legal aid. Taking this into account, the negative development that Russia is undergoing today is all the more serious since it risks suffocating liberal elements in general, and human rights organizations in particular, that have struggled for survival and influence since the end of the 1960s. Taken together this development might make it less likely for legal participation to constitute a real and widespread alternative to political participation in a Russia which, during the period of this study, has moved in the direction of becoming more authoritarian. Nevertheless, it remains one of the few available channels for exercising control and influence, and it could be argued that its potential has not been fully realized.

5. Summary and Conclusions

Above the conclusion was reached that the Russian Federation is best described as a state becoming increasingly authoritarian, and that the channels available for political participation are becoming less influential due to that development. Taking into consideration that the impact of traditional political channels for control of political and administrative powers - that never had the chance to fully develop or to be consolidated after the dissolution of the Soviet Union – have been undermined, the channels for individuals to exercise control of political and administrative powers are further weakened.

Still, the overall question of this dissertation – whether judicial protection of individual rights in combination with individual legal activism can constitute an alternative or complementary mechanism for political participation and control – must in the Russian case be answered with a cautious yes, at least in theory. Russian constitutional- and administrative procedural law does offer judicial protection of individual rights at the surface level of law. There is a rights-based concept of administrative law in Russia, meaning that rights, as stipulated in the CRF and in the ECHR, put limitations on the exercise of political and administrative power, they can be invoked before a court of law, and they are enforceable. Additionally, Russian public law adjudication is closer to the Republican model of rights enforcement than to the Liberal, which means that the public interest and striving for the common good is reflected in the standing rules, court proceedings, and court decisions. Legal aid is provided only when stipulated by law, but on the other hand legal representation before a court of law is not mandatory and State fees can be exempted.

It is clear that the membership of the CoE has had a significant impact on the judicial protection of individual rights, as well as individual legal activism in Russia. It is equally clear that the Russian support structure is suffering from several weaknesses, which also weakens access to justice, taking into account the large parts of the Russian population officially classified as poor, and the vast regional differences within Russia. The situation for NGOs involved in human rights litigation that are independent from the state, is becoming more and more difficult. This development, in combination with the criticism put forward against the Russian legal aid scheme presented above, provides for some pessimism concerning individual legal activism, which is unfortunate taking into account the increasing number of administrative cases being referred to the general courts and the large number of cases where the state is found to be in violation of the law.

Naturally, this *per se* puts a heavy burden on the courts and it would be preferable if the state and its authorities could improve their conduct. However, as long as this is not the case, remedies are required.

What has been discussed thus far is mainly the situation on the surface level of law. Regarding the level of legal culture, it has to be recognized that there are still several forces, within both political and legal sectors, as well as within civil society, that are moving in different directions. It would be premature to reach the conclusion that the legal reform that the Russian Federation has experienced since the beginning of the 1990s is consolidated in the sense that there is a stable *status quo* concerning attitudes and activity within the legal system as to rights enforcement. Even though the Russian state is becoming increasingly authoritarian and the prerogative of the state tends to precede that of the individual, legal reform is not consolidated as long as there are human rights organizations, state officials, and legal professionals that adhere to human rights and which have the resources to argue and disseminate this approach.

PART FOUR

SUMMARY AND CONCLUSIONS

1. Summary and Conclusions

1.1 Summary

This dissertation has three purposes. *The first and overall purpose* has been to investigate, within the field of public law, whether judicial protection of individual rights and individual legal activism can be seen as an alternative or complement to electoral control of political and administrative powers. To fulfil that purpose, the pros and cons of, the preconditions for, potential consequences of, and the role played by the CoE for judicial protection of individual rights on the one hand, and individual legal activism on the other, in both established European rule of law states and post-Socialist states have been examined and discussed.

Part II concludes that judicial protection of individual rights and individual legal activism within the field of public law can be seen as an alternative or complement to electoral control of political and administrative powers, especially when public trust in, and the powers of, the legislative assembly and political parties is low and decreasing. And in addition, if the preconditions for individual legal activism are of such a character that access to judicial protection of individual rights is available to the larger public and not only a limited group of advantaged individuals. Thus, it is argued that judicial review in combination with individual legal activism can strengthen democracy, so long as access to justice is equal and when traditional channels for political participation are either discredited or not functioning, and that the degree to which judicial protection of individual rights and individual legal activism can be seen as an alternative or complement depends on the definition of standing rules and the existence of a vibrant support structure.

To discuss the effect of various standing rules and the potential societal function of public law adjudication, a model for analyzing the character of public law adjudication has been developed. The model allows for a characterization of public law adjudication as either Liberal or Republican, depending on the determining features of standing rules, court proceedings, and court decisions. The Republican model provides for public interest litigation in order to strive for the common good, while the Liberal model is more concerned with self-interest of the individual.

In Part III of the dissertation, the theoretical framework presented in Part II was used to analyse judicial protection of individual rights and individual legal activism

in post-Socialist Russia. The results show that the Russian state is best described in terms of an authoritarian mode of governance and that the traditional principal-agent relationship is weak. Thus, in order to strengthen the individual in relation to the state, alternatives for exercising control and participation are required. In order to find out whether the judiciary has the potential to improve this relationship, both the character of public adjudication in Russia, and whether Russian administrative law is rights-based were examined. The results show that Russian administrative law is rights-based (according to public law legal doctrine and rules) and that the character of Russian public law adjudication is closer to the Republican model than the Liberal. However, the Russian support structure is still weak and finds itself in an increasingly inhospitable environment - legally, financially, and politically.

The final purpose has been to assess the impact of Russia's membership in the CoE on judicial protection of individual rights within the sphere of public law. This study concludes that there has been an impact on:

- developing and improving the legislative framework,
- developing Russian court jurisprudence referring to the ECHR and to the jurisprudence of the ECtHR,
- exerting pressure on the Russian state to improve practices of the state bureaucracy, enforcement of court decisions, paying of damages etc.,
- stimulating individual legal activism, and
- increasing individuals' knowledge and awareness of their lawful rights and how to implement them.

However, additional improvements will be needed.

1.2 Final Conclusions and Analysis

1.2.1 Judicial Review in Combination with Individual Legal Activism - A Complement or Alternative to Political Participation?

The overall question that has been dealt with in this dissertation is: *Why, and under what circumstances can judicial protection of individual rights and individual legal activism be an alternative or complement to traditional channels of political participation?* Clearly, judicial protection of individual rights has played a political role in several common law legal orders, for example in the U.S., the United Kingdom and in Canada. However, this dissertation focuses on civil law legal orders and the question is

whether legal participation can also be an alternative or parallel to political participation in these countries.

This study takes its starting point in the purportedly weak position of legislative and representative assemblies. They either remain weak or are being weakened due to their losing in terms of influence, control, and legitimacy. Globalization, Europeanization, and the growth of the welfare state, have been put forward as plausible explanations for this development. In addition, the increasing interaction between states and the influence of multilateral actors on both domestic and foreign policy issues on the one hand, and the rise of the welfare state on the other, requires a larger national administrative apparatus and a more extensive delegation of powers to the executive. For several reasons - such as corruption, inefficiency, and opportunism - legislative assemblies, especially in post-Socialist Europe have lost, or failed to win, trust from their citizens. This is reflected by decreasing voter turnout, as well as decreasing membership of, and activity in, political parties. Thus, the conclusion was reached that there is a need for alternatives and complements to traditional channels for control of political and administrative powers in both “old” and “new” democracies in Europe. The question was therefore raised whether judicial control of political and administrative powers might provide such an alternative.

1.2.1.1 Judicial Review of Political and Administrative Powers

The question of judicial control of political and administrative powers has for a long time been subjected to both academic and political debate. And this author does not claim that it is a new or under-researched question. However, this study approaches the problem from both a macro and a micro level and by doing so is able to present new questions, approaches, and answers. The results presented here suggest that judicial control of political and administrative powers, when invoked by individuals, has a potential to actually strengthen democracy, rather than weaken it, as is often maintained. It is argued that when traditional channels for political participation and control for various reasons do not stand out as an alternative for citizens to influence the society in which they live, the judicial channel can be a parallel or alternative channel for doing so.

This conclusion might be controversial in parliamentary systems with a strong belief in electoral control and procedural democracy on the one hand, and a separation between law and politics on the other. Still, in order to provide another point of view on the matter, public law adjudication has been discussed in the context of Loughlin’s view of public law i.e., “*as a sophisticated form of political*

discourse'. Recognizing that judicial review of laws and governmental actions have been the subject of several scholars' attention – the contribution of this study is the articulation and scrutiny of the connection between public law and politics within the field of public law adjudication from a micro perspective.

In order to highlight the individual perspective, this study takes into account the principal-agent relationship. In doing so, it shifts the focus from the horizontal and macro perspective to the vertical dimension of control. The term vertical control refers to a bottom-up perspective, taking its starting point in the means available to individuals to exercise control of political and administrative powers. One of the manifestations of the sovereignty of a state is the power to adopt laws. However, as discussed in Part I, Chapter Three, Loughlin awards sovereignty both a political and a legal meaning. The legal concept of sovereignty is connected to the state's power to adopt laws, while the political is concerned with the state's ability to generate power by improving the relationship between the state and its citizens. It is suggested that that power will be strengthened by invoking self-limitation, which is also the core of constitutionalism, and that public law contributes to the control, evaluation, and guidance of government.

The ambition of this dissertation has been to apply these abstract ideas to the study of judicial review of statutes and governmental actions from the individual perspective. The argument put forward here is that when traditional channels for control of political and administrative powers that uphold the legitimacy of the state through popular participation either fail or are not sufficient, then alternatives and complements are needed. Judicial review, in combination with individual legal activism, has been presented as such an alternative. This in its turn requires that public law adjudication within civil law legal orders be re-evaluated. Instead of limiting the sovereignty of the state, public law adjudication may actually strengthen it in the sense that it provides increased individual influence and control, which in its turn may strengthen the legitimacy of the state in terms of trust. Should this be the case, then the political sovereignty and power of the state has been increased as a result of improving the relationship between the state and its citizens. Clearly, the functioning of a state is due to the interaction of legal and political sovereignty. However, should legal sovereignty be undermined by alienation from or low trust in the legislative assembly, then boosting political sovereignty by allowing increased control of legal sovereignty and the administrative apparatus might actually improve and strengthen the state.

Still, the possibility for individuals to use the judicial channel for this purpose varies depending on the political system within which they are active. By creating

three ideal models for discussion on various modes of governance, i.e., parliamentary, constitutional democracy, and authoritarian systems, different channels available to citizens to exercise control of political and administrative powers are laid bare. And so are the characteristics of these various channels. The conclusions reached in Part II regarding parliamentary systems show that individuals' control of political and administrative powers are primarily to be exercised through participation in elections. Judicial review of legislative and administrative acts is possible, although a court's mandate to declare legislative acts null and void is usually limited. On the other hand, constitutional democracy systems are characterized by a normative constitution with enforceable rights and freedoms, constitutional judicial review, and clearly electoral control. In most cases, the number of channels available for control is extended due to the existence of a constitutional court or the equivalent. But in those cases where there is no constitutional court, the constitution still has normative effect and thus is likely to extend the exercise of judicial review in the sense that both constitutionality and legality can be assessed by a court. Channels available for individual legal activism in parliamentary systems are rather limited if compared to constitutional democracy systems. Authoritarian modes of governance are characterized by a defunct separation of powers, limited pluralism, weak electoral control, and a limited number of channels available for individual control of political and administrative powers. Still, even in authoritarian systems, legal systems might uphold some degree of autonomy, which could provide a channel for exercising control.

Thus, in times of *inter alia* weak trust in, and inefficiency on the part of representative assemblies and political parties, constitutional democracies enable individual legal activism as a complement to electoral control. They do so by providing a normative constitution with rights that can be enforced by a court of law in combination with a wider judicial review of statutes and governmental action, than that likely to be found in a parliamentary democracy. In authoritarian systems, electoral control will be low, if present at all. Still, taking into account the potential autonomy of legal orders, individual legal activism may constitute an alternative to electoral control and political participation as long as the power of the ruling elite is not threatened. In conclusion, the channels available for judicial review, as well as the scope for it, will differ depending on what mode of governance a state adheres to. Interestingly, what the three modes of governance discussed here have in common is the very fact that legal participation is a possible scenario that does not necessarily contradict and diminish democracy – rather the opposite if combined with a vibrant support structure and individual

legal activism. In authoritarian systems it might be the only channel for control and participation.

The model presented in Part II as to the character of public law adjudication allows for a discussion on whether public law adjudication in a specific legal order is designed in such a way that makes it fit to constitute an alternative to political participation. A Republican approach to public law adjudication is characterized by the recognition of striving for the *common good per se*, while the Liberal approach takes its starting point in the individual and its striving for maximum gain. According to the Liberal approach to public law adjudication as defined here, the common good is the accumulation of individual actions, and it is not necessarily a goal in itself. The implication of accepting legal participation by individual legal activism as an alternative or complement to traditional political participation such as electoral control would be a need to re-evaluate standing rules so as to democratize the judicial process in order for it to become more Republican, as defined above. In addition, a generous legal aid-regime would be needed. And this is where the support structure comes in. Through provision of *inter alia* free legal aid, the judicial process is democratized in the sense that the poor, the marginalized, and non-citizens in society are supported in their endeavor to invoke their rights in relation to the state.

In addition, it can be assumed that the increased possibility for individuals to obtain redress from courts by invoking their rights in public law cases is likely to affect the understanding of individual rights and enable individual constitutional input. Thereby democracy is strengthened rather than limited, (at least if we accept the substantial definition of democracy), since by exercising individual legal activism, citizens may contribute to fighting abuse of office, and to ensure that political activity or inactivity is in congruence with the rights and freedoms as stipulated by constitutions. They may also contribute to highlighting the poor quality of the law, should this be the case. Taken together, this allows for initiating a rights culture, if the political climate allows the court to act independently, and if the procedural and legal aid legislation are supportive of individual legal activism, since, by using procedural and material rights stipulated on the surface level of law, a link between the surface level and the level of legal culture is established in the sense that actions accumulate experiences and legal facts, which are likely to have an effect, over time, on the legal culture. With that conclusion, attention is now shifted to the possibility of individuals to control political and administrative powers by using the judicial channel, i.e., by invoking judicial review of normative and non-normative acts in contemporary Russia.

1.2.2 The Case of Russia

In Part III the conclusion was reached that Russia at the end of Putin's first term as President is moving towards becoming more authoritarian rather than democratic. From a principal-agent perspective, this means that the channels available for individuals to exercise control of political and administrative issues are limited. This is especially valid for electoral control. Another conclusion reached was that the President's centralizing of powers to the federal bodies of power, especially the Presidential Administration, puts more powers in the hands of the President at the same time as it restricts the possibility for popular control. In that light, it was asked whether the judicial channel could constitute an alternative for individuals to exercise control of political and administrative powers.

In that connection, Part III discussed to what extent Russian administrative law is rights-based and whether constitutional and administrative procedural law offers judicial protection of individual rights on the surface level of law. Thereafter, we discussed whether legal preconditions for individual legal activism are present in Russia and whether this is likely to contribute to the consolidation of democracy and rule of law in the Russian Federation. It was established that Russian administrative law is rights-based in the sense that the ECHR, the CRF and other laws stipulating rights and freedoms are to be guiding and binding on all state activity. A rights-based concept of administrative law has both a *de jure* and a *de facto* feature to it. The former refers to whether the rights referred to can be invoked before a court of law, i.e. whether they have normative force. The other is concerned with its actual enforcement. Russia has severe problems with implementation and enforcement and could not be said to have a fully *applied* rights concept of administrative law.

Following that conclusion, the character of Russian public law adjudication on the surface level of law was analyzed, using the model presented in Part II. It was concluded that rights enforcement within public law in the Russian legal order is closer to the Republican than the Liberal model of public law adjudication. This, *per se*, suggests that legal participation could be considered as an alternative to political participation. Still, the problems experienced in Russia concerning efficient access to justice, including costs for engaging in litigation, lengthy proceedings, increasing control of human rights organisations, and low trust in the courts might *de facto* restrict this potential. The focus of this study has been on

procedural legislation and support structures. After reaching the conclusion that Russian procedural legislation in constitutional and administrative law is closer to the Republican model, the following Section will discuss the Russian support structure.

1.2.2.1 The Russian Support Structure

In Part II it was argued that a vibrant support structure could increase the incentive and possibility to use the judicial channel and to engage in individual legal activism. It was also suggested that a vibrant support structure is necessary for a “democratization” of access to justice. However, conclusions reached in Part III show that the Russian support structure is weak and one of the weakest links in the chain is probably the financial resources for rights litigation. A vibrant support structure, as defined by Epp, is characterised by *inter alia* differentiated and pluralistic sources of funding, including both governmental and private sources. Although, according to Russian law, legal aid is to be provided for poor people, this has not so far been an area of state priority. In addition, lately it has been increasingly difficult for human rights organizations engaged in rights litigation to obtain necessary funding from private and foreign sources. This is a combination of the fact that Western states are cutting down on their aid to these organizations *inter alia* as a consequence of Russian tax legislation, and the lack of domestic donors.

Concerning human rights organisations as an important part of the support structure, it should be noted that following liberal reforms initiated by Gorbachev in the late 1980s, and partly followed up by Yeltsin, significant changes to the detriment of human rights organizations have also taken place during the period considered in this study. In view of the standard argument that Russia has never had a functioning civil society or legal system, both the existence of an embryo of liberal reforms in the 1990s and the recent backsliding are noteworthy. The interesting questions are first, what effects have the reforms initiated by Gorbachev had so far on the legal system in general and rights enforcement in particular; and secondly, what is being done in contemporary Russia to follow up on the initial reforms? This author’s conclusion is that the reforms have had far-reaching positive effects on both the legal system and civil society (both in terms of institutions and actors), but that the process is now backsliding since the late 1990s. Putin’s view of civil society is that it works for the state and together with the state; hence, criticism is not accepted. The situation is especially grave in

Chechnya and in the surrounding republics, although this approach is present in most spheres of Russian public life.

In addition, although legal assistance is guaranteed by the CRF the Russian federal state only provides funding for free legal assistance in criminal cases. Free legal assistance in civil and administrative cases is to be funded by means provided for by federal subjects and regional bar associations. Thus the federal state as such is not the provider of legal assistance in these cases. That is to be provided by advocates, i.e., members of bar associations. Considering the history of Russia as a repressive state it might be a good thing that citizens do not necessarily have to turn to a state body in order to obtain legal assistance in civil and especially administrative law issues. In addition, it might be reasonable that a private organization like the bar will cover the cost for and take responsibility for providing legal aid, since it is a professional body and since its members are engaging in lucrative business – the providing of free legal assistance can be considered a redistribution of means. Still, the contemporary Russian system is suffering from several weaknesses. The bar is still quite weak due to poor finances and internal struggles. In addition, several lawyers are choosing not to become members of the bar in order to avoid having to provide free legal assistance, since it takes time, cases are several, but especially since the remuneration is low and uncertain. Thus, it is more attractive to practice law as an in-house lawyer or with a law firm that is not a member of the bar.

The 2002 “Law on Advocacy” was adopted in order to create order among lawyers in Russia. After the dissolution of the Soviet Union, state control and regulation concerning the practice of law was loosened up. This meant that several parallel interest organizations for lawyers were created and the competition between these has been keen. Thus, the new law aims to restore order within the advocacy profession. It also aims to regulate the conditions for providing free legal assistance in civil and administrative cases. Whether it will succeed or not in this endeavor is too early to say. (Amendments to the 2002 Law are already being discussed). Still, several factors point in the direction of a larger role for the state to be played when it comes to funding.

The Procuracy also has a legal aid-providing function. Individuals can complain to a procurator when they consider their rights to have been infringed by, for example, a state body. A procurator has the power to instigate judicial proceedings on behalf of individuals defined by law, i.e., weaker parties and groups of unidentified members. A procurator may also act in the interest of the state. Individuals do turn to the Procuracy to a rather large extent. This can be explained

by the fact that the Russian people is familiar with the Procuracy since it had a similar role throughout the Soviet era. In addition, its services are rendered free of charge. However, the Procuracy is one of the most politicized legal bodies in Russia and its powers in civil and administrative cases have been limited after the adoption of the new CPC. In addition, the fact that the Procuracy in contemporary Russia is highly politicized might restrict its potential to become an efficient protector of individual rights and freedoms in relation to the state. Taking this into consideration, the legal system as a whole and judicial proceedings in particular might benefit from an improved legal assistance program with clearer emphasis on the legal assistance provided by advocates and human rights organizations, but sponsored by the federal state.

As to the final question whether the Russian Federation lives up to CoE standards when it comes to providing legal assistance in civil and administrative cases - since this service to a large extent actually is provided by human rights organizations and law clinics at universities and elsewhere, and taking into account the large number of people living below the poverty line, the answer to that question would most likely be no.

1.2.2.2 Individual Legal Activism

Concerning the question whether individual legal activism has the potential to contribute to democratic development and the establishment of rule of law in the Russian Federation, the answer would be yes in theory; in practice, taking into consideration the developments in the last couple of years, its contribution is nevertheless lower than what could potentially be the case.

Starting with the prerequisites for individual legal activism as they have been defined in Part II, Russia can be said to have a communitarian approach to rights enforcement concerning the standing rules in public law adjudication. Victim autonomy is not the main concern, although it is used to identify the claimants. As a main rule, plaintiffs have to identify themselves as at least potential victims. However, the Russian support structure suffers from several weaknesses, as has been shown above. To start with, human rights organizations find themselves in an increasingly difficult environment, making it difficult for them to provide legal aid. The Russian state policy is that legal aid should be provided by members of the Russian bar associations, i.e., advocates. Still, taking into account that legal aid in civil and administrative law cases is to be provided for by advocates and only to a limited extent be financed by the federal subjects, the situation needs to be improved in order for access to justice to be “democratized”.

In addition, it is questionable whether the Russian state actually does guarantee access to justice in public law cases. This conclusion is reached taking into account the large number of inhabitants living below the poverty line in combination with the lack of federal funding for legal aid, weak support for human rights organizations, and problems with lengthy proceedings and failure to enforce court decisions. Still, the number of complaints filed with both Russian courts and the ECtHR has been continuously increasing. Individual legal activism is a reality. Nevertheless, the question remains whether it is allowed to have sufficient impact on the formulation of policies and state practices. As discussed above, decisions by the ECtHR are binding on all Russian state bodies. Indeed, the Supreme Court Plenum has underlined the need to respect and implement these. The question remains whether the Russian state will continue to reform the judiciary and to provide it with sufficient funds so that inefficiency and corruption can be eliminated. Should this be the case, then the question posed initially in this Section could be answered in the affirmative. In conclusion, in order for individual legal activism to contribute to a dynamic movement between the surface level of law and the legal culture, well-functioning institutions and a strong support structure are required. We will now turn to an analysis of the impact of the international socialization process in this regard.

1.2.2.3 International Socialization

The overall discussion as to whether Russia has domesticated international human rights standards using Tuori's model and the international socialization idea formed the starting point for further discussion on legal reform with focus on judicial review of statutes and governmental actions in Russia (Part I). Clearly, Russia has obtained a high degree of domestication on the surface level of law and in its main parts the legal transition has come to its end, which means that the legislative framework, establishing institutions, and stipulating both procedural and substantive law for a rule of law state are in place.

In order to take this question further, **the impact** of international socialization on domestication of human rights standards was discussed in terms of three concepts of norms; the *formal*, *behavioural*, and *communicative* conceptions of norms. Clearly, the international socialization process that was invoked particularly by Russia's membership of the CoE has had an impact on the *formal* conception of norms in Russia, as was just stated. The study of the Russian legislative framework, and to a smaller extent of Russian legal doctrine and other authoritative material, show that national laws and the establishment of institutions that allow for the enforcement

of international norms have been adopted. Thus, the effect of international socialization has been effective concerning the formal conception of norms in Russia.

Taking the analysis one step further, we refer to the *behavioural* concept of norms and asked whether changes on the surface level of law have altered the behaviour of the state concerning human rights standards and rights enforcement, i.e. has the legal system turned into a system of regulating rules? The conclusion concerning Russia in this regard is less optimistic. However, the analysis benefited from making a distinction between various groups in society. Clearly, certain groups use the possibilities afforded at the surface level of law in order to invoke rights before courts of law. The Russian state, on the other hand, is quite selective in how it applies, and when it considers itself bound by, rules on the surface level of law. Clearly, the Russian state does not consider itself fully bound either by the ECHR and the CRF and its principles, or by other national laws when it comes to, for example, the war in Chechnya¹, dealing with the oligarchs, and other issues closely linked to the inner circle of power. It is in difficult situations like these that a state and its values and principles are put to the test and Russia has not lived up to expectations in this regard, as indicated by several ECtHR decisions. In conclusion, there are several groups in Russia, especially within civil society, but also within academia and judicial personnel, whose behaviour is influenced and perhaps determined by the new legislative framework and international principles and standards. Still, in their attempts to enforce a new legislative framework they will meet the other group whose attitudes and behaviour have not altered – hence, in this sense legal reform in Russia is not consolidated. As long as this is the case, neither can the process of international socialization be ended. Contemporary Russia is clearly experiencing a tipping game – the situation is ambivalent, although it still allows for a positive development if the political climate becomes more responsible and tolerant.

The third category of international socialization is the *communicative* conception of norms. This category focuses on the impact of international norms on the communication between domestic actors. Clearly, individual human rights and freedoms, the respect for the rule of law, and a free and vibrant civil society are

¹ As illustrated by the following ECtHR decisions related to the war in Chechnya in which the Russian state was found to be in violation of Articles 2 and 13 ECHR, and Article 1 of Protocol no. 1. *Isayeva v. Russia*, *Yusupova v. Russia*, and *Bazayeva v. Russia*, February 24, 2005, (*Application nos. 57947/00, 57948/00, 57949/00*).

values that are being referred to in the Russian debate.² These values are referred to not only by the same groups in society that try to enforce them by initiating judicial review, but also by representatives of the state, ultimately the President, especially in connection to the national legislative process and international debate. In this sense, the effects of international socialization could also be described as the use of law as rhetoric. Research suggests that the communicative conception of norms is likely to arise first in the international socialization process, to be followed by the formal and the behavioural concept of norms (in that order).

In addition, **the degree** of international socialization will vary considerably. As described in Part I, the degree of international socialization refers to “*the extent to which an international norm has been transposed into a state’s domestic political and institutions and culture*”. The degree of socialization can be discussed in terms of internal sanctioning systems. An intermediate level of sanctioning is obtained when international norms are frequently challenged by domestic actors, but protected by courts, media, and elections, who prevent these challenges from turning into violations. This is called *intrasocietal* sanctioning. *International* sanctioning refers to intervention by international actors together with domestic actors that support, for example, the domestication of human rights standards. When international sanctioning is required to ensure international norms the internationalization process is considered less successful.

Russia finds herself in the middle between intrasocietal and international sanctioning. During the 1990s, media, courts and elections contributed to the protection of various human rights standards, although it could not prevent some violations. In parallel, courts were increasingly referring to international standards in their activity and the ECHR became part of Russian law. Clearly, elections, mass media, and the courts could not prevent the majority of violations against human rights and standards, but in comparison, the leverage put on those challenging human rights standards was harder during the 1990s than has been the case since Putin’s coming to power in 2000. In addition, the use and effect of international socialization has varied considerably throughout the period subject to investigation in this study. At the beginning of the 1990s it was efficient, taking into account the eagerness of the Russian Federation to be accepted into the international community, *inter alia* the CoE. The CoE uses a mixture of an

² See for example, “Russia to Bring Rights Back Calls Expert”, Moscow, December 2, RIA Novosti.

inclusive and exclusive strategy when socializing states. Once Russia became a member, the exclusive strategy was pre-empted, leaving only the inclusive strategy. In this regard, the only leverage to be exerted, besides the traditional such as diplomatic and financial pressure, and apart from the activity of the ECtHR and suspension of voting rights in the PACE, is exclusion.³

Sarah E. Mendelson suggests that the outcome of the internationalization process is a function of external and internal barriers that can slow or impede the diffusion of international norms. She argues that in Russia the external barrier is a highly permissive international community that has failed to hold Russia responsible for grave violations of human rights. The internal barrier in the Russian case is suggested to be the Soviet legacy, including organizational structures and attitudes towards human rights.⁴ This conclusion is not difficult to subscribe to, with the exception that the ECtHR has actually held Russia responsible for its grave violations of human rights and freedoms. The latter seems to be what creates an incentive for individual legal activism. The remaining questions are whether the process of international socialization will continue to support a fragile Russian human rights movement, and whether the Russian state will overcome its internal barriers and take its responsibility for achieving access to justice. In conclusion, Russia's membership of the CoE has been successful in the sense that important legal reforms have been initiated and worked out in close cooperation between the CoE and Russia. It has also been successful taking into account that several Russian individuals whose rights have been infringed have been successful in Strasbourg. It is not only a matter of justice, but also an important link for disseminating information about the order of things in Russia, hence avoiding isolation.

1.2.2.4 Changing Concepts of Rights

On the surface level of law, the concept of rights in Russia has clearly altered from the collectivistic to the individual. Concerning expert legal culture, the situation is not equally clear. There are still individuals and institutions that adhere to a state-oriented and non-liberal concept of rights – but the ideological rhetoric has been replaced by the threat of international terrorism. On the other hand, there are professionals, both judges and legal scholars, who subscribe to the liberal concept of rights. Most importantly, the highest courts in Russia have showed that they

³ Russia's voting rights in PACE was suspended in April 2000 as a result of the war in Chechnya.

⁴ Mendelson, "Russian's Rights Imperilled. Has Anybody Noticed?", pp. 39-69.

subscribe to the liberal concept of rights, through their activities, decisions, and recommendations. Concerning the legal consciousness of the Russian population, opinion surveys show that the public in general regards the right to invoke their rights before a court of law as highly valued. In addition, although not too optimistic about their actual implementation, the Russian public does subscribe to the liberal concept of rights.

The question remains whether the values stipulated in the ECHR, CRF and other laws have been realized. Clearly, problems remain concerning implementation of the law. Implementation in this context refers to both the courts enforcing these and the state and its bodies recognising these in their everyday activity. Russia is still suffering from weak enforcement in both respects. The conclusion drawn in the section above was that consideration of and respect for the ECHR and the CRF and the principles laid down therein differ between various segments of society. Within certain categories and within various levels of Russian society, concepts of rights have altered. Still, with the Russian state increasingly moving in an authoritarian direction, it is not unreasonable to suspect that these groups are best described as increasingly isolated. In addition, the rights and values stipulated in the ECHR and the CRF have not contributed to integration of Russian society. In that sense, Russia still has a long road to travel.

In conclusion, in contemporary Russia security is the collective goal, to the detriment of individual rights. On a surface level of law, changes of concepts of rights have been achieved. Still, there is a weak existence of rights in Russia beyond positive law and it could be argued that the perception of the role of the state based on statism still dominates in contemporary Russia, even though liberal values *per se* are not alien to Russian citizens. Still, the lack of social welfare and economic stability make large parts of the population look back at the Soviet period with nostalgia, while the Russian state is considered weak (empirically correctly so) because it cannot guarantee its citizens economic and social welfare.

1.2.3 Conclusions

The results and arguments presented here lead to the conclusion that judicial review as a means to achieve rights enforcement is a strategic question to be determined *in casu*, as suggested by Freeman. As for the Russian case, it seems likely that judicial review of statutes and governmental actions can contribute to the strengthening of the system rather than the opposite if reforms are continued. The potential for courts to play this role can be higher than for other institution, taking into account the weak political party grassroots movement, low trust in

political parties and the legislative assembly, and the emerging *de facto* one-party system. A lot of work remains to be done, however, and it could be argued that the independence of courts and judges in Russia today is not enough for judicial review and individual legal activism to be a real alternative – but that it might be in the future should it be that the highest Russian courts are being pragmatic in order to be able to “live to fight another day”. Whether this is a fact needs to be followed up by systematic study of the case law of the RF Constitutional Court and the RF Supreme Court, and the tolerance intervals of various political actors. However, in the meantime we will have to be wary of the consequences of negative experiences of individual legal activism, for example due to lengthy proceedings and weak enforcement. Because of the obvious risk of negative experiences in this regard, the Russian court system is in a fragile state at this point.

The challenge ahead is to make the CRF not only a paper of symbols, like the USSR constitutions, but a document providing real and enforceable rights. In order to achieve this, additional awareness, knowledge, and efforts are needed and this can be obtained *inter alia* through further research by sociologists and political scientists, among others, on questions related to legal aid, legal representation, and standing. Another question concerns administrative discretion and how it is dealt with in contemporary Russian administrative law adjudication. In addition, Russian consumer-, environmental-, and social law seems to be a giant field for investigation and of relevance to what has been discussed here.

Reforms in Russia following the dissolution of the Soviet Union have been dominated by a focus on elections and democracy-building prioritized to the detriment of state-building and establishing the rule of law. The dysfunctional federal system, problems with the state administration, and the rollercoaster economic situation is partly a result of this. And that in its turn has had a negative impact on the incentives and prospects for establishing functioning institutions and providing welfare to the citizens of Russia. In order for Russia to find a way out of a process that has been described as “democratization backwards”, important features of the state-building process, such as strengthening the legal system, have to be reinforced. In order to achieve this, additional efforts are needed concerning *inter alia* legal education, legal aid, civic education to the public, and the fight against corruption – all in combination with additional efforts aiming at making the judicial system more efficient.

REFERENCES

References

Books and Articles

Administrative Discretion and Problems of Accountability, Strasbourg, Council of Europe Publishing, 1997.

Ahdieh, Robert B., *Russia's Constitutional Revolution. Legal Consciousness and the Transition to Democracy*, University Park, Pennsylvania State University Press, 1997.

Alexopoulos, Golfo, "Exposing Illegality and Oneself: Complaint and Risk in Stalin's Russia", *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997, (168-189).

Baev, Pavel K., "The Evolution of Putin's Regime. Inner Circles and Outer Walls", *Problems of Post-Communism*, Vol. 51, No. 6, November/December, 2004.

Baglai, M.B., *Konstitutsionnoye Pravo Rossiiskoy Federatsii*, Moscow, Norma, 2005.

Barak, Aharon, *Judicial Discretion*, New Haven, Yale University Press, 1989.

Barry, Donald D., "Administrative Justice and Judicial Review in Soviet Administrative Law", in *Soviet Law after Stalin, Part II*, eds. Donald D. Barry, George Ginsburgs and Peter B. Maggs, Leiden, Sijthoff & Noordhoff, 1978, (241-270).

Barry, Donald D., "The Development of Soviet Administrative Procedure", in *Soviet Law after Stalin, Part III*, eds. Donald. D. Barry, Ferdinand Feldbrugge, George Ginsburgs and Peter B. Maggs, Leyden, Sijthoff & Noordhoff, 1979, (1-24).

Bell, John, "Mechanisms for Cross-fertilization of Administrative Law in Europe", in *New Directions in European Public Law*, eds. Jack Beatson and Takis Tridimas, Oxford, Hart Publishing, 1998.

Bell, John, "Public Law in Europe: Caught between the National, the Sub-National and the European?" in *Epistemology and Methodology of Comparative Law*, ed. Mark van Hoecke, Oxford, Hart Publishing, 2004.

Bell, John, *French Constitutional Law*, Oxford, Clarendon Press, 1992.

Berg, Ger P. van den, "Russia's Constitutional Court: A Decade of Legal Reform. Part 1, Summaries of Judicial Rulings", *Review of Central and East European Law*, vol. 27, nos. 2-3, 2001.

Berman, Paul, *Terror and Liberalism*, New York, W.W. Norton, 2003.

- Beyme, Klaus von "The German Constitutional Court in an Uneasy Triangle between Parliament, Government and the Federal Laender", in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, (101-118).
- Bhat, Girish N., "The Consensual Dimension of Late Imperial Russian Criminal Procedure: The Example of Trial by Jury", in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997, (61-81).
- Birkinshaw, Patrick, "Decision-Making and Its Control in the Administrative Process – An Overview", *Law, Legitimacy and the Constitution*, eds. Patrick Auslan and John F. McEldowney, London 1985, (151-169).
- Blazer, Harley, "Managed Pluralism: Vladimir Putin's Emerging Regime", *Post-Soviet Affairs*, vol. 19, no. 3, July-September 2003, (189-227).
- Bogdan, Michael *Comparative Law*, Deventer, Kluwer Law and Taxation Publishers, 1994/2000.
- Bower, Mike and Cameron Loss, eds., *Russia after the Cold War*, Longman, London, 2000.
- Boyle, Elisabeth Heger, and Melissa Thompson, "National politics and Resort to the European Commission on Human Rights", *Law and Society Review*, 2001, No. 35, (321-344).
- Brooker, Paul, *Non-Democratic Regimes. Theory, Government and Politics*, London, MacMillan Press, 2000.
- Brown, Archie, ed., *Contemporary Russian Politics*, Oxford, Oxford University Press, 2001.
- Bull, Thomas, "Om domstolarnas roll i demokratin – fågel, fisk eller mittemellan?" *JT*, part 1 1999-2000, No. 4, part 2 2000-01, No. 1.
- Bull, Thomas, "Konstitutionella snedsteg – en studie av svensk trohet mot grundlagen", *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (71-89).
- Bull, Thomas, *Mötes och demonstrationsfriheten. En statsrättslig studie av mötes och demonstrationsfrihetens innehåll och gränser i Sverige, Tyskland och USA*, Uppsala, IUSTUS, 1997.
- Burbank, Jane, "Legal Culture, Citizenship, and Peasant Jurisprudence: Perspectives from the Early Twentieth Century", in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997, (82-106).
- Burnham, William, Peter B. Maggs and Gennady M. Danilenko, *Law and Legal System of the Russian Federation*, third ed., Huntington, Juris Publishing, 2004.

- Butler, William E., *Russian Law*, 1 ed., Oxford, Oxford University Press, 1999.
- Caenegem, R. C. van, *An Historical Introduction to Western Constitutional Law*, Cambridge, Cambridge University Press, 1995.
- Caenegem, R. C. van, *European Law in the Past and the Future: Unity and Diversity over two Millennia*, Cambridge, Cambridge University Press, 2002.
- Caiazza, Amy, *Mothers & Soldiers. Gender, Citizenship and Civil Society in Contemporary Russia*, New York, Routledge, 2002.
- Cameron, Iain, "The Swedish Experience of the European Convention on Human Rights Incorporation", *International Comparative Law Quarterly*, no. 48, 1999.
- Cameron, Iain, *An Introduction to the European Convention of Human Rights*, Uppsala, Iustus Förlag, 2002.
- Cameron, Iain, *National Security and The European Convention on Human Rights*, Uppsala, Iustus Förlag, 2002.
- Campbell, Tom, "Legal Positivism and Deliberative Democracy", in *Law and Democracy*, ed. by Tom Campbell and Adrienne Stone, Aldershot, Ashgate, 2002.
- Cappelletti, Mauro, "Vindicating the Public Interest Through the Courts: A Comparativist's Contribution", *Buffalo Law Review*, 643, 1975-1976, (643-690).
- Cappelletti, Mauro, *The Judicial Process in Comparative Perspective*, Oxford, Clarendon Press, 1989
- Cappelletti, Mauro, and Bryant Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective", *Buffalo Law Review*, 181, 1977/1978, (181-292).
- Carothers, Thomas, "The End of the Transition Paradigm", *Journal of Democracy*, Vol. 13, No. 1, January 2002.
- Cashu, Ilian G. and Mitchell A. Orenstein, "The Pensioners' Court Campaign: Making Law Matter in Russia", *East European Constitutional Review*, Vol. 10, No. 4, Fall 2001, (67-71).
- Colton, Timothy J., and Michael McFaul, "Russian Democracy Under Putin", *Problems of Post-Communism*, vol. 50, no. 4, July/August 2003, (12-21).
- Cotterrell, Roger, *The Sociology of Law*, London, Butterworths, 1992.
- Council of Europe, *The Administration and You*, Strasbourg, Council of Europe Publishing, 1996.
- Dahl, Robert A., *Democracy and its Critics*, New Haven, Yale University Press, 1989.

- Danelius, Hans, *Mänskliga rättigheter i europeisk praxis. En kommentar till Europakonventionen om de mänskliga rättigheterna*, Stockholm, Norstedts, 2000.
- Danilov, E.P., *Grazhdanskii Protsessualny Kodeks Rossiiskoy Federatsii*, Moscow, Prospekt, 2003.
- Danjoux, Olivier, *L'Etat c'est pas Moi. Reframing Citizenship/s/ in the Baltic Republics*, Lund, Studentlitteratur, 2000.
- Diamond, Larry, *Developing Democracy. Toward Consolidation*, Baltimore, the Johns Hopkins University Press, 1999.
- Dijk, P. van, *Judicial Review of Governmental Action and the Requirement of An Interest to Sue*, Alphen aan den Rijn, Sijthoff & Nordhoff, 1980.
- Dmidov, V. V., and V. M. Zykov, *Kommentarii k Zakonodatelstvy o Miroyyx cydax*, Moscow, Yurist, 2001.
- Duffy, Peter, presentation, in *Judicial Control of Administrative Acts*, Strasbourg, Council of Europe Publishing, 1997.
- Eide, Asbjorn and Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge", in *Economic, Social and Cultural Rights*, eds. Asbjorn Eide, Catarina Krause and Allan Rosas, Dordrecht, Martinus Nijhoff Publishers, 1995.
- Ekroth, Jesper, *JO-ämbetet. En offentlighetsstudie*, Stockholm, Stockholms universitet, 2001.
- Epp, Charles R. *The Rights Revolution. Lawyers, Activists, and Supreme Courts in a Comparative Perspective*, Chicago, The University of Chicago Press, 1998.
- Epstein, Lee, Jack Knight and Olga Shevtsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government", *Law and Society Review*, Vol. 35, No. 1, 2001, (117-164).
- Feldbrugge, Ferdinand Joseph Maria, "Human Rights in Russian Legal History", in *Human Rights in Russia and Eastern Europe*, eds. Ferdinand Feldbrugge and William B. Simons, The Hague, Kluwer Law International, 2002, (65-90).
- Feldbrugge, Ferdinand Joseph Maria, *Russian Law: The End of the Soviet System and the Role of Law*, Dordrecht, Nijhoff Publishers, 1993.
- Ferejohn, John and Pasquale Pasquino, "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice", in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, (20-36).

- Ferschtman, M., "Reopening of Judicial Procedures in Russia: The Way to Implement the Future Decisions of the ECHR Supervisory Organs?", *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal order*, eds. T. Barkhauysen, M. van Emmerik, and P. H. van Kempen, The Hague, Martinus Nijhoff, 1999.
- Fogelklou, Anders and Anna Jonsson, "Russia – a fragile legal order", in *Consolidating Legal Reform in Central- and Eastern Europe*, eds. Anders Fogelklou and Fredrik Sterzel, Uppsala, IUSTUS, 2003, (233-268).
- Fogelklou, Anders, "Constitutional Order in Russia at the Threshold of the New Century. Prospects and Threats", *Working Papers*, 60, Department of East European Studies, Uppsala University, December 2000.
- Fogelklou, Anders, "Constitutional Order in Russia: A New Territory for Constitutionalism?", *Review of Central and East European Law*, 2000, No. 3, (231-257).
- Fogelklou, Anders, "Continuity and Change in Soviet Legal Thought after Stalin: The Concept of Law", *Nordic Journal of Soviet and East European Studies*, Vol. 3, Nos. 3-4, 1986.
- Fogelklou, Anders, "Introduction: from transition to integration", in *Consolidating Legal Reform in Central- and Eastern Europe*, eds. Anders Fogelklou and Fredrik Sterzel, Uppsala, Iustus, 2003, (11-28).
- Fogelklou, Anders, "Law as an Ornament of Power", in *Symbols of Power*, eds. Lars Erik Blomqvist and Claes Arvidsson, Stockholm, Almqvist & Wiksell International, 1987, (99-112).
- Fogelklou, Anders, "Legal Transition and Legal Thinking in Eastern and Central Europe", in *Festschrift till Åke Frändberg*, eds. Anders Fogelklou and Torben Spaak, Uppsala, IUSTUS, 2003, (97-120).
- Fogelklou, Anders, "Principles of Rule of Law and Legal Development", in *Legal Assistance to Developing Countries. Swedish Perspectives on the Rule of Law*, ed. Per Sevastik, Stockholm, Norstedts Juridik/ Kluwer Law International, 1997, (32-61).
- Fogelklou, Anders, "Russia and the European Council", *Rättspolitisk debatt*, 1996.
- Fogelklou, Anders, "På spaning efter rättsstaten: Det nya rättstänkandet i Sovjetunionen", *Retfaerd*, nr. 52, 13, årgång 1990.
- Foglesong, Todd, "The Dynamics of Judicial (In)Dependence in Russia", in *Judicial Independence in the Age of Democracy. Critical Perspectives from around the World*. eds. Peter H. Russell and David M. O'Brien, Charlottesville, The University Press of Virginia, 2001, (62-88).
- Frankowski, Stanislaw and Paul B. Stephan III, eds., *Legal Reforms in Post-Communist Europe. The View from Within*, Dordrecht, Martinus Nijhoff Publishers, 1995.

- Freeman, Samuel, "Constitutional Democracy and the Legitimacy of Judicial Review", *Law and Philosophy*, 9, 1990-1991, (327-370).
- Frowein, Jochen Abr. and Thilo Marauhn, eds. *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Berlin, Springer, 1998.
- Fukuyama, Francis, "The Imperative of State-Building", *Journal of Democracy*, vol. 15, no. 2, April, 2004, (17-31).
- Fukuyama, Francis, *State Building. Governance and World Order in the 21st Century*, Ithaca, Cornell University Press, 2004.
- Galligan, Denis J. and Deborah Sandler, "Implementing Human Rights", in *Human Rights Brought Home. Socio-Legal Perspectives on Human Rights in the National Context*, eds. Simon Halliday and Patrick Schmidt, Oxford, Hart Publishing, 2004, (23-56).
- Galligan, Denis J., and Daniel M. Smilov, *Administrative Law in Central and Eastern Europe, 1996-1998*, Budapest, Central European University Press, 1999.
- Gibson, James L., "Russian Attitudes towards the Rule of Law: An Analysis of Survey Data", *Law and Informal Practices. The Post-Communist Experience*, eds. Denis J. Galligan and Marina Kurkchyan, Oxford, Oxford University Press, 2003, (77-91).
- Gilligan, Emma, *Defending Human Rights in Russia. Sergei Kovalyov, Dissident and Human Rights Commissioner, 1969-2003*, London, Routledge Curzon, 2004.
- Glenn, H. Patrick, *Legal Traditions of the World*, Oxford University Press, 2000.
- Gönenc, Levent, *Prospects for Constitutionalism in Post-Communist Countries*, The Hague, Kluwer Law International, 2002.
- Granik, Lisa, "The Trials of the *Proletarka*: Sexual Harrasment Claims in the 1920s", *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997. (131-167)
- Grosz, Stephen, Jack Beatson and Peter Duffy: *Human rights, The 1998 Act and the European Convention*, London, Sweet & Maxwell, 2000.
- Gulyaev, A.P., K. E. Rivkin, O. B. Saraikina, and C. M. Yudushkin, *Kommentarii K Federalnomu Zakonu ob Advokatskoi Deyatelnosti i Advokature*, Moscow, Ekzamen, 2004.
- Habermas, Jürgen, *Diskurs, rätt och demokrati. Politisk-filosofiska texter i urval av Erik Oddvar Eriksen och Anders Molander*, Göteborg, Daidalos, 1995.
- Hahn, Gordon M., "Long Arm of Putin's Reform Reaching Russia's Regions", *The Russian Journal*, Vol. 5, No. 22, June 14-20, 2002.
- Hedlund, Stefan, Kristian Gerner, Niclas Lundström, *Hjärnridån*, Stockholm, Fischer & Co, 1995.

- Hellner, Jan, *Metodproblem i rättsvetenskapen. Studier i förmögenhetsrätt*, Stockholm, jure, 2001.
- Henderson, Jane, "Improvements in Russian Courts: Citizens Appeals and Judges", *European Public Law*, Vol. 2, Issue 4, 1996, (508-513).
- Henderson, Jane, "The Failure of Judicial Reform? The Plight of Administrative Justice in the Russian Federation", Unpublished paper presented at the conference *Russia in a Common European Legal Space*, ILPP, NUPI, Oslo 26 November, 2004.
- Hendley, Kathryn and Peter Murrell, "Dispute Resolution in Russia: A Regional Perspective", in *Unleashing Russia's Business Potential: Lessons from the Regions for Building Market Institutions*, ed. Harry G. Broadman, World Bank Discussion Paper No 434, March 2002.
- Hendley, Kathryn, "Appellate Decision-Making in the Russian *Arbitrazh* Courts: A Three Year Assessment", *Review of Central and East European Law*, vol. 24, no. 4, 1999, (465-491).
- Hendley, Kathryn, "Demand" for Law in Russia – A Mixed Picture", *East European Constitutional Review*, fall 2001, (72-77).
- Hendley, Kathryn, "Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law", in *Contemporary Russian Politics*, ed. Archie Brown, Oxford University Press, 2001, (131-138).
- Hendley, Kathryn, "Suing the State in Russia", *Post-Soviet Affairs*, vol. 18, no. 2, 2002, (122-147).
- Hendley, Kathryn, Peter Murrell, and Randi Ryterman, "Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises", *Wisconsin Law Review*, no 3, 2001, (685-715).
- Hobér, Kaj, *The Impeachment of President Yeltsin*, Huntington, Juris Publishing, 2004.
- Holmström, Barry, *Domstolar och Demokrati. Den tredje statsmaktens politiska roll i England, Frankrike och Tyskland*, Uppsala, Skytteanum, 1998.
- Hosking, Geoffrey, *Russia and the Russians. A History*, Cambridge, Harvard University Press, 2003.
- Huskey, Eugene, and Alexander Obolonsky, "The Struggle to Reform Russia's Bureaucracy", *Problems of Post-Communism*, vol. 50, no. 4, July/August 2003, (22-33).
- Huskey, Eugene, *Presidential Power in Russia*, Armonk, M.E. Sharpe, 1999.
- Hyde, Matthew, "Putin's Federal Reforms and their Implications for Presidential Power in Russia", *Europe-Asia Studies*, Vol. 53, No. 5, 2001.
- Jackson, William D., "Russia and the Council of Europe", *Problems of Post-Communism*, vol. 51, no. 5, September/October, (23-33).

- Javeline, Debra and Vanessa Baird, "Judicial Pioneers: Litigants in the Moscow Theater Hostage Case", research paper presented at APSA Conference, September, 2, 2004, available at http://socsci.colorado.edu/~bairdv/Javeline_Baird.pdf, (2005-03-17).
- Jonsson, Anna, "Den enskilde och staten – att påverka eller påverkas", *Nordic Journal of Human Rights*, Vol. 21, No. 2, 2003, (129-146).
- Jonsson, Anna, "The Constitutional Court of the Russian Federation and Individual Legal Activism", *Uppsala University Yearbook of East European Law 2003*, ed. Kaj Hobér, London, Wildy, Simmonds & Hill Publishing, 2004, (91-121).
- Jonsson, Anna, "The Constitutional Court of the Russian Federation, 1997-2001," *Working Papers*, 73, October, 2002, Department of East European Studies, Uppsala University.
- Jordan, Pamela A., "The Russian Advokatura (Bar) and the State in the 1990s", *Europe-Asia Studies*, vol. 50, no. 5, 1998, (765-791).
- Jordan, Pamela A., "Does Membership Have Its Privileges?: Entry into the Council of Europe and Compliance with Human Rights Norms", *Human Rights Quarterly*, 25, 2003, (660-688).
- Judicial Organisation in Europe*, Strasbourg, Council of Europe Publishing, 2000.
- Kahn, Jeffrey D., "Russia's "Dictatorship of Law" and the European Court of Human Rights", *Review of Central and East European Law*, 2004, no. 1, (1-14).
- Kahn, Jeffrey D., *Federalism, Democratization and the Rule of Law in Russia*, New York, Oxford University Press, 2002.
- Kam, Christopher, "Not Just Parliamentary 'Cowboys and Indians': Ministerial Responsibility and Bureaucratic Drift", *Governance: An International Journal of Policy and Administration*, vol. 13, no. 3, July 2000, (365-392).
- Kis, János *Constitutional Democracy*, Budapest, Central European University Press, 2003.
- Klebnikov, Paul, *Godfather of the Kremlin. The Decline of Russia in the Age of Gangster Capitalism*, New York, Harcourt Inc., 2000.
- Kort, Joop de, "How Right are Economic and Social Rights? The Interaction between Law and Economics in Human Rights", in *Human Rights in Russia and Eastern Europe*, eds. Ferdinand Feldbrugge and William B. Simons, The Hague, Kluwer Law International, 2002, (133-146).
- Krasnov, J.K., *Gosudarstvennoye Pravo Rossii*, Moscow, Yurist, 2002.

- Krug, Peter, "The Russian Federation Supreme Court and Constitutional Practice in the Courts of General Jurisdiction: Recent Developments", *Review of Central and East European Law*, Vol. 26, No. 2, 2000, (129-146).
- Kryazhkov, B.A., *Konstitutsionnoye Subyektivnoye Pravo Rossiskoi Federatsii*, Moscow, Gorodets-Izdat, 2002.
- Krygier, Martin and Adam Czarnota, eds., *Problems and Prospects in East-Central Europe*, Aldershot, Ashgate, 1999.
- Kunin, H.M., *Administrativnoye Pravo Rossii*, Moscow, Yurist, 2004.
- Küpper, Herbert, "Slovenia and its Law: A Post-Communist Success Story?", in *Consolidating Legal Reform in Central and Eastern Europe*, eds. Fredrik Sterzel and Anders Fogelklou, Uppsala, IUSTUS, 2003, (287-320).
- Ladeur, Karl-Heinz, ed., *The Europeanisation of Administrative Law. Transforming National Decision-making Procedures*, Darmouth, Ashgate, 2002.
- Lazarev, V.V., ed., *Konstitutsiya Rossiskoy Federatsii. Kommentarii*, Moscow, Spark, 2001.
- Leijonhielm, Jan et. al., *Rysk military förmåga i ett tioårsperspektiv: Tendenser och problem 2004*, Stockholm, FOI, (forthcoming 2005).
- Lesage, Michel, "The Crisis of Public Administration in Russia", *Administrative Transformation in Central and Eastern Europe. Towards Public Sector Reform in Post-Communist Societies*, ed. Joachim Jens Hesse, Oxford, Blackwell Publishers, 1993.
- Letsas, George, "The Truth in Autonomous Concepts: How to Interpret the ECHR", *European Journal of International Law*, Vol. 15 No.2, 2004, (279-305).
- Lindblom, Per Henrik, "Domstolarnas växande samhällsroll och processens förändrade funktioner – floskler eller fakta?", *Svensk juristtidning*, årgång 89, no. 3, 2004, (229-262).
- Lindblom, Per Henrik, *Grupptalan. Det anglo-amerikanska class actioninstitutet ur svenskt perspektiv*, Stockholm, Norstedts Juridik, 1989.
- Lindblom, Per Henrik, *Progressiv process. Spridda uppsatser om domstolsprocess och samhällsutveckling*, Uppsala, IUSTUS, 2000.
- Lindblom, Per Henrik, *Studier i processrätt*, Stockholm, Norstedts Juridik, 1993.
- Lindblom, Per Henrik, "Processens funktioner – en resa i gränlandet", in *Festskrift till Stig Strömholm, Del II*, Uppsala, Iustus, 1997.
- Linde, Jonas, *Doubling Democrats? A Comparative Analysis of Support for Democracy in Central and Eastern Europe*, Örebro, Örebro University, 2004.

- Linz, Juan J. and Alfred Stepan, *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and post-Communist Europe*, Baltimore, the Johns Hopkins University Press, 1996.
- Linz, Juan J., *Totalitarian and Authoritarian Regimes*, Boulder, Lynne Rienner Publishers, 2000.
- Loughlin, Martin *The Idea of Public Law*, Oxford, Oxford University Press, 2003.
- Loughlin, Martin, *Public Law and Political Theory*, Oxford, Clarendon Press, 1992.
- Lundin, Olle, "Riksdagsledamöternas och statsrådets rättsliga ansvar", in *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (154-171).
- Lundqvist, Lennart, *Förvaltning och demokrati*, Stockholm, Norstedts Juridik, 1991.
- MacCormick, D. Neil, and Robert S. Summers eds., *Interpreting Precedents, A Comparative Study*, Aldershot, Ashgate, 1997.
- Mahler, Gregory S., *Comparative Politics. An Institutional and Cross-National Approach*, Englewood Cliffs, Prentice Hall, 2nd edition, 1995.
- Malfliet, Katlijn, "Property Rights as Human Rights: A Post-Communist Paradigm?" in *Human Rights in Russia and Eastern Europe*, eds. Ferdinand Feldbrugge and William B. Simons, The Haag, Kluwer Law International, 2002, (163-186).
- Marchenko, M.H., ed., *Problemy Teorii Gosudarstva i Pravo*, Moscow, Yurist, 2002.
- Marsh, Christopher, and Nikolas K. Gvosdev, eds., *Civil Society and the Search for Justice in Russia*, Lanham, Lexington Books, 2002.
- McBride, Jeremy, "Access to Justice under International Human Rights Treaties", *Parker School Journal of East European Law*, vol. 5, 1998.
- McFaul, Michael and Elina Treyger, "Civil Society", in *Between Dictatorship and Democracy. Russian Post-Communist Political Reform*, eds. Michael McFaul, Nikolai Petrov and Andrei Ryabov, Washington D.C., Carnegie Endowment for International Peace, 2004, (135-173).
- McFaul, Michael and Nikolai Petrov, "Elections", *Between Dictatorship and Democracy. Russian Post-Communist Political Reform*, Washington D.C., Carnegie Endowment for International Peace, 2004, (23-55).
- McFaul, Michael, "Political Parties", *Between Dictatorship and Democracy. Russian post-Communist Political Reform*, Washington D.C., Carnegie Endowment for International Peace, 2004, (105-134).
- McFaul, Michael, and Nikolai Petrov, "Russian Democracy in Eclipse. What the Elections Tell Us", *Journal of Democracy*, Vol. 15, no. 3, July 2004.

- McGregor, Jane, "Dealing with Citizens' Complaints against Public Bodies. The Approach in New Russia", in *The Legal Foundations of the New Russia*, ed. Brynjulf Risnes, Oslo, Nupi, 1998, (80-94).
- McGregor, Jane, "Mechanisms for Redress of Citizens' Grievances in Russia", in *Constitutional Reform and International Law in Central and Eastern Europe*, eds. Rein Mullerson, Malgosia Fitzmaurice, and Mads Andenas, The Hague, Kluwer Law International, (123-132).
- Mendelson, Sarah E., "Russian's Rights Imperilled. Has Anybody Noticed?", *International Security*, vol. 26, no. 4 (Spring 2002), (39-69).
- Michalowski, Sabine, and Lorna Woods, *German Constitutional Law. The Protection of Civil Liberties*, Aldershot, Ashgate, 1999.
- Miles, Joanna, "Standing under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication", *The Cambridge Law Journal*, March 2000, Vol. 59, (133-167).
- Miller, William L., Stephen White, and Paul Heywood, *Values and Political Change in Postcommunist Europe*, Houndmills, MacMillan, 1998.
- Mishler, William and Richard Rose, "What are the Origins of Political Trust? Testing Institutional and Cultural Theories in post-Communist Societies", *Comparative Political Studies*, vol. 34, no.1, February 2001, (30-62).
- Müllerson, Rein, Malgosia Fitzmaurice and Mads Andenas, eds., *Constitutional Reform and International Law in Central and Eastern Europe*, London, Kluwer Law International, 1998
- Nedjati, Zaim M., and J.E. Trice, *English and Continental Systems of Administrative Law*, Amsterdam, North-Holland, 1978.
- Nergelius, Joakim, *Konstitutionellt rättighetsskydd. Svensk rätt i ett komparativt perspektiv*. Stockholm, Ftizes, 1996.
- Nikitin, Alexander, and Jane Buchanan, "The Kremlin's Civic Forum", *Demokratizatsiya*, Vol. 10, No. 2, Spring 2002, (147-165).
- Nino, Carlos Santiago, ed., *Rights*, Aldershot, Dartmouth, 1992.
- Nino, Carlos Santiago, *The Ethics of Human Rights*, Oxford, Oxford University Press, 1991.
- Oda, Hiroshi, "The Emergence of *Pravovoe Gosudarstvo* (Rechtstaat) in Russia", *Review of Central and East European Law*, Vol. 25, No. 3, 1999, (373-434)
- Ortung, Robert W., "Russia", *Nations in Transit 2004*, eds. Amanda Schnetzer et. al., New York, Freedom House, 2004.

Pavlov, Ivan, "Human Rights Activism in Putin's Russia", *East European Analytical Case Reporter*, no. 1, 2004, http://www.eeacr.org/Articles/0404_pavlov.htm.

Petersson, Olof, Jörgen Hermansson, Michele Micheletti, Jan Teorell, and Anders Westholm, *Demokrati och medborgarskap*. Demokratirådets rapport 1998, SNS Förlag 1998.

Pinto, Diana, "Assisting Central and Eastern Europe's Transformation", in *The Challenges of a Greater Europe. The Council of Europe and Democratic Security*, Strasbourg, Council of Europe Publishing, 1996.

Pipes, Richard, *Property and Freedom*, New York, Vintage Books, 1999.

Pistor, Katharina, "Supply and Demand of Law in Russia", *East European Constitutional Law Review*, Fall 1999, Vol. 8, No. 4, (105-109).

Politkovskaya, Anna, *A Small Corner of Hell. Dispatches from Chechnya*, Chicago, Chicago University Press, 2003.

Politkovskaya, Anna, *Putin's Russia*, London, Harvill, 2004.

Ponthoreau, Marie-Claire, and Jaques Ziller, "The Experience of the French *Conseil Constitutionnel*: Political and Social Context and Current Legal-Theoretical Debates", in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, (119-142).

Procházka, Radoslav, *Mission Accomplished. On founding Constitutional Adjudication in Central Europe*, Budapest, Central European University Press, 2002.

Radford, Mike, "Mitigating the Democratic Deficit? Judicial Review and Ministerial Accountability", Peter Leyland and Terry Woods, eds., *Administrative Law Facing the Future. Old Constraints and New Horizons*, London, Blackstone 1997.

Ragnemalm, Hans, *Administrative Justice in Sweden*, Stockholm, Juristförlaget, 1991.

Raz, Joseph, *The Concept of a Legal system. An Introduction to the Theory of Legal System*, New York, Oxford University Press, 1980.

Reisinger, Miller, Hesli, "Russians and the Legal System: Mass Views and Behaviour in the 1990s", *Journal of Communist Studies and Transition Politics*, Vol. 13, No. 3, September 1997, (24-55).

Revue de Justice Constitutionnelle Est-Européenne, Presses Universitaires de la Faculté de Droit de Clermont-Ferrand Université d'Auvergne.

Risnes, Brynulf, "Relations between Moscow and North Western Russia – The Legal Aspect", in *Centre-Periphery Relations in Russia. The case of the North-western Regions*, eds. Geir Honneland and Helge Blakkisrud, Aldershot, Ashgate, 2001.

- Rose, Richard, and Neil Munro, *Elections without Order. Russia's Challenge to Vladimir Putin*, Cambridge, Cambridge University Press, 2002.
- Rothstein, Bo, *Sociala fällor och tillitens problem*, Stockholm, SNS Förlag, 2003.
- Russell, Peter H., "Toward a General Theory of Judicial Independence", in *Judicial Independence in the Age of Democracy. Critical Perspectives from Around the World*, eds. Peter H. Russell and David M. O'Brien, Charlottesville, University Press of Virginia, 2001, (1-24).
- Sadurski, Wojciech, "Legitimacy and Reasons of Constitutional Review After Communism", in *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, ed. Wojciech Sadurski, The Hague, Kluwer Law International, 2002, (163-187).
- Sadurski, Wojciech, ed., *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in A Comparative Perspective*, The Hague, Kluwer Law International, 2002.
- Sajó, András, *Limiting Government. An Introduction to Constitutionalism*, Budapest, Central European University Press, 1999.
- Sakwa, Richard, *Russian Politics and Society*, London, Routledge, 3d ed., 2002.
- Samuel, Geoffrey, "Epistemology and Comparative law: Contributions from the Sciences and Social Sciences", *Epistemology and Methodology of Comparative Law*, ed. Mark van Hoecke, Oxford, Hart Publishing, 2004, (35-77).
- Sartori, Giovanni, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes*, London, MacMillan Press, 2nd ed, 1997.
- Schimmelfennig, Frank, "Introduction: The Impact of International Organizations on the Central and Eastern European States – Conceptual and Theoretical Issues", in *Norms and Nannies. The Impact of International Organizations on the Central and East European States*, ed. Ronald H. Linden, Lanham, Rowman & Littlefield Publishers, 2002, (1-29).
- Schwartz, Herman, *The Struggle for Constitutional Justice in Post-Communist Europe*, The University of Chicago Press, 2000.
- Sergeeva, A, *Civil Law*, Moscow, 2001.
- Service, Robert, *Russia: Experiment with a People*, Cambridge, Harvard University Press, 2003.
- Shapiro, Martin, "Two Transformations in Administrative Law: American and European?", *The Europeanisation of Administrative Law. Transforming National Decision-making Procedures*, ed. Karl-Heinz Ladeur, Dartmouth, Ashgate, 2002.

Shapiro, Martin, and Alec Stone Sweet, *On Law, Politics and Judicialization*, Oxford, Oxford University Press, 2002.

Sheinis, Viktor, "The Constitution", in *Between Dictatorship and Democracy. Russian Post-Communist Political Reform*, eds. Michael McFaul, Nikolai Petrov and Andrei Ryabov, Washington D.C., Carnegie Endowment for International Peace, 2004.

Shelley, Louise I. "The Challenge of Crime and Corruption" in *Russia's Policy Challenges: Security, Stability and Development*, ed. Stephen K. Wegren, New York, M.E. Sharpe, 2002, (103-121).

Shelley, Louise I., "Crime and Corruption: Enduring Problems of post-Soviet Development", *Demokratizatsiya*, Vol. 11, No. 1, Winter 2003, (110-114).

Shelley, Louise I., "Post-Totalitarianism and Soviet Law", in *Totalitarian and Post-Totalitarian Law*, eds. Adam Podgorecki and Vittorio Olgiati, Aldershot, Dartmouth, 1996.

Shugerman, Jed Handelsman, "Marbury and Judicial Deference: The Shadow of *Whittington v. Polk* and the Maryland Judiciary Battle", *Journal of Constitutional Law*, vol. 5:1, October 2002, (58-108).

Singh, Mahendra P., *German Administrative Law in a Common Law Perspective*, Heidelberg, Springer, 2001.

Slagstad, Rune, "Liberal Constitutionalism and its Critics: Carl Schmitt and Max Weber", in *Constitutionalism and Democracy*, eds. Jon Elster and Rune Slagstad, Cambridge, Cambridge University Press, 1993, (103-130).

Smilov, Daniel, "Structural Corruption of Party-Funding Models: Governmental Favoritism in Bulgaria and Russia", in *Political Corruption in Transition. A skeptic's Handbook*, eds. Stephen Kotkin and András Sajó, Budapest, Central European University Press, 2002, (327-352).

Smith, Eivind, and Olof Peterson, "Konstitutionell demokrati som begrepp och som ideal", in *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (7-41).

Smith, Eivind, ed., *Grundlagens makt. Konstitutionen som politiskt redskap och som rättslig norm*, Stockholm, SNS Förlag, 2002.

Smith, Gordon B., "Of Politicians, Puppets, Prostitutes and Prosecutors: Political Influences on the Procuracy", Paper presented at the ICCEES VI World Congress, Tampere, Finland, July 29-August 3, 2000.

- Smith, Gordon B., "The Struggle over the Procuracy", in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of the Legal Order*, ed. Peter H. Solomon, Jr., M E Sharpe 1997, (348-373).
- Smith, Gordon B., ed., *Public Policy and Administration in the Soviet Union*, New York, Praeger Publishers, 1980.
- Smith, Gordon B., *Reforming the Russian Legal System*, Cambridge, Cambridge University Press, 1996.
- Smith, Karen E., "Western Actors and the Promotion of Democracy", in *Democratic Consolidation in Eastern Europe. Volume 2. International and Transnational Factors*. eds. Jan Zielonka and Alex Pravda, New York, Oxford University Press, 2001, (31-57).
- Solomon, Peter H. Jr. and Todd S. Fogelson, *Courts and Transition in Russia. The Challenge of Judicial Reform*. Boulder, Colorado, Westview Press, 2000.
- Solomon, Peter H. Jr., "Judicial Power in Russia: Trough the Prism of Administrative Justice", *Law and Society Review*, vol. 38, no. 3, September 2004, (549-582).
- Solomon, Peter H. Jr., "Law and Courts in post-Soviet Russia: The Progress of Legal Transition", *Project on Systemic Change and International Security in Russia and the New States of Eurasia*, available at <http://www.sais-jhu.edu/programs/res/papers/solomon.pdf> (2005-03-09).
- Solomon, Peter H. Jr., "Putin's Judicial Reform: Making Judges Accountable as well as Independent", *East European Constitutional Review*, vol. 11, 2002, nos. 1/2.
- Solomon, Peter H. Jr., "Courts and their Reform in Russian History", in *Reforming Justice in Russia, 1864-1996. Power, Culture and the Limits of Legal Order*, ed. Peter H. Solomon Jr., Armonk, M.E. Sharpe, 1997, (3-20).
- Solomon, Peter H. Jr., "The New Justices of Peace in the Russian Federation: A Cornerstone of Judicial Reform?", *Demokratizatsiya*, vol. 11, No. 3, Summer 2003.
- Squier, John, "Russian Society and the Challenge of Russian Gosudarstvennost", *Demokratizatsiya*, Vol. 10, No. 2, Spring 2002, (165-182).
- Stepan, Alfred, "Russian Federalism in a Comparative Perspective", *Post-Soviet Affairs*, Vol. 16/2, April-June 2000, (133-176).
- Sterzel, Fredrik, "Lagstiftningsmakten och förordningsmakten", in *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (122-153).
- Stone, Alec Sweet, *Governing with Judges. Constitutional Politics in Europe*, Oxford, Oxford University Press, 2000.

- Stoner-Weiss, Kathryn, "Central Weakness and Provincial Autonomy: Observations on the Devolution Process in Russia", *Post-Soviet Affairs*, Vol. 15, January-March 1999, (87-104).
- Strashun, Boris, "Constitution as the Main Source of Law", in *Interpretation and Direct Application of the Constitution*, Vilnius, 2002, (184-191).
- Sudebnaya Sistema Rossii*, Moscow, Dela, 2000.
- Tarschys, Daniel, "Enlargement: the Russian Chapter", in *The Challenges of a Greater Europe. The Council of Europe and Democratic Security*, Strasbourg, Council of Europe Publishing, 1996.
- Taube, Caroline, "Regeringsformen: positiv rätt eller redskap för rättshaverister?", *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (42-70).
- Taube, Caroline, *Constitutionalism in Estonia, Latvia and Lithuania. A Study in Comparative Constitutional Law*, Uppsala, Iustus, 2001.
- Teitel, Ruti G., *Transitional Justice*, New York, Oxford University Press, 2000.
- Trochev, Alexei, "Less Democracy, More Courts: A Puzzle of Judicial Review in Russia", *Law & Society Review*, Vol. 38, no. 3, September 2004, (513-548).
- Troxel, Tiffany A., *Parliamentary Power in Russia, 1994-2001*, Hampshire, Palgrave Macmillan, 2003.
- Tuori, Kaarlo "Har förvaltningsrätten en framtid?", *Förvaltningsrättslig tidskrift*, årgång 66, 2003, häfte 4, (553-574).
- Tuori, Kaarlo, "Towards a Multi-Layered View of Modern Law", in *Justice, Morality and Society. A Tribute to Aleksander Peczenik on the Occasion of his 60th birthday*, eds. Aulis Aarnio, Robert Alexy and Gunnar Bergholtz, Lund, Juristförlaget i Lund, 1997, (427-442).
- Tuori, Kaarlo, *Critical Legal Positivism*, Aldershot, Ashgate, 2002.
- Uhlin, Anders, *Post-Soviet Civil Society. Democratisation in Russia and the Baltic States*, London, RoutledgeCurzon, (forthcoming 2005).
- Uibopuu, Henn-Jüri, "The Individual in Soviet Administrative Procedure", in *Soviet Law after Stalin*, Part III, eds. Donald. D. Barry, Ferdinand Feldbrugge, George Ginsburgs and Peter B. Maggs, Leyden, Sijthoff & Noordhoff, 1979, (25-30).
- Vile, M.J.C., *Constitutionalism and the Separation of Powers*, Indianapolis, Liberty Fund, 2nd ed. 1998.

- Vinogradova, Elena Aleksandrovna, "Procedural Law in Russia. Judicial Procedures of Resolving Disputes in the Economic Field", in *Legal Foundations of Russian Economy*, eds. Juha Tolonen and Boris Topornin, Helsinki, Kikimora Publications, 2000, (205-270).
- Warnling-Nerep, Wiweka, *Rättsprövning och Rätten till Domstolsprövning*, Stockholm, JureCLN, 2000.
- Weigle, Marcia A., "State and Civil Society from Yeltsin to Putin", *Demokratizatsiya*, vol. 10, no. 2, Spring 2002, (117-146).
- Westberg, Peter, "Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet", *Festskrift till Per Olof Bolding*, Stockholm, Juristförlaget, 1992, (421-446).
- Woodhouse, Diana, "UK Ministerial Responsibility in 2002: The Tale of Two Resignations", *Public Administration*, vol. 82, no. 1, 2004, (1-19).
- Zirk-Sadowski, Marek, "Legal Epistemology and Transformation of Legal Cultures", *Epistemology and Methodology of Comparative Law*, ed. Mark van Hoecke, Oxford, Hart Publishing, 2004.
- Åhman, Karin, "Rättighetskyddet i praktiken – skydd på pappret eller verkligt genomslag?". *Konstitutionell demokrati*, eds. Eivind Smith and Olof Peterson, Stockholm, SNS Förlag, 2004, (172-204).

Court Decisions and Resolutions

ECtHR:

- Airey v. Ireland*, 11 September, 1979, (*Application no. 6289/73*).
- Burdov v. Russia*, 7 May, 2002, (*Application no. 59498/00*).
- Chassagnou and others v. France*, 29 April, 1999, (*Applications nos. 25088/94, 28331/95 and 28443/95*).
- Del Sol v. France*, 26 February, 2002, (*Application no. 46800/99*).
- Fayed v. United Kingdom*, 21 September, 1994, (*Application no. 17101/90*).
- Golder v. United Kingdom*, 21 February 1975, (*Application no. 4451/70*).
- Gusinskiy v. Russia*, 19 May, 2004, (*Application no. 70276/01*).
- Isayeva v. Russia, Yusupova v. Russia, and Bazayeva v. Russia*, February 24, 2005, (*Application nos. 57947/00, 57948/00, 57949/00*).
- James v. United Kingdom*, 21 February, 1986, (*Application no. 8793/79*).

- Kalashnikov v. Russia*, 15 July, 2002, (*Application no. 47095/99*).
- Klass and others v. Germany*, 6 September, 1978, (*Application no. 5029/71*).
- Khyakhin v. Russia*, 30 November, 2004, (*Application no. 46082/99*).
- König v. Germany*, 28 June, 1978, (*Application no. 6232/73*).
- Kormacheva v. Russia*, 29 January, 2004 (*Application no. 53083/99*).
- Kudla v. Poland*, 26 October, 2000, (*Application no. 30210/96*).
- Le Compte et al v. Belgium*, 26 June, 1981, (*Application nos. 7299/75;7496/76*).
- Levshiny v. Russia*, 9 November, 2004, (*Application no. 63527/00*).
- Nikitin v. Russia*, 15 December, 2004 (*Application no. 50178/99*).
- P., C. and S. v. United Kingdom*, 16 July, 2002, (*Application no. 56547/00*).
- Pellegrin v. France*, 8 December, 1999, (*Application no. 28541/95*).
- Plaksin v. Russia*, 29 April, 2004, (*Application no. 14949/02*).
- Pravednaya v. Russia*, 18 November, 2004, (*Application no. 69529/01*).
- Ringeisen v. Austria*, 16 July 1971, (*Application no. 2614/65*).
- Ryabykh v. Russia*, 24 July, 2003, (*Application no. 52854/99*).
- Smirnova v. Russia*, 24 July, 2003, (*Application nos. 46133/99 and 48183/99*).
- Stockholms försäkrings- och skadeståndsjuridik AB v. Sweden*, 16 September, 2003, (*Application no. 38993/97*).
- Timofeyev v. Russia*, 23 October, 2003, (*Application no. 58263/00*).
- Valsamis v. Greece*, 18 December, 1996, (*Application no. 21787/93*).
- Wasserman v. Russia*, 18 November, 2004, (*Application no.15021/02*).
- Yaroslavtsev v. Russia*, 2 December, 2004, (*Application no. 42138/02*).
- Yemanakova v. Russia*, 23 September, 2004, (*Application no. 60408/00*).

RF Constitutional Court:

- Decisions of the RF Constitutional Court, March 11, 1996, No. 7-P.
- Decision of the RF Constitutional Court, January 24, 1997, No. 1-P.
- Decision of the RF Constitutional Court, October 16, 1997, No. 14-P.
- Decision of the RF Constitutional Court, May 19, 1998, No. 15-P.
- Decision of the RF Constitutional Court, June 16, 1998, No. 19-P.

Decision of the RF Constitutional Court, July 17 1998, No. 23-P.

Decision of the RF Constitutional Court, December 2, 1999, No. 3-P.

Decision of the RF Constitutional Court, April 11, 2000, No. 6-P.

Supreme Court of the Russian Federation:

Shupanko v. Government of St. Petersburg, BVS 1996, No. 5.

The RF Supreme Court's Plenum's Resolution No. 2, 20 January, 2003, on Questions Related to the Adoption and Entering into Force of the New CPC.

The RF Supreme Court's Plenum's Resolution No. 5, 10 October, 2003, on Application by Courts of General Jurisdiction of the Commonly Recognized Principles and Norms of International Law and the International Treaties of the Russian Federation.

The RF Supreme Court's Plenum's Resolution No. 23, 19 December, 2003, on Court Decisions.

U.S. Supreme Court:

Monroe v. Pape, 365 U.S. 167 (1961).

Rules of the Supreme Court of the United States, adopted January 27, 2003.

Other Sources

Council of Europe:

Recommendation No. R (80)2 Concerning the Exercise of Discretionary Powers by Administrative Authorities, adopted by the Committee of Ministers of the Council of Europe, 11 March, 1980

Recommendation No. R(93)1 on Effective Access to the Law and to Justice for the Very Poor, of the Committee of Ministers to the Member States, adopted 8 January, 1993.

Rec(2003)16 on the Execution of Administrative And Judicial Decisions in the Field of Administrative Law and Explanatory Memorandum, adopted by the Committee of Ministers of the Council of Europe, 9 September, 2003.

Rec(2004)6 on the Improvement of Domestic Remedies of the Committee of Ministers to the Member States, adopted 12 May, 2004.

Resolution 78(8) on Legal Aid and Advice and Explanatory Memorandum, adopted by the Committee of Ministers of the Council of Europe, 2 March 1978.

Opinion No. 193 (1996)1 on Russia's Request for Membership of the Council of Europe.

Survey of Activities, European Court of Human Rights, 2003.

Other:

Access To Justice in Central and Eastern Europe. A Source Book, Public Interest Law Initiative, Columbia University, 2003.

East European Constitutional Review, "Constitution Watch, Russia", *East European Constitutional Review*, Vol. 11. No. 1/2, Winter/Spring, 2002.

East-West Institute, *Russian Regional Report*, Vol. 5, No. 14, 12 April 2000.

Human Rights Watch, "Chechnya: Human Rights Defender Abducted", January 22, 2005, available at <http://hrw.org/english/docs/2005/01/21/russia10055.htm>, (2005-01-29).

International Observation Mission, Election of President of the Russian Federation 16th June 1996, and 3rd July 1996, Report on the Election, Michael Meadowcroft, p. 5. Available at http://www.osce.org/documents/odihr/1996/07/1453_en.pdf, (2004-11-09).

OSCE, *Russian Federation, Presidential Election, Final Report*, OSCE/ODIHR, Warsaw, 19 May, 2000, p.3. Available at http://www.osce.org/documents/odihr/2000/05/1449_en.pdf, (2004-11-09).

OSCE, *Russian Federation, Presidential Election*, OSCE/ODIHR Election Observation Mission Report, Warsaw, 2 June, 2004. Available at (2004-11-09) http://www.osce.org/documents/odihr/2004/06/3033_en.pdf.

RFE/RL Security Watch Vol. 2, No. 43, 6 November 2001.

Teorell, Jan, *Methodology Report of the Public Opinion Panel Survey in Russia*, Moscow, The Russian Centre for Public Opinion and Market Research, 2000.

Transparency International, *Corruption Perception Index 2003*

http://www.transparency.org/pressreleases_archive/2003/dnld/cpi2003.pressrelease.en.doc.

U.S. Agency for International Development, "Ratings: General Definitions", *NGO Sustainability Index 2003*, Washington: U.S. Government Printing Office.

U.S. Agency for International Development, "Russia", *The 2002 NGO Sustainability Index for Central and Eastern Europe and Eurasia*, Washington: U.S. Government Printing Office.