The Russian Constitutional Court: A Third Branch of the Russian Federal Government

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The 1990s brought with them a frantic pace of political, social, and economic change in the Soviet Union and Russia. In addition to the outward revolution of mass demonstrations, civil wars, and the coup attempt against Gorbachev, the Soviet Union was also experiencing an internal revolution. In particular, perestroika was gradually incorporating into law such Western concepts as rule of law, separation of powers, checks and balances, and limited government. And these efforts were largely paralleled on the republic level, particularly in Russia.

Spring of 1991 brought one of the most interesting and perhaps most important developments in Russia: the passage and signing into law of the “Law on RSFSR Constitutional Court,” creating the first Russian court with the power of judicial review. In late October, the Russian Congress of People’s Deputies selected and swore in thirteen judges, and the Constitutional Court began operating before the end of the same year.

In its first two years, the Court has experienced a variety of successes and failures, from initial victories to a temporary suspension in October following the attempted Parliamentary coup. After two years the questions loom ever larger and more urgently. How powerful and effective is the Constitutional Court? To what extent has it really influenced Russian government in the past and what are its prospects for the future?

Soviet Roots of the Judiciary

Prior to Gorbachev’s reforms of the judicial system, the phrase “Soviet justice” was an oxymoron—at least by any Western standard. In the Soviet Union, the USSR Supreme Court was the highest judicial body. Elected by the USSR Supreme Soviet for five-year terms, members of the USSR Supreme Court were officially independent of the other branches of government. However, the 1977 Constitution of the USSR made the Supreme Court directly accountable to the Supreme Soviet (ch. 20, art. 152). This same pattern was followed on all levels of government (ch. 20, art. 152), and it did not favor the exercise of justice.

The results are quite dramatic. Even after Stalin’s show trials, the system did not significantly improve—although it may have become less injurious to the defendants. One study even shows that the rate of acquittals in Soviet courts steadily decreased from the late 1940s to the 1980s, until by the mid-1980s “acquittals had practically disappeared” (Solomon 1987, 531-38). Yet, the judges did try to ease the effects of the judicial system, by giving light sentences, overturning appeals on technicalities, or remanding cases for retrial after which the cases were quietly dropped for lack of evidence (Solomon 1987, 539-41). Hence, the system sometimes could judge people “guilty” but not punish them. Such incidents of mercy are noteworthy, but such lenience was severely limited by the Party.

Perestroika and the Judiciary

The Gorbachev era marked a radical change in the Soviet—and Russian—legal and political system. At his urging, the USSR Supreme Soviet created the USSR Congress of People’s Deputies in December 1988, which was actually elected in pseudodemocratic elections. In the same month, the Supreme Soviet also began an
extensive reform of the judicial system. Constitutional amendments extended the terms of office of all judges to five years, ended the popular election of judges on the local level, and transferred power of election to the Soviets on the level immediately superior to the courts. During the next year, the Congress of People's Deputies enacted strict penalties for violating the independence of the courts. Many of the Soviet republics quickly followed suit by enacting similar legislation (Butler 1992, 112-13).

In March 1990, the Supreme Soviet created the office of the President of the Soviet Union and elected Gorbachev President. He subsequently created the Committee on Constitutional Supervision—the Soviet forerunner of the Russian Constitutional Court—to ensure that Soviet laws complied with the country's constitution (Benn 1992, 178-79). Thus, by the end of 1991, the Soviet Union had the beginnings of separate branches of government, a primordial system of checks and balances, and a judicial body to enforce them.

**Creation of the Russian Constitutional Court**

In May 1991, the Russian parliament took a radical step, passing the "Law on RSFSR Constitutional Court." On May 6, the Russian Supreme Soviet passed the original statute. After adding approximately two hundred amendments, the Russian Congress of People's Deputies passed the statute. On July 12, President Yeltsin signed it into law (Sharlet 1993, 2).

On October 27, after a series of political turf battles, the Russian Congress of People's Deputies (CPD) chose ten members of the thirteen-member Russian Constitutional Court. On the following day, the CPD selected three additional justices, swore in all thirteen, and tabled selection of the remaining two justices until the next session of Congress (Zamyatina 1991, 50). Five days later, the new Court met and selected Valerii Zorkin as Chairman of the Constitutional Court (Klimov and Artemev 1991, 60).

**A Comparison of Courts**

Comparing the Russian Constitutional Court to the U.S. Supreme Court reveals some of the strengths and weaknesses of the Russian Constitutional Court. Beyond the basic responsibility of judicial review, their politicians and responsibilities in the judiciary structure and jurisdictions differ widely.

Unlike the U.S. Supreme Court, the Constitutional Court is not the ultimate wielder of judicial power. The Russian Supreme Court and the Russian Supreme Court of Arbitration—carry-overs from the Soviet era (Butler 1992, 112)—each exercise final judgement in their own jurisdictions. Theoretically, the Constitutional Court considered constitutional questions, the Supreme Court decides civil and criminal cases, and the Supreme Court of Arbitration resolves economic disputes. Obviously, these jurisdictions overlap and create a "problem of competition" among the supreme courts, as noted by Deputy Chairman Vitruk in the Izvestiya Case (cited in Feofanov 1993, 26).

Additionally, while in the United States all federal and some state courts can exercise judicial review, in Russia the Constitutional Court is the sole judge of constitutionality (Sharlet 1993, 3). These constitutional responsibilities specifically include examining all treaties, laws, and executive orders. The Constitutional Court also decides disputes between the executive and legislative branches and between members of the Russian Federation.
Notably, the Constitutional Court does not normally adjudicate disputes between citizens or between the citizen and the government, as the U.S. Supreme Court does. Instead, it confines itself to interpreting the constitution (Zherebenkov 1991, 68). While the U.S. Supreme Court can sidestep constitutional issues—and often does—by simply deciding on the specific merits of the case in question; the Constitutional Court must directly confront constitutional questions, because they are the only questions which the court can legally decide.

In addition, while the U.S. Supreme Court has almost complete control over its docket, the Constitutional Court exercises little control over which cases it considers. The difference lies in the different types of jurisdictions. Currently, the U.S. Supreme Court receives few cases of original jurisdiction; hence, most cases arrive via petitions for certiorari, which the Court may accept or dismiss at its own discretion (O'Brien 1991, 96). Conversely, most cases reach the Constitutional Court by appeal on original jurisdiction, so the Court must hear them (Sharlet 1993, 3). With such an open door to disputes, the Constitutional Court consistently finds itself embroiled in fierce power struggles between the branches of government or simply overwhelmed by the sheer number of cases.4

However, the Constitutional Court does have on defense to hide behind: the law specifically forbids the Constitutional Court to consider “political questions” (Wishnevsky 1993, 3). (Judicial precedent imposes a similar restraint upon the U.S. Supreme Court.) Of course, the line between political and constitutional questions is blurry at best, and since the Constitutional Court determines what is a political question, it could conceivably use this loophole to control its docket. The Court could declare undesirable case political questions and conversely ignore the political nature of cases which the Court wanted to hear—a time-honored practice of the U.S. Supreme Court.

Until ratification of the new constitution on December 12, 1993, the Constitutional Court continually wrestled with the inadequate Constitution of the Brezhnev era. Written and ratified under Soviet communism, it bore little relation to the political environment in which the Constitutional Court was working. Even Chairman Zorkin, the strongest and most vocal supporter of compliance with the Brezhnev constitution, acknowledged the paradox in having “to comply with an obsolete Constitution” (Muratov 1992, 45).

Finally, the Russian public attitude toward the law and the courts radically differs from the American legal tradition, even from the earliest days of the United States. The U.S. Supreme Court started in 1789 with the advantage of a public which generally upheld and respected the law and court decisions. The Russian Constitutional Court has no such advantage, and like any other court, it depends on the executive and legislative branches to enforce its decisions until it gains a reputation and a prestige that the other branches dare not defy.

If the first few decades of the U.S. Supreme Court teach any lesson, it is that supreme courts walk an extremely shaky tightrope during the first years. The first decade saw a rapid changeover in personnel, including three different Chief Justices.5 During the second decade, President Jefferson and Congress blatantly tried to destroy the Supreme Court. With some adroit legal maneuvering, Congress completely canceled the Supreme Court’s 1802 session. Then, in early 1802, the U.S. House of Representatives impeached a federal district judge and Supreme Court Justice Samuel Chase.6 In this volatile environment, only Chief Justice Marshall’s
politically astute decision of *Marbury v. Madison* succeeded in saving the Supreme Court. The Russian Constitutional Court has not had the similar luxury of two decades to gather its strength.

**The Initial Decisions**

Yet, with all the problems the Constitutional Court faces, its creation could not have been timed better. Two months after the Court was created, President Gorbachev resigned and the USSR Supreme Soviet voted itself and the USSR out of existence. The Russian Constitutional Court wasted no time in stepping into the resulting power vacuum. On December 26, 1991—the same day the USSR Supreme Soviet dissolved itself—the Court “unanimously adopted a sensational statement,” declaring that it would “stand in the way of dictatorship and tyranny, whatever their source” (Orlov 1991, 43). The same day, Chairman Zorkin announced in a press conference that the Court would soon examine the constitutionality of a Presidential decree merging the two ministries, as well as several legislative acts of the Supreme Soviet (INTERFAX 1991b, 39).

After several quick hearings, on January 15 the Court announced a unanimous ruling against Yeltsin’s decree merging the RSFSR Ministry of Security and the Ministry of Internal Affairs. The Court declared that the merger violated the constitutional “separation of powers . . . which gave only the legislature the power to create ministries” (Sharlet 1993, 6). This decisive ruling won instant praise from the Russian media, which jubilantly declared that “law and Russia are not two incompatible things” (Reshetnikov 1992, 38). Yeltsin accused the Court of playing politics instead of interpreting the constitution, but he did grudgingly comply with the Court’s decision (Shakhray 1992, 39). Having successfully stared down the powerful Russian President, the Court had clearly established itself as a real political and legal force.

However, the next major case turned into a disaster for the Constitutional Court. In early 1992, the leaders of the Tartar Autonomous Republic announced a public referendum on whether Tartarstan should be a separate state within the Russian Federation. The Court quickly heard the case and on March 13 declared various sections of the referendum unconstitutional as an attempt to secede from the Federation. But three days later, during a special session, the Tartar parliament defiantly chose not to alter the referendum but simply to declare that it was not a referendum on secession. Two days later, Zorkin addressed the Russian parliament—as per his Constitutional prerogative—asking them to enforce the Court’s ruling. The parliament concurred and called upon President Yeltsin to enforce the Court order. However, Yeltsin ignored the parliamentary resolution and did nothing except offer his verbal support. Consequently, the Tartar referendum proceeded as planned and the Court was publicly embarrassed (Wishnevsky 1993, 3; Sharlet 1993, 7-8).

Before the Tartar Case, the Court had established itself as a legitimate court, but by even hearing the Tartar Case the Court pointlessly sacrificed much of its newly acquired prestige. First, nationalism is the most volatile issue in the Russian Federation. The Constitutional court simply does not have the power to enforce any decision on the issue without the full support of the legislative and executive branches, which it never received. Second, the Constitutional Court acted much too hastily. Tartarstan had not even held the referendum before the Court ruled against it. The Court should have at least waited until after the
vote to consider the matter; a “no” vote would have rendered the whole case mute. Finally, the referendum was legally nonbinding and an extremely politicized issue. The Court could have—and should have—simply declared it a “political question” and therefore nonjusticiable. Instead, the activist Court fought a hopeless and useless battle which eventually damaged its credibility.

The CPSU Case

The Court repeated the same mistakes with an appeal by the Communist Party of the Soviet Union (CPSU) and the RSFSR Communist Party. Sharlet observes:

If the Russian Constitutional Court had followed its legislative mandate, it would have invoked the “political question” rule and avoided the CPSU case. (1993, 17)

Conversely, if the Court had succeeded in successfully resolving the question, the Court’s prestige and power would have taken a quantum leap forward.

Following the attempted August 1991 coup, Yeltsin had outlawed both parties by executive decree. The parties appealed to the Constitutional Court, and the Court accepted the case in December 1991, but deliberately delayed hearing the case until it had established some sense of legitimacy—a wise move, as far as it went. However, during the interim, the Sixth Congress of People’s Deputies amended the 1978 RSFSR Constitution more than two hundred times, and one of these amendments specifically extended the jurisdiction of the Constitutional Court to “political parties and public associations” (Sharlet 1993, 19-20).

When the CPSU hearing finally opened on May 26, 1992, the trial quickly became a disappointment to the media and spectators. They had expected a sensational confrontation, but instead found a seemingly endless and complex legal proceeding. Adding to the inherent complexity was the complete absence of a system of Court regulations. Hence, the trial proceeded on a completely ad hoc basis. The Court probably intentionally intensified the complexity and monotony in order to defuse the highly explosive situation. The rationale was that if people became bored enough, they would not even care about the final ruling and the Court would escape relatively unscathed (Sharlet 1993, 17).

Yet, as the trial proceeded, it gradually became evident from the questions and procedural votes that the justices did not agree with each other and that the final decision was unpredictable, which introduced a new type of excitement and interest. All this time, the Court—especially Zorkin—tried to portray this trial as a completely judicial proceeding with no hint of “political expediency.” They were only partially successful. While some of the press spoke favorably of the Court, others referred to the trial as “a political farce” and a “political show trial” (Sharlet 1993, 23).

The Court still might have escaped relatively uninjured if it had not tried to force Gorbachev to testify. When the trial began in May, the Court subpoenaed him to testify. He flatly refused, citing executive immunity. In July, Gorbachev announced that he and Chairman Zorkin had agreed that he would not need to testify. Yet, shortly afterwards, the rest of the Constitutional Court overruled Zorkin and tried to force Gorbachev to testify (thereby violating the constitution). Gorbachev still refused to appear in Court. The Court then fined Gorbachev one hundred rubles for contempt of court—the maximum penalty allowed by law. The Ministry of Security and the Ministry of Foreign Affairs followed by revoking Gorbachev’s passport, thus preventing him from leaving Russia. If he did try to leave, the border police were
ordered to arrest him. These illegalities inflamed public outrage against the Court, which eventually relented and stopped harassing Gorbachev (Wishnevsky 1993, 5).

The political maneuvering did not end with harassing Gorbachev. During the court proceedings, “Yeltsin bestowed on the justices a substantial pay raise” (Sharlet 1993, 28). Then, on October 28, Yeltsin upped the stakes by issuing a decree banning the National Salvation Front (NSF), a political organization of extreme nationalists, monarchists, and communists. The Court responded by placing the NSF appeal next on its docket.

Finally, on November 30, the Court issued an 11-2 decision finding that Yeltsin’s decree banning the central party organizations of the CPSU was constitutional. However, the decrees confiscating property and outlawing local party organizations were found unconstitutional.

The ruling represented a partial victory to both sides—an obvious attempt to placate both Yeltsin and the CPSU. The dissenting justices—Luchin and Ebzdeev—severely criticized the decision as politically expedient rather than legally sound, which is probably an accurate evaluation (Katanyan 1992, 11-12). The spit vote and dissenting opinions represent a serious deepening of the rifts within the Court.

The 1993 Decision and Power Politics

On January 15, the Court began hearings on the NSF case, but initially two justices—Ametistov and Kononov—boycotted the hearings. In spite of the initial delays and divisions among the justices, the Court quickly decided the case finding Yeltsin’s decree unconstitutional. However, by this time—mid-February—the power-sharing agreement was collapsing, and the escalating conflict between Yeltsin and the parliament eclipsed the importance of the Court’s ruling.

The crisis peaked on March 20, when Yeltsin announced “special rule” by the president. True to form, Zorkin quickly denounced the action as unconstitutional, and a few days later the Court reviewed Yeltsin’s speech and declared his decree unconstitutional by a 9-3 vote. Yeltsin consequently backed down and issued a sterilized executive order which did not contain any of the unconstitutional provisions (Kasyanenko 1993, 33-34; Sharlet 1993, 32).9

Although the March crisis marked a temporary victory for the Constitutional Court, it left the Court ultimately weaker. Now the Court could no longer claim neutrality in the conflict between Yeltsin and the parliament. Instead of thinking clearly, Zorkin had led the Court unarmed into a dangerous political no-man’s land. In addition, his denouncement of Yeltsin’s decree prior to the Court’s decision was a gross violation of his sworn neutrality as a judge. Also, the Court made the mistake of issuing a preemptive decision, which made them look extremely foolish once Yeltsin issued his sterilized decree. If the Court had waited until Yeltsin actually issued the order, they could have avoided embarrassment and might not have had to consider the issue.

However, once drawn into the fray, the Court faced increasing political pressure during the summer. The Court and its members had been bothered by threats and security breaches since their first ruling in 1992 (Muratov 1992, 44-45). After the March incident, Yeltsin did his best to exploit the Court’s dependence on the executive branch. In June, Chairman Zorkin was deprived of his official car, his portable phone, and his state dacha. Next, Yeltsin directed the Main Security Directorate to stop guarding the Court’s
building, the judges, and their families—leaving them completely unprotected in what had become a dangerous city. Finally, the state information agency ITAR-TASS simply refused to distribute official Constitutional Court documents (Kravtsov 1993, 29-30).

Then, on September 22, President Yeltsin unconstitutionally dissolved the Congress of People's Deputies and the Supreme Soviet. Ironically, in the same speech Yeltsin admitted that his actions were unconstitutional but justified them with political necessity (Yeltsin 1993b, 8-9). Predictably, Zorkin immediately and unequivocally denounced Yeltsin's action and then led a deeply divided Court in overturning Yeltsin's decrees. However, within a week Zorkin had “backtracked on his previous uncompromising criticism of Yeltsin’s actions” and was seeking some sort of compromise arrangement (Slater 1993a-1993b).

Zorkin’s efforts to broker a second agreement failed, and government forces were eventually forced to crush the parliamentary uprising. Shortly after regaining control, Yeltsin publicly blamed the Constitutional Court for inciting the violence (Yeltsin 1993a, 37-38). He subsequently suspended the Constitutional Court until after the December elections and forced Chairman Zorkin to resign (Teague 1993; Tolz and Wishnevsky 1993).

Chairman Zorkin

The rise and fall of Chairman Zorkin itself sheds some light on the Court. Following the CPSU decision, Zorkin became deeply involved in mediating the growing dispute between Yeltsin and parliament. Even then—December 1992—rumors of disbanding parliament were circulating. Yet somehow, during the December session of the Congress of People’s Deputies, Zorkin successfully brokered a power-sharing agreement between Yeltsin and parliament (Wishnevsky 1993, 7-8). This incredible success instantly made him extremely popular with the general public. Some of the press even referred to him as the “Man of the Year,” and a public opinion poll in early 1993 named him as the fifth most powerful politician (Sharlet 1993, 31).

Yet, at the same time his actions were dividing the members of the Constitutional Court. As time progressed, Zorkin became even more involved in politics. Deputy Chairman Vitruk critically observed, “It has become almost the norm for Constitutional Court Chairman V. Zorkin to appear in the mass media and to make political statements and assessments at meetings of various kinds” (Feofanov 1993, 26). For 1992 and the first half of 1993, FBIS reports alone include over forty statements by Zorkin to the press, and few of them directly relate to his responsibilities as Chairman of the Constitutional Court.10 Particularly annoying was Zorkin’s habit of preempting the Court—stating his opinion on a case before the Court even heard it. About Zorkin’s unprofessionalism, Deputy Chairman Vitruk appropriately advised, “If you want to be a politician, take off your judge’s gown” (Feofanov 1993, 27).

Conclusion

Considering the political and social environment in which the Constitutional Court was born, the Court has not done poorly in its first two years. The Court has definitely increased its own prestige and power and also that of the entire judicial system. Its huge caseload11 shows this. However, this increased power has also increased the stakes in the political games it plays.
The first decision firmly established the legitimacy and power of the Court, but some of the subsequent decisions seriously injured the Court. The biggest failing of the Court to date has been its excessive activism. In such an unstable constitutional environment as the Russian Federation, judicial activism will eventually backfire. And when it does backfire, the very existence of the Court is in danger—as the events of October 1993 vividly illustrate. The Court should never have considered the Tartarstan case and probably should not have accepted the CPSU appeal. While most of its decisions were legally defensible, they were not politically wise. The Court has yet to learn that it cannot make judicial decisions in a political vacuum.

The Court should instead conserve its political capital for the most critical cases, and otherwise decide only routine matters. The Court cannot rely solely on legal idealism; it is a quick form of political suicide. Until the Court has developed a strong reputation and sense of legitimacy in Russia, the Court should avoid conflicts between the executive and legislative branches as much as possible by doing as little as possible.

While Chairman Zorkin did show skill in negotiating the December 1992 power-sharing agreement, his political grandstanding has seriously damaged the Court’s image and divided the justices. By forcing him to resign, Yeltsin has probably unwittingly strengthened the Court in the long run.

Finally, recent events suggest the Court will become pro-Yeltsin and will consequently do little to contradict his will. The recently-ratified Constitution conveniently allows Yeltsin to immediately appoint at least seven more judges to the Court to expand its number to nineteen. Even President Franklin D. Roosevelt would have been envious of this court-packing scheme. Presumably, Yeltsin will succeed in taming the Court in the short term. Yet, the fact that Yeltsin even included provisions in the new Constitution which preserve the Constitutional Court suggests that the Court is already too powerful for Yeltsin to completely disband it, which he certainly would not object to doing—the Court has caused him much grief since its inception. Hence in the next few years the new Constitutional Court will probably exercise significantly less independence from the executive branch, but it will also be protected by the executive branch. In such a position, the Court could conceivably evolve into a truly independent branch of government over the next few decades.

WORKS CITED


**NOTES**

1. The law specifically states that the "judges . . . of USSR Supreme Court are independent and subordinate only to the law" (Law on the USSR Supreme Court 1980, 14).

2. The USSR Committee of Constitutional Supervision was not particularly effective during its short existence. The Russian Constitutional Court even referred to its "sad fate" in a press release (*INTERFAX* 1991a, 39).


4. Sharlet notes that by the end of 1992 the Constitutional Court had decided only nine cases but resolved approximately sixteen thousand complaints (1993, 8).

6. In March 1804, the U.S. Senate removed Federal District Judge John Pickering from office. In 1805, Justice Chase barely survived the Senate vote. If Justice Chase had been removed, other impeachments and removals would certainly have followed (Gunther 1991, 11).

7. Justice Ernest Ametistov dissented, arguing that the referendum was merely an exercise of the “universally recognized right of nations to self-determination” (Wishnevsky 1993, 3)—an explosive doctrine in a multination-state like Russia.

8. “Article 67 of the Russian Constitution prohibits the forcing of any person to give evidence that could be used against him at a criminal trial” (Wishnevsky 1993, 4).

9. Based on the Court’s ruling, the Congress of People’s Deputies tried and failed to impeach Yeltsin.

10. The examples of U.S. Supreme Court justices sharply contrast with Zorkin’s flamboyant style. Supreme Court justices lead extremely quiet lives and rarely make public statements outside of their court opinions.

11. During spring of 1992, Zorkin reported that the Court was receiving “hundreds of [individual] complaints” every day. At the end of 1992, the Russian Constitutional Court had decided nine cases and “settled approximately 16,000 complaints” (Sharlet 1993, 8).

12. The Draft Constitution of the Russian Federation expands the number of justices on the Constitutional court to nineteen. With Zorkin’s resignation and the previous two vacancies, Yeltsin can immediately appoint seven new justices (see Art. 83 and 125).