

6. The Constitutional Review Models from Transitional Countries: A case of Russia

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Abstract

The Russian Constitutional Court was established in 1991 as the consequence of the profound political and social transformation of Soviet society. Since then, the Constitutional Court performed the role of reformer of Russian constitutional order, generator of contemporary ‘living constitutionalism.’ This paper briefly examines the history, composition, authorities, and the essential attributes of judicial precedents of this unique institution, and evaluates its performance. One of the core distinctions of the Russian Constitutional Court, compared with its Asian counterparts, is that it cooperates with the international judicial organization in the field of human rights protection. This paper sheds light on the relationship between the Russian Constitutional Court and the ECtHR and attempts to reveal the contradictory position, which the Constitutional Court holds under today’s complicated political situation in Russia.

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INTRODUCTION

In Russia, the Constitutional Court (hereinafter, the Court) is a relatively young institution. It was established in 1991 at the last stage of *Perestroika* based on the Austro-German model¹. During the Soviet era, the integral principles and concepts of constitutional adjudication like separation of powers, independence of the judiciary, human rights, and constitutionalism were denied as products of bourgeois ideology. The Supreme Soviet of the USSR, the state's highest body, and its Presidium were vested with the power to ensure observance of the Soviet Constitution². However, until the late 1980s, this function had not been invoked³.

The establishment of this Court was one of the most prominent developments, which symbolized the systemic transformation from the communist regime in the field of law. Since then, the Court, an institution enshrined in the Constitution of 1993 as a keystone of the ‘rule of law state,’ contributed tremendously to transform old socialist legal order into the new one. One of the Judges of the Court, Nikolai Bondar’ explicated that the Court performed a role of “reformer of Russian constitutionalism, generator of contemporary “living” constitutionalism,”⁴ and the Constitutional control changed the Constitution from a mere legal act into “living law.”⁵

The main aim of this paper is to elaborate on the basic attributes of the Russian Constitutional Court, its composition, and authority. Furthermore, this paper will shed light on the underlying features of the Court’s activity. Such a pre-context will enable the author to eventually assess the actual condition of "judicial constitutionalism" in Russia.

I. OVERVIEW OF THE RUSSIAN CONSTITUTIONAL COURT - ITS HISTORY, COMPOSITION, AND AUTHORITY

1. Brief history prior to the establishment of the Constitutional Court of 1994

When the Supreme Soviet of the RSFSR established the Court in 1991, it was expected that this new institution would oversee not only the legislative body but also the Presidency and the judiciary. As an example, citizens could submit a constitutional complaint to this Court against alleged encroachment of their constitutional rights, when a “law application practice” (*pravoprimenitel'naja praktika*) infringed such rights⁶. The concept of a “law application practice” means a well-established

¹ Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР. 1991. № 19. Ст. 621.

² The Presidium of the Supreme Soviet of the USSR was vested with the power to control the observance of the Constitution of the USSR and guarantee the conformity of constitutions and laws of union republics to the Constitution and laws of the USSR (Article 121, section 4 of the Constitution of the USSR of 1977).

³ In 1988, the Supreme Soviet of the USSR invoked this authority against decisions of the Azerbaijan and Armenian SSRs regarding the Nagorno-Karabakh conflict and the Declaration of the state independence of the Estonian SSR.

⁴ Бондарь Н. С. Судебный конституционализм: доктрина и практика. 2-е изд. М., Норма. 2016. С. 95.

⁵ Там же, С. 118.

⁶ Article 66 of the Act on the Constitutional Court of the RSFSR of 1991. См. Коваленко К. А. Понятие «сложившаяся правоприменительная практика» в федеральном конституционном судопроизводстве// Журнал конституционного

judicial practice. One of such examples included a “guiding explanation of the Plenum of the Supreme Court” that interpreted legal norms in an abstract manner regardless of concrete cases⁷. The Court, therefore, in this respect, played the role of the quasi-higher court over the ordinary courts. Simultaneously, the Court was competent to examine the constitutionality of the individual acts and decisions of the Russian President both on the request from select state authorities and the Court’s own initiative⁸.

In the fall of 1993, President El’tsin suspended the operation of the Russian Parliament based on the presidential decree, following a conflict between him and the legislature. The Constitutional Court, on its initiative, held that decree unconstitutional. The President, in turn, suspended the activity of the Court⁹. Soon after this *coup d'état*, in December 1993, the current Constitution of the Russian Federation was enacted through a national referendum. Even though the Court was not dissolved and former judges still maintained their terms of office, the composition and authority of the Court went through certain modifications¹⁰.

In 1994, the Court lost its authority to independently initiate the examination of the President’s decisions. Within the procedure of a constitutional complaint, the Court could only examine the constitutionality of laws that allegedly violated fundamental rights of citizens. The Court lost its authority to review the “law application practice,” and hence cannot control the judicial practice of ordinal courts again. Simply speaking, the Court lost its status as the highest body of the judicial branch.

2. Judges and the Chairman of the Russian Constitutional Court

The Court consists of 19 judges¹¹. The Federal Council appoints judges upon the proposals from the President¹². The judge’s term of office is not restricted, excluding the requirement to retire at the age of 70¹³. Initially, the Court’s judges voted and elected the Chairman of the Court in the plenary session¹⁴. In 2009, after the Constitutional Court Act was amended on the proposal of President Medvedev, the Federal Council obtained authority to appoint the Chairman of the Court upon the Russian President’s proposal. The Chairman’s term of office is six years. In 2010, this position was

правосудия. 2012. № 1.

⁷ Article 56, section 1 of the Act on the Judiciary of the RSFSR of 1981. The guiding explanation was issued in the form of the Decision of the Plenum of the Supreme Court.

⁸ Article 74, section 2 of the Act on the Constitutional Court of the RSFSR of 1991.

⁹ Подробнее см. Авакьян С. А. Конституция России: природа, эволюция, современность. 2-ое изд. М., РЮИД. 2000. С. 171-184.

¹⁰ СЗ РФ. 1994. № 13. Ст. 1447.

¹¹ Article 125, section 1 of the Constitution of the Russian Federation of 1993.

¹² The Federal Council is the Upper House of the Federal Assembly (Parliament), composed of the representatives of legislative and executive bodies of each constituent entity of the Russian Federation.

¹³ Article 12 of the Act on the Constitutional Court of the Russian Federation of 1994 (revised by the Federal Constitutional Law on 5 April 2005 No.2-FCL).

¹⁴ Article 23, section 1 of the Act on the Constitutional Court of the Russian Federation of 1994 (before the amendment thereof by the Federal Constitutional Law on 2 June 2009 No.2-FCL).

exempted from a retirement age restriction¹⁵.

3. Structure and location of the Court

Previously, the Court's structure included a plenary session and two chambers. As an example, the Plenary Session had competence to examine the conformity of constitutions or charters of the constituent entities of the Russian Federation to the Federal Constitution. Unlike the relationship between sections and grand chambers of ECtHR, the plenary session of the Russian Court could not quash the rulings of a chamber. In 2010, the two chambers were abolished. Now, it is only the session that is eligible to examine every case that the Court recognizes as "permissible"¹⁶.

Initially, the Court was located in Moscow. Since 2008 the Court has been relocated to Saint Petersburg. It now operates in the building of the Governing Senate (*Pravitel'stvujushchij Senat*), the former Supreme Court of the Russian Empire.

4. Authority of the Court

The authority of the Russian Court is similar to the Federal Constitutional Court of Germany. First, according to the Constitution and the Constitutional Court Act, the Court resolves cases concerning the conformity to the Constitution of the Russian Federation of legal regulations (federal laws, legal acts of the President, constitutions of republics, charters, and laws of constituent entities of the Russian Federation)¹⁷ and international agreements of the Russian Federation, which have not entered into force¹⁸, i.e. abstract norm control¹⁹. Second, the Court exercises a concrete norm control, or in other words, performs a constitutional review of law arising in specific cases forwarded by ordinary courts²⁰. Third, the Court tests the constitutionality of law applied in a specific case in response to complaints of citizens against the alleged violation of constitutional rights and freedoms, i.e., constitutional complaint²¹. Forth, the Court resolves competence disputes between; federal bodies, federal bodies and bodies of constituent entities of the Russian Federation, and state bodies of

¹⁵ СЗ РФ. 2009. № 23. Ct. 2754.

¹⁶ Article 21 of the Act on the Constitutional Court of the Russian Federation of 1994 (revised by the Federal Constitutional Law on 3 November 2010 No.7-FCL).

¹⁷ Article 125, section 2, item a) - c) of the Constitution of the Russian Federation of 1993; Chapter 9 of the Act on the Constitutional Court of the Russian Federation of 1994.

¹⁸ Article 125, section 2, item d) of the Constitution of the Russian Federation of 1993; Chapter 10 of the Act on the Constitutional Court of the Russian Federation of 1994.

¹⁹ Petitions for abstract review can be lodged by the President of the Russian Federation, the Federal Council (the Upper Chamber), the State Duma (the Lower Chamber), more than one-fifth of MP of each Chamber, the Federal Government, the Supreme Court, Legislative and executive bodies of the constituent entities of the Russian Federation.

²⁰ Article 125, section 4 of the Constitution of the Russian Federation of 1993; Chapter 13 of the Act on the Constitutional Court of the Russian Federation of 1994.

²¹ Article 125, section 4 of the Constitution of the Russian Federation of 1993; Chapter 12 of the Act on the Constitutional Court of the Russian Federation of 1994.

constituent entities of the Russian Federation²². Fifth, the Court gives interpretations of the Constitution²³. The Court also gives conclusions on compliance with the procedure for accusing the President of the Russian Federation of treason or the commission of another grave offense, i.e., the examination on impeachment procedure of the President²⁴. Furthermore, it examines the treaties on the admission of foreign countries or a part of them into the Russian Federation as its new constituent entity²⁵. In addition, the Court also reviews the constitutionality of the implementation of decisions of international human rights protection organizations²⁶.

Unlike the German Court, the Russian Court cannot handle issues related to a ban on political parties. As mentioned earlier, the scope of the constitutional complaint is also limited only to the review of the constitutionality of laws, and the Court does not examine the application of laws by the executive or judicial branches. A relatively weak authority of the Court is the outcome of the political confrontation with the President in 1993.

5. Legal force of a Judgement

The Court's ruling is final and cannot be appealed. A ruling has a general binding force and, in principle, a prospective effect. That means legal regulations which had been declared unconstitutional lose their force for the future. However, in case of a constitutional complaint, a judgment of the Court has a retroactive effect on the case, in which the judgment was rendered. In such situations, a retrial in the civil or criminal procedures follows whenever a retrial is necessary to give remedy for victims. Accordingly, in order to implement rulings of the Court, cooperation from legislative and judicial branches is essential. In this respect, however, the Chairman of the Court sometimes blames the non-implementation of its rulings by them²⁷.

II. THE PRACTICE OF THE CONSTITUTIONAL COURT

Now, the Russian Court annually renders about 30 to 40 judgments. Furthermore, it also renders

²² Article 125, section 3 of the Constitution of the Russian Federation of 1993; Chapter 11 of the Act on the Constitutional Court of the Russian Federation of 1994.

²³ Article 125, section 5 of the Constitution of the Russian Federation of 1993; Chapter 14 of the Act on the Constitutional Court of the Russian Federation of 1994.

²⁴ Article 125, section 7 of the Constitution of the Russian Federation of 1993; Chapter 15 of the Act on the Constitutional Court of the Russian Federation of 1994.

²⁵ This authority is vested to the Constitutional Court, not by the Constitution or the Act on the Constitutional Court but the Act on the procedure for admitting to the Russian Federation and forming in its composition a new constituent entity of the Russian Federation, enacted in 2001. This procedure was for the first time applied in the case of the annexation of Crimea in March of 2014 (Постановление Конституционного Суда РФ от 19 марта 2014 г. N 6-II). The proceeding of the case was criticized by the professor of the High School of Economics, Elena Luk'janova, and this issue became a popular topic among the general public. См. Лукьянова Е. А. #КРЫМНАШ: Спор о праве и о скрепах двух юристов и их читателей. М., Кучково поле, 2015.

²⁶ Chapter 13¹ of the Act on the Constitutional Court of the Russian Federation of 1994. This authority will be analyzed in section 4.

²⁷ Дмитрий Медведев провел судебные слушания// Коммерсантъ, 16 июля 2008; Валерий Зорькин стал думским лоббистом// Коммерсантъ, 21 январь 2009.

‘decisions.’ According to the Constitutional Court Act, the merit of a case is resolved in the form of a judgment, and a procedural issue is settled in the form of a decision²⁸. During its activity, however, the Court developed the practice of decisions²⁹. Some decisions reveal the meaning of Constitutional provisions, especially by demonstrating interpretations of legal norms which do not contradict the Constitution. Such interpretation is expected to be considered and respected in ordinary courts. Therefore, one may assert that the Court of 1994 was set up as the legislature’s watchdog, while in practice, it has also been trying to affect the judiciary’s practice.

In order to illustrate the basic features of practices of the Court, its activity of 2015 will be taken as an example. During this year, a total of 14622 cases were lodged to the Court, and it rendered 34 judgments. Among them, only one judgment did not recognize any violation of the Constitution. In 19 cases, the provisions of legal norms were regarded as unconstitutional. In 17 cases, the Court revealed interpretations of laws which conformed with the meaning of the Constitution. In 14 cases, the Court explicitly demanded the legislature to amend legal regulations. Furthermore, the Court rendered 3111 decisions³⁰.

1. Basic trends of the rulings

The Court has played a crucial role in reforming Russian old socialist legal order. It is this Court that had introduced in Russia the case law system. According to this system the specific cases reveal the meaning of legal norms and make these norms obligatory in the form of precedents. The old fashioned, inquisitorial, criminal proceeding was also reformed based on many judgments of the Court. In general, the Court contributed to eliminating obstacles and enhancing the level of human rights protection.

On the other hand, the 1993 political confrontation seriously affected the activity of the constitutional adjudication in cases touching upon the separation of powers³¹. When the Court comes across with issues on the Presidency or cases with political interest, it generally stands on the side of the Presidency.

The most prominent example is the 1995 Chechen case³². In this case, the Court endorsed the

²⁸ Article 71 of the Act on the Constitutional Court of the Russian Federation of 1994.

²⁹ Витушкин В. А. Определения Конституционного Суда Российской Федерации: особенности юридической природы. М., Норма. 2005; Петров А. А. Решения Конституционного Суда Российской Федерации: конституционно-правовое исследование: монография. Иркутск, Фонд «Право и Демократия». 2012; Сивицкий В. А. О динамике типологии решений конституционного суда Российской Федерации// Журнал Высшей школы экономики. Право. 2012. № 2; Смирнов А.В. Взаимосвязь видов решений Конституционного суда Российской Федерации, их оснований, целей и способов правового толкования// Журнал конституционного правосудия. 2012. № 3.

³⁰ Информационно-аналитический отчет об исполнении решений Конституционного Суда Российской Федерации, принятых в ходе осуществления конституционного судопроизводства в 2015 году (электронный ресурс). Available at: <http://www.ksrf.ru/ru/Info/Maintenance/Informationks/Pages/ReportKS2015.aspx> (Accessed: 31 August 2019).

³¹ The conclusion of the Constitutional Court, which declared the El’tsin’s decree unconstitutional, only heightened the tension between the President of the State and the Parliament, and, at the end, lives of hundreds of persons within the Parliamentary building were lost by a bombardment of the President’s tanks.

³² Постановление Конституционного Суда РФ от 31 июля 1995 г. N 10-II.

theory of so-called presidential “implicit powers.”³³ According to this theory, the President has authority (and in the instant case, president could order to the Ministry of Defense to send troops to the domestic regions, i.e., to the Chechen Republic), which can be deduced from the abstract provision of the Constitution. The President can invoke such authority without any statutory empowerment. In the Chechen case, Article 80, section 2, which enables the President to “adopt measures to protect the sovereignty of the Russian Federation, its independence and state integrity,” justified the troops’ development into Chechnya in the ‘extraordinary situation’ without the permission from the upper chamber of the Parliament.

The December 21, 2005 judgment is another bright example. In this case, the Court altered its old precedent of 1996, which demanded the constituent entity of the Russian Federation (in this case, Altai region) to select its governor through direct elections by the local population³⁴. The judgment of 2005 justified a new appointment procedure of governors, according to which the President of the Russian Federation nominated candidates, and a local parliament appointed a governor among them. This new procedure was proposed by the President Putin in 2004 in the context of confronting the terrorism accident, known as the Beslan School Siege. The 2005 judgment replaced the old precedent of 1996, which protected the political interest of former President El’tsin by a new one, which supported Putin’s federal reform³⁵. The Court justified the precedent change by stating that interpretation of the Constitution would be changed according to the transformation of its surrounding social and historical contexts, including “concrete socio-legal conditions.”³⁶ According to this logic, the transformation of ordinary laws endorses the change of the interpretation of the Constitution, which has higher authority than any other legal act. The 2005 judgment was, therefore, vehemently criticized as distorting the idea of the supremacy of the Constitution by Judge Anatolij Kononov in his persuasive dissenting opinion³⁷.

2. Method of judicial review

At this point, it would be beneficial to make a cursory glance at methods of judicial review of the Court. As a consequence of the introduction of German-style constitutional review, the Russian Court accepted the principle of proportionality in order to assess the conformity of law to the Constitution³⁸. Article 55, section 3 of the Constitution is the legal basis of this principle. It states that “the rights and freedoms of human and citizen may be limited by the federal law only to such an extent to which it is

³³ Комментарий Эбзеева Б. С., Комментарий к постановлениям конституционного суда Российской Федерации. т. 1. М., Норма. 2001. С. 244-245.

³⁴ Постановление Конституционного суда РФ от 18 января 1996 г. N 2-П.

³⁵ См. Авакьян С. А. Почему «наместники» лучше «баронов»// Российская Федерация Сегодня. № 24. 2004.

³⁶ Постановление Конституционного Суда РФ от 21 декабря 2005 г. N 13-П.

³⁷ Особое мнение судьи Конституционного Суда РФ А. Кононова в Постановлении КС РФ от 21 декабря 2005 г. N 13-П.

³⁸ См. Толстых В.Л. Конституционное правосудие и принцип пропорциональности// Российское правосудие. № 12. 2009.

necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring the defense of the country and security of the State.”

In Russia, like other countries, the proportionality test consists of four criteria. First, the objectives of the legislation are examined as to whether it pursues a legitimate aim. In practice, the legitimacy of objectives is, in most cases, positively recognized by the Court. Second, the test of suitableness or rational basis test is applied. In 2013, the Court held a provision of the Labor Code unconstitutional because it barred the person from working as a teacher when he or she was convicted of a criminal offense, which did nothing to do with an educational profession³⁹. The third test is about necessity. If there are less restrictive alternatives, the legal restraints are regarded as unconstitutional. For example, in 2002, a prohibition against attorney’s right to participate in the hearing of civil trial when he or she does not have access to the state secret was regarded as unconstitutional because there are other less restrictive options as in-camera hearings⁴⁰. The last test relates to proportionality in a narrow sense.

There is some criticism among scholars about the actual practice of applying proportional test by the Court⁴¹. The Court, for example, tends to acknowledge traditional and conservative values like “special role of women for child-raising” as constitutionally relevant. Such a social value is applied as a rationale for the constitutional review in order to justify the constitutionality of the legislations without any sufficient justification⁴². It is also criticized that the Court acknowledged the principle of proportionality on the surface, but it actually often did not apply it and reviewed cases only by “measuring by eye.”⁴³

III. FIREWALL FOR CONSTITUTIONAL IDENTITY ? RUSSIAN CONSTITUTIONAL COURT AND EUROPEAN COURT OF HUMAN RIGHTS

Lastly, a new function of the Courts, which was assigned in the middle of 2010s in connection with Europe, must be mentioned here. One of the prominent distinctions of Russian legal order from those of Asian countries is that Russia ratified the European Convention on Human Rights (ECHR) in 1998, and Russian state authorities are now under the jurisdiction of European Human Rights protection⁴⁴.

³⁹ Постановление Конституционного Суда РФ от 18 июля 2013 г. N 19-П.

⁴⁰ Определение Конституционного Суда РФ от 10 ноября 2002 г. N 314-О.

⁴¹ Троицкая А. Пределы прав и абсолютные права: за рамками принципа пропорциональности? Теоретические вопросы и практика Конституционного Суда РФ// Сравнительное конституционное обозрение. № 2. 2015. С. 57.

⁴² Белов С. Пределы универсальности конституционализма: влияние национальных ценностей на практику принятия решений конституционными судами// Сравнительное конституционное обозрение. № 4.2014. С. 50.

⁴³ Белов С. А. Ценностное обоснование решений как появление судебного активизма Конституционного Суда Российской Федерации// Сравнительное конституционное обозрение. № 2. 2012. С.147.

⁴⁴ Nußberger A. The Reception Process in Russia and Ukraine in H. Keller and A. Stone Sweet (eds.) *A Europe of Rights: The*

The first judgment of the European Court of Human Rights (ECtHR) against Russia was rendered in 2002. Since then, the number of cases submitted to and pending in the ECtHR kept increasing year by year. In 2010, the number of pending cases reached more than 40000. Because of multiple problems in the domestic court system, many Russian citizens regard the ECtHR as an effective remedy for the protection of rights and legal interests.

In the first decade of this century, ordinary courts, headed by the Supreme Court of the Russian Federation, were reluctant to refer to the precedents of ECtHR⁴⁵. It was not uncommon that judges lacked basic knowledge of its application, though Article 15, section 4 of the Constitution makes international treaties and agreements of the Russian Federation a component part of its legal system. In this context, the Court acted as a mediator between Russia and Europe. The Court frequently quoted provisions of the ECHR and judgments of ECtHR, considered itself as the translator of European precedents into Russian law⁴⁶. The general measures, which are introduced into Russia based on judgments of ECtHR, are also supported by the assistance of rulings of the Court. For instance, the Court introduced a permanent moratorium on death penalty sentences in 2009⁴⁷. We can also take a case of 2010, which recognized a judgment of ECtHR as a ground for opening a retrial in civil litigation⁴⁸.

In some cases, the Court refers to case-law of ECtHR while ignoring its original context in order to justify a restriction of fundamental rights and freedoms⁴⁹. The Court, however, earnestly invoked the Convention, especially in cases when the right to a fair trial, provided in Article 6 of the European Convention, was violated. Such activities of the Court contributed to decreasing cases, lodged from Russia, and pending before the ECtHR. In other words, the Court, to some extent, succeeded in “bringing human rights into the home.”⁵⁰

Since 2010, the friendly atmosphere between the two Courts disappeared, and dissonance has come to the fore. This new situation was prompted by the judgment of ECtHR on the famous Markin case in 2010, in which discrimination against male military personnel was examined. The applicant, Konstantin Markin requested childcare leave for three years, which was guaranteed for female soldiers. Russian Army, however, rejected his request, and Russian courts also did not recognize his action. He,

Impact of the ECHR on National Legal Systems, OUP, 2008.

⁴⁵ About implementation of ECHR in Russia, see, Burkov A. The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996-2006, *Ibidem*-Verlag, 2007; Бурков А. Конвенция о защите прав человека в судах России. М., 2010.

⁴⁶ Коротеев К. Место Европейской Конвенции о защите прав человека и основных свобод в аргументации решений Конституционного Суда РФ// Сравнительное конституционное обозрение. 2013. № 4. С. 69-70.

⁴⁷ Определение Конституционного Суда Российской Федерации от 19 ноября 2009 г. N 1344-О-Р.

⁴⁸ Постановление КС РФ от 26 февраля 2010 г. N 4-П.

⁴⁹ Например, см. Постановление КС РФ от 7 июня 2012 г. N 14-П.

⁵⁰ E. Pamfilova depicted the main task of Russia in the 2000s in terms of European human rights protection as “bringing human rights into the home.” См. Памфилова Э.А. Главная цель международного права – «принести права человека домой». Под ред. Буркова А. Л. Применение Европейской конвенции о защите прав человека в судах России. Екатеринбург, Изд-во Урал ун-та. 2006.

therefore, applied to the ECtHR. This issue was also reviewed by the Court in 2009⁵¹. The Court did not recognize the violation of equal treatment between men and women. ECtHR, however, in its ruling, examined the reasoning of the Court thoroughly, rejected its reasoning in detail, and held that decision of the Russian Army infringed applicant's right protected by the Convention⁵².

The Chairman of the Court, Valerij Zor'kin, immediately responded to the ruling by publishing his article in the state official newspaper, the Russian Gazette. He asserted that in Russian legal order, international treaties and agreements were subordinate to the Constitution, and the interpretation of the Constitutional Court must not be overturned by the interpretation of the Convention by ECtHR. He emphasized as a conclusion that Russia reserved a power to establish "a protective mechanism," which defended Russia from violation of its state sovereignty⁵³.

Since this statement, discussion over "the protective mechanism" repeatedly emerged, especially among the discourse of politicians⁵⁴. Finally, in 2014 the first step towards its realization was taken. The legislature introduced a new procedure. According to it, domestic courts were obliged to raise questions to the Court on the constitutionality of legal norms, when its examination is required in order to review the cases based on the decision of international human rights protection organizations⁵⁵. In this procedure, it is expected that if a legal norm, which was regarded as constitutional by the Court, was, however, declared as encroaching on human rights by ECtHR, then domestic courts, in the retrial of that case, were to ask the Court for an opinion.

This new procedure attracted public attention and invited criticism as an attempt to overturn the jurisdiction of ECtHR. This new authority of the Court, however, leaves room for acceptance as a tool to find out an acceptable way in terms of the domestic constitution to implement the individual and general measures posed on Russia by rulings of the ECtHR⁵⁶. This amendment of the Constitutional Court Act still may be regarded as a way to seek a compromise and consensus with the European legal order. In 2015, we witnessed the second attempt for establishing "the protective mechanism," and its core attributes, however, differ from its first step in 2014, as was mentioned above.

In July 2015, in response to the petition for abstract norm control, the Court held that a ruling of ECtHR, which was based on the unconstitutional interpretation of the European Convention, was not obligatory for Russia⁵⁷. Subsequently to this judgment, the Constitutional Court Act was once

⁵¹ Определение КС РФ от 15 января 2009 г. N 187-О-О.

⁵² Markin v. Russia, 7 October 2010.

⁵³ Зорькин В. Предел уступчивости// Российская газета. 29 октября 2010.

⁵⁴ Торшин А. Выбор России// Российская газета. 12 июля 2011; Исаева М. Сергеева И. Сучкова М., Россия и Европейский Суд: реформы или конфронтация? // Арбитражный и гражданский процесс. № 10-11. 2011.

⁵⁵ С3 РФ. 2014. № 23. Ст. 2922. This amendment of the Act on the Constitutional Court is the direct outcome of the judgment of the Constitutional Court on 6 December 2013, which handled the case raised from the Leningrad Regional Court based on the retrial of the Markin case. См. Постановление КС РФ от 6 декабря 2013 г. N 27-П.

⁵⁶ Вайпан Г. Трудно быть богом// Сравнительное конституционное обозрение. 2016. № 4.

⁵⁷ Постановление КС РФ от 14 июля 2015 г. N 21-П.

amended. The federal executive bodies, which are in charge of defending the interests of the Russian Federation in international human rights protection organizations, and in this context, the Ministry of Justice, are vested with a new authority. The Ministry of Justice is, now, able to ask the Court about the possibility to constitutionally implement a decision of international human rights protection organizations, purporting to contradict the Russian Constitution⁵⁸. Furthermore, the Constitutional Court Act explicitly provides that the Court renders a judgment regarding “impossibility” to implement an unconstitutional decision of international human rights protection organization⁵⁹.

Though this new ‘protective mechanism’ is denounced as ignoring duty to recognize the compulsory character of the jurisdiction of the European Court by Russian liberals and the Venice Commission of COE⁶⁰, the Court has already invoked this authority two times on the request of the Ministry of Justice. In a case, when uniform disfranchisement of prisoners, based on Article 32, section 3 of the Constitution, was regarded as a violation of the ECHR⁶¹, the Court stated that it was impossible to provide prisoners with the right to elect and be elected without a constitutional amendment. At the same time, the Court, in its ruling, suggested the legislative way to evade from this impasse without any constitutional reform⁶². In this case, the Constitutional Court demonstrated its readiness to cooperate with Europe⁶³. In the second case, when the implementation of damages of the so-called *Jukos* case was examined⁶⁴, the Court simply rejected the possibility of its implementation⁶⁵.

According to the 2015 judgment, the Court now undertakes the task of defending the ‘constitutional identity’ of the Russian Federation. This function resembles to a firewall on the computer, which monitors and drives back the inventions from outside. The concept ‘constitutional identity’ can contain variable meanings and nuances, starting from liberal up to conservative or traditional ones, as was often seen in Western and Central Europe⁶⁶. However, a closer look at the practice of the Russian Court, especially in this decade, shows that the Court has assumed a role of defending values, which is something different from what the Court tried to pursue during the period of systemic transformation.

⁵⁸ Chapter XIII.1 of the Act on the Constitutional Court of the Russian Federation of 1994(revised by the Federal Constitutional Law on 12 December 2015 No.7-FCL). С3 РФ. 2015. № 51. Ст. 7229.

⁵⁹ Article 104.4 of the Act on the Constitutional Court of the Russian Federation of 1994.

⁶⁰ CDL-AD (2016)005.

⁶¹ *Anchugov and Gladkov v. Russia*, 4 July 2003.

⁶² Постановление КС РФ от 19 апреля 2016 г. N 12-П.

⁶³ Дедов Д.И. Решение системной проблемы социальной адаптации// Российский ежегодник ЕСПЧ. № 3. 2017. С. 14; Морщакова Т. О некоторых актуальных проблем конституционного правосудия// Сравнительное конституционное обозрение. 2017. № 3. С. 120. About criticism against this judgment, см. Пушкинская А. Конституционный суд впервые разрешил не исполнять решение ЕСПЧ// Коммерсантъ. 19 апреля 2016.

⁶⁴ *OAO Neftyanaya kompaniya Yukos v. Russia*, 31 July 2014.

⁶⁵ Постановление КС РФ от 19 января 2017 г. N 1-П.

⁶⁶ See Arnaiz A. S. and Llivina C. A. (eds.) *National constitutional identity and European integration*, Intersentia, 2013.

CONCLUSION

The Russian Constitutional Court has been demonstrating judicial activism since its establishment in 1991. It does not hesitate to render judgments, which hold legal regulations unconstitutional. Russian citizens recognize the positive role of the Court in the field of human rights protection. The fact of the trust of citizens is well supported by numerous complaints lodged with the Court. This might be considered as good evidence of the notion that even in the states with a hybrid regime, the constitutional judiciary can play a decisive role and be active in certain fields of law.

Nevertheless, one must not overlook the fact that activism of the Constitutional Court ceases to exist when cases interact with political interests⁶⁷. For example, the Court did not pay attention to the “chilling effect” in its rulings when issues on freedom of expression were examined. Cases on the principle of horizontal and vertical separation of powers were also resolved in favor of the Presidency and the central government.

In addition, the Court took a task to safeguard Russian ‘state sovereignty’ and ‘constitutional identity’ against ‘inventions’ from outside. This task was assigned by legislative measures. Nevertheless, one has to admit that its basic concept was already elaborated by the judgment of the Court based on the enthusiastic contribution of the Chairman Zor’kin⁶⁸. In this aspect, we are now witnessing endeavors of the ‘guardian of the Constitution’ to seek its ‘*raison d’être*’ seriously in order to survive under the complicated political situation in Russia.

⁶⁷ Коротеев К. Указ. соч., С. 80.

⁶⁸ Например. см. Зорькин В.Д. Взаимодействие национального и наднационального правосудия: новые вызовы и перспективы// Журнал конституционного правосудия. № 5. 2012.