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Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state



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ABSTRACT

This article analyzes the successful adaptation of the Russian Constitutional Court (RCC) to an increasingly authoritarian regime under President Vladimir Putin. It argues that the key to its success lay in its pragmatic approach, whereby the Court decides cases that matter to the regime in a politically expedient way, while giving priority to legal and constitutional considerations in other cases, thereby recognizing the reality of a dual state. Over the years the RCC has taken a pragmatic approach in its reaction to changes in the rules of its operations, in its personnel, and in the policies of the popular political leader, including reducing the country's subordination of European legal norms. In so doing, the Court and its skillful chairman Valerii Zorkin achieved considerable autonomy in pursuing its own legal vision on many issues and even improved the implementation of its decisions by other judges and political bodies alike (previously a big problem). In short, the RCC developed its own version of "authoritarian constitutionalism", which may serve as a model for constitutional judicial bodies in other authoritarian states.

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In 2016 and 2017, the Constitutional Court of the Russian Federation (RCC) failed to support the constitutionality of a single challenged law. Three quarters of its judgments on the merits in both years either required the legislature to issue new laws or pronounced new constitutional interpretations of existing laws. In the past, other courts tended to ignore such interpretations but the 2016 amendments to the Law on the Russian Constitutional Court (CC) – a product of successful lobbying by the RCC – made these interpretations binding on the rest of the judiciary. Moreover, in 2017 RCC justices, some of them Vladimir Putin appointees, wrote 19 dissenting opinions, in contrast to the absence of dissenting opinions by the Russian Supreme Court justices. Despite the objections from Vladimir Putin's lawyers, the RCC requested in politically sensitive cases *amicus curiae* submissions from NGOs that the Russian government had earlier declared to be "foreign agents" in an effort to force them out of political life. Further, in November 2016, after its Chief Justice publicly slammed the Western-style gender equality as anti-Christian and anti-humanity, the Court declared that European human rights were fundamental to the Russian legal order. And in May 2018, following the violent crackdown against those protesting against Vladimir Putin's inauguration, the Chief Justice had to remind Russian authorities that ordinary citizens had a constitutional right to protest against government actions (Zorkin, 2018). How could such an activist constitutional review tribunal, which resembles a powerful debate club more often than a rubber-stamping robot, survive in an authoritarian regime that does not tolerate dissent?

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As we show below, 2016 and 2017 were not unique in the life of the 25-year-old RCC. This increasingly pragmatic (Vaipan, 2014; Antonov, 2017a; Trochev, 2017) tribunal was established in 1991 during the dying days of Soviet power. At that time, rule by the communist party had ended, and the Court began its operation at a time of struggle to create a workable democracy. Importantly, the RCC was created as a democracy-promotion institution and not as a “Potemkin village” or a golden parachute for important individuals. Many RCC judges embraced this democratic accountability role and supported the efforts of their first Chief Justice to save democratic Russia from power-hungry politicians at the center and in the regions. As a former vice-Chairman of the RCC Tamara Morshchakova put it a few years after the bloody confrontation between President Yeltsin and the Russian Parliament, her court was not ‘a decorative bow in Russian democracy’ (Maslennikov, 1996).

Still, over the course of the Court's life thus far, especially in the Putin era, Russia's political regime became less democratic and more authoritarian. The Court has been forced to adjust to the new political realities, and that adjustment has reflected both the uncertainties in the political situation and how members of the court understand its role. Adjusting to the needs of an authoritarian regime intensifies the challenge that is faced by any constitutional court of balancing the conflicting demands of law and of politics.

Moreover, the duality of the Russian state complicates this balancing act (Sakwa, 2011; Hendley, 2017). This duality (Fraenkel, 1969) refers to the contradictory co-existence of two governance regimes, what we call the constitutional and the politically expedient, the co-existence of which can be observed in not only Russia but also to varying degrees in Ukraine (Kyselova, 2014), Turkey (Söyler, 2013), Thailand (Mérieau, 2016), and even the United States (Wilson, 2016). In the Russian context, the constitutional regime refers to the operation of formal constitutional rules and rules of European human rights law, which both constrain and guide Russia's leaders in ruling their country. The regime of political expediency, in contrast, refers to the unrestrained rule of the powerful, whose strategies, tactics and whims bypass constitutional restraints and prevail over constitutional values. As the Russian CC Justice Gadis Gadzhiev (2012:55) put it at the time of Vladimir Putin's return to presidency in 2012, “Russia faces a choice: either use archaic forms of *realpolitik*, under which one lives according to a cynical realism that privileges momentary success, or turn to a morally based realism” that is based on constitutional values constraining the state. The latter, he contends, “is better for Russia in the long term”.

To put it simply, this duality means that “the same court - even the same judge - can follow the law to the letter or openly disregard it, depending on the context” (Hendley, 2017:4). The political leaders expect that the Russian Constitutional Court will do both and by so doing take part in the operation of both regimes. At the same time, like any large hierarchical organization, the RCC has its own internal autonomy, mechanisms of decision-making, and lines of accountability (Dzmitryieva, 2017; Grigoriev, 2018), all of which influence the operation of both governance regimes.

To be sure, over the years Russia's leaders have limited the court's autonomy through changes in the system of selecting its leaders and lowered its prestige through moving the Court from the capital city Moscow to St. Petersburg. But what mattered most for the Court's longevity was its demonstration of enhanced sensitivity to the needs of the regime in particular cases. At the same time, the Court became a trusted ally of the regime in its defense of national prerogatives against decisions of the European Court of Human Rights that seemed to threaten Russian national interests. That these things happened without open conflict (as in the 1993 constitutional crisis) or a diminution of the Court's role (as in Egypt) is significant, especially as some actors had even contemplated the absorption of the CC into the Supreme Court (the fate of the Higher *Arbitrazh* court). The stability of the RCC today was due in large part to the pragmatic behavior, and shifting intellectual predispositions, of its chairman Valerii Zorkin (Antonov, 2014; 2017b), who managed to fend off attacks on the tribunal through his interactions with Russia's leaders.

This article analyzes the conduct of the RCC (and its chairman), in an effort to explain its institutional health and longevity. It starts by outlining three key characteristics of an institutionalized constitutional review tribunal - access and jurisdiction, decision-making autonomy in handling cases and managing the Court's internal operations, and authoritativeness. Then, it specifies the patterns of conduct that each of the two regimes—constitutional and political expediency—anticipates, and explores the pragmatism of the RCC as reflected in its loyalty to a popular President and in its resilience and activism. This involves consideration of the formal and informal rules of court operation (Solomon, 2007), the court's handling of ordinary cases, and its reaction to politically salient ones, including its defense of Russian interests against the ECtHR and the requirements of international law. From all this we conclude that the Constitutional Court's standing in the Russian political system depends on its skill in catering to the political needs of Russia's rulers.

1. Defining the power of the constitutional court

Scholars who study supreme, constitutional, and supranational courts have identified three key dimensions of the power of these tribunals, which may even help them constrain the conduct of leaders: 1) jurisdiction and rules of standing, 2) autonomy in deciding cases and managing internal operations, and 3) authoritativeness that encourages implementation of decisions (Solomon, 2004). These variables are not dichotomous but rather present a spectrum of possibilities.

The first aspect of power is the accessibility of a tribunal for social groups and the range of state actions subject to review by the courts. Often, constitutional tribunals actually expand their jurisdiction through decisions in particular cases, and they sometimes lobby the political branches to enshrine this expansion in enabling legislation. Arguably, increases in formal access to a tribunal indicate a powerful tribunal, especially when they are realized in practice.

The second characteristic of a powerful tribunal is a high degree of autonomy in both deciding cases and arranging its own internal operations. Judicial autonomy refers to both the institutional autonomy of the tribunal and the individual autonomy

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