

***Between Authoritarianism and Territorial Disintegration:
Judicial Vision of Russian Federalism***

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Introduction

There is an ongoing debate in Russia and abroad over the appropriate role of the judiciary in defining the nature of Russian federalism. Some criticize the Russian Constitutional Court (RCC) for being too timid, inefficient, and dependent in resolving federal-center disputes. For instance, in his analysis of Russian federalism under Yeltsin, Jeffrey Kahn characterizes the Court as “an ineffective and infrequent arbiter in federal disputes...Even when its opinions are directly sought, the Constitutional Court is often reluctant to take a stand.”¹ Discussing Russia’s fiscal federalism of the 1990s, Elizabeth Pascal also views the RCC as “a mostly toothless judicial body” offering little recourse in policing center-regional relations.² More recently, the Court critics blasted judges for being in President Putin’s pocket by pointing at the December 2005 RCC decision to uphold the abolition of the direct elections of the regional governors.³ In that case, the Court decided, in a 12-6 vote, to overrule its earlier precedent set in 1996 that regional governors had to be directly elected, thus, legitimizing President Putin’s power to submit gubernatorial nominees for the approval of regional legislatures.⁴

¹ Jeffrey Kahn, Federalism, Democratization and the Rule of Law in Russia (Oxford: Oxford University Press, 2002), 176-182

² Elizabeth Pascal, Defining Russian Federalism (Wesport, CT: Praeger, 2003), 50.

³ See, e.g., Masha Gessen, “The Dear Departed Judiciary,” Moscow Times, 2005, December 29, p. 7, at <http://www.themoscowtimes.com/stories/2005/12/29/006.html>; Dmitry Babich, One Decision and Two “No Comments,” Russia Profile, 2005, December 22, at <http://www.russiaprofile.org>

⁴ RCC decision 13-P of December 21, 2005, Sobranie zakonodatelstva Rossiiskoi Federatsii (hereinafter SZ RF), 2006, no. 3, st. 336 (Justices Kononov and Iaroslavtsev, dissenting).

Other observers disagree with criticism and commend the Court for bringing order and stability to Russian federalism.⁵ In fact, between 1995 and 2004, the Court has received 585 petitions, related to federalism issues. During Yeltsin's presidency, between 1995 and April 2000, the Court accepted 49 petitions and dismissed 75 petitions from the regional governments. During Putin's presidency, between 2000 and 2005, regional governments asked the Court no less frequently: the RCC accepted 27 of their petitions and refused to hear 116 such requests. In fact, by the spring of 2003, the regions continued to petition the Court so much that Chief Justice Zorkin had to ask some of the regions to postpone submission of their requests.⁶ Overall, the RCC addressed federalism issues in about a hundred judgments accompanied by numerous dissents.⁷ Why do regional elites continue to use the Court if it is "toothless" and biased towards the federal center?

To be sure, neither Russian nor foreign observers expect or should expect that the judges have the capacity to resolve center-regional, interregional and intraregional disputes.⁸ This paper argues that the Court has gradually become one of the key actors in the federalism game by ensuring that this game continues indefinitely. Indeed, according to Alain Gagnon, "the success of federal systems is not to be measured in terms of the

⁵ See, e.g., Robert Sharlet, "Russia's Second Constitutional Court: Politics, Law, and Stability," in Victoria E. Bonnell and George W. Breslauer, eds., Russia in the New Century: Stability or Disorder? (Boulder: Westview Press, 2001), 59-77.

⁶ Irina Begimbetova, "V povestku sessii Gossoveta RT vklyucheny 42 dopolnitel'nykh voprosa," Intertat.Ru, May 26, 2003.

⁷ These figures are taken from official statistics of the RCC. The number of regional petitions during Yeltsin's presidency include 11 petitions from the members of the Federation Council, the upper house of the Russian Parliament, which, at the time was composed of the heads of the regional legislative and executive branches.

⁸ See, e.g., Irina Umnova, "Konstitutsionno-pravovye aspekty biudzhethno-finansovogo federalizma," Federalizm, 1 (1999):135; William Pomeranz, "The Russian Constitutional Court's Interpretation of Federalism: Balancing Center-Regional Relations," Parker School Journal of East European Law 4 (1997): 401-43.

elimination of social conflicts but instead in their capacity to regulate and manage such conflicts.”⁹ Therefore, the key question is how successful was the Russian CC in setting up the framework of managing conflict within the nascent 10-year old Russian Federation. As I will explain below, the RCC manages federalism conflicts by both providing the open forum for argumentation over key public policies and political resources for key federal and local actors.¹⁰ This is why local elites still find it attractive to use constitutional litigation even though they know that judicial agenda is very similar to President Putin’s agenda of a strong federal center. On the one hand, judges, albeit in a non-linear fashion, allowed municipalities to challenge the constitutionality of federal and regional statutes and allowed regions to contest President Putin’s campaign of bringing regional laws into conformity with federal ones. The Court scrutinized virtually all key elements of federal reforms launched by President Putin. On the other hand, judges did not strike down the core of Putin’s federalism reforms. But judges did so, not because they were afraid of the popular President, but because President Putin chose to implement RCC decisions in federalism cases, issued during Yeltsin’s era. In short, unlike his predecessor, Vladimir Putin shares the Court’s views or at least the views of its majority, that a strong federal center (even in its authoritarian version) is key to the survival and prosperity of Russia.

To explore how and why judges decided to champion strong federal supremacy, the paper proceeds as follows. First, it discusses the actual sociopolitical context that the

⁹ Alain-G. Gagnon, “The Political Uses of Federalism,” in Michael Burgess and Alain-G. Gagnon, eds., Comparative Federalism and Federations (Toronto: University of Toronto Press, 1993), p. 18.

¹⁰ On the use of judicial decisions as political resources, see Peter H. Russell, “The Supreme Court in Federal-Provincial Relations: The Political Use of Legal Resources,” Canadian Public Policy 11 (1985), no.2: 161-70.

Court faced when deciding federalism disputes. Next, to address the charge that the Court was timid and “toothless,” it explores the judicial visions of federalism and responses from federal and local politicians to these judge-made visions. Without studying these responses, it is difficult to assess whether judge-made federalism makes a difference on the ground. Finally, to determine why regional elites kept using the Court, it examines the benefits of constitutional litigation, Russian-style.

1. The Context: “Difficult Childhood”: A “Wounded Court” in an Unstable Federation

Scholars of judicial politics agree that explaining judicial behavior is impossible without paying attention to the sociopolitical context facing judges. In federations, this context is complicated and involves:

- 1) formal institutions, like different orders of government, the constitutional division of powers between them, representation of regional interests in the federal center, electoral rules, etc.;
- 2) informal institutions, from party systems and fiscal federal-provincial-municipal arrangements to the legal aid agencies;
- 3) pre-existing legacies, like inter-regional, ethnic, religious, linguistic and class cleavages, long-term and immediate histories of judicial politics, existing public attitudes towards courts and the nature of federal society and so on; and
- 4) immediate power struggles and calculations of litigants.

Let’s consider briefly how each of these four groups of factors shaped judicial behavior in the Russian case.

1.1 Formal Institutions

In terms of formal institutions, Russia follows the advice of numerous scholars of federalism and establishes the Russian Constitutional Court to ensure that federal and regional governments stay within their constitutionally prescribed limits of authority. This Court is a 19-member tribunal, modeled after the German Federal Constitutional Court and charged with the task of resolving federal-regional, inter-regional and intra-regional disputes.¹¹ Both federal and regional legislatures and executive can ask the Court directly to challenge the constitutionality of federal and regional statutes, to request the constitutional interpretation or to settle the intergovernmental dispute. Today, this Court is regionally representative as it ever has been.¹²

However, the RCC is just one player among many in the complex, ongoing debate on the future of Russian federalism. What are these players? Federal and regional legislatures and executives are among them. The 1993 Constitution empowers the Russian president to be “the guarantor of the Constitution” (Article 80). In addition, the division within the Russian judicial system introduces more complexity. The Russian Supreme Court with the army of 2,500 lower courts resolves numerous intergovernmental disputes, and, as Putin’s successful campaign of streamlining regional statutes has shown, this Court can be much more efficient than the RCC in policing regional non-compliance with federal standards. The Russian Supreme Commercial Court with 117 lower commercial courts is also in the picture. This Court deals with various intergovernmental

¹¹ The Russian federal judiciary consists of the federal Constitutional Court; the ordinary courts in charge of civil, administrative, and criminal cases; and commercial (*arbitrazh*) courts.

¹² 9 judges are Muscovites, 3 are from St. Petersburg, 3 are from ethnic republics, 3 are from Siberia, and 1 comes from the Southern Russia. In 1991, when the Court was created, 8 out of 13 judges were from Moscow.

fiscal disputes over the amounts of federal transfers to the regions, over the division of federal, regional and municipal property, and so on. Finally, 15 regions have their own constitutional courts in charge of policing federal-regional relations albeit the importance of these tribunals is gradually declining in a pattern not unfamiliar to the observers of German federalism.¹³ To be sure, the inter-judicial rivalry over which courts have the final say in the federalism game has been particularly fierce under both Yeltsin's and Putin's rule.¹⁴

In terms of formal rules of the federalism game, the 1993 Russian Constitution is like any other federal constitution: it is vague and ambiguous on the division of powers between the Federation and the regions. In addition, it also preserved unique Soviet and Tsarist legacies of a hierarchical and multi-ethnically structured Russia.¹⁵ The eighty-nine units, or "subjects of the Federation," vary in their constitutional status: thirty-two of them (twenty-one republics, ten autonomous districts, and one autonomous province) are ethnically defined, while the remaining forty-nine provinces, six territories, and the cities of Moscow and St. Petersburg are almost entirely populated by ethnic Russians. Although all regions possess equal constitutional rights, republics have the most power, while nine autonomous districts are also included in the composition of six provinces and one territory (so-called matryoshka federalism). Under the 1993 Russian Constitution, republics are defined as states (Article 5.2), and they are free to choose the way to adopt their own constitutions, while the rest of the regions have to adopt their charters

¹³ Alexei Trochev, "Less Democracy, More Courts: The Puzzle of Judicial Review in Russia," Law & Society Review 38 (September 2004): 513-548.

¹⁴ Alexei Trochev, "Competing for the Judge-Made Law: Politics of Intra-Judicial Conflicts in Russia and the Czech Republic." Paper presented at the 35th AAASS National Convention, Toronto, Canada, November 21, 2003

¹⁵ Zhanna Ovsepian, Stanovlenie konstitutsionnykh i ustavnnykh sudov v sub'ektakh Rossiiskoi Federatsii (1990–2000 gg) (Moscow: IKTs "MarT", 2001), pp. 12–13.

exclusively by their legislatures (Article 66). Article 68.2 of the federal constitution grants republics the right to establish an official “state language.” In short, these written ambiguities and contradictions invite judges and lawmakers to clarify them in subsequent judicial interpretations, legislative enactments, and intergovernmental bargaining. Moreover, if judges care about their posterity, as some theorists have argued, the competition with the rest of governmental bodies also invites the Constitutional Court to say something meaningful about building independent Russia.

1.2 Informal Institutional Context

However, this competition with other political and judicial actors takes place within the informal structure of incentives and constraints. Unlike old federations, Russia lacked the luxury of unwritten constitutional customs. Moreover, the transition away from the Soviet regime destroyed established conventions of the Soviet rule, which were enforced by the Communist party discipline. Facing unprecedented economic collapse in the country, severe social dislocation on the ground, calls for “sovereign” status from the regions and vicious political infighting in the federal center in the early 1990s, personal connections and bilateral deals between the federal center and the regions were becoming the norm of the federalism in Yeltsin’s era. For the deadlocked, fragmented and weak federal center, bilateralism provided an opportunity to “divide and rule” by exploiting inter-regional rivalries, by keeping these side deals in secret by granting special privileges to specific regions in exchange for votes, and arguably preventing the secessionist struggles.¹⁶ Regional leaders, which succeeded in getting special favors from

¹⁶ Bilateralism can also flourish with fiscally healthy federal center. Recall the “better terms” deal with Nova Scotia in 1867 or the offshore deal with Newfoundland in 2005.

the center, entrenched their rule and status on the ground by withholding tax revenues from the center, by coercing local businesses to maintain public roads, to pay wages on time and to comply with regional price controls. To be sure, the proliferation of side deals promoted perverse practices: it entrenched clientelistic relationships among federal and local elites, resulted in the asymmetrical federalism, distorted the flow of information and revenues from the ground to federal coffers, and, of course, violated the Constitution. If a federal center reneges on its obligations, regional leaders either go to Kremlin to demand the compliance or they withhold revenues. As numerous studies have shown, those regional governors, who a) spent a lot of time lobbying in Moscow, and b) publicly demanded more autonomy – were much more likely to succeed in gaining special powers over the “rulebook” and “pocketbook” in the 1990s.¹⁷ The main point here is that when both sides get what they want through negotiations, there is a little demand for court services even though we usually think that courts are there to enforce contracts.¹⁸ Introducing the court in the negotiation process complicates the bargaining process by increasing the uncertainty of bargaining: neither side is sure of the outcome, neither side is willing to delegate the bargaining power to the lawyers, and neither side is prepared to replace the expediency arguments with the legal ones, those, which the Court will consider. Based on the surviving Soviet traditions of negotiation, lawyers are needed only after the deal is reached and only for the transforming the wishes of the powerful into the letter of statutes, executive orders and bilateral agreements.

¹⁷ See, e.g., Daniel Treisman, After the Deluge: Regional Crises and Political Consolidation in Russia (Ann Arbor, MI: University of Michigan Press, 1999); Kahn, Federalism, Democratization and the Rule of Law in Russia; Pascal, Defining Russian Federalism.

¹⁸ As it will be shown below, the RCC shares the view of the Supreme Court of Canada that federal statutes take precedence over any federal-provincial agreement, and that any intergovernmental agreement is a political act and not enforceable in courts. See Reference Re Canada Assistance Plan [1991] 2 S.C.R. 525.

1.3 Short-term and Long-term Legacies of the Past

This brings us to the third of element of the sociopolitical context, in which judges operate, namely, legacies of the past, like inter-regional, ethnic, religious, linguistic and class cleavages, long-term and immediate histories of judicial politics, existing public attitudes towards law & courts and towards the nature of federal society and so on. In terms of the short-term historical legacies, the most important one for Russian judges was the unexpected and rapid disintegration of three socialist federations: Yugoslavia, Czechoslovakia, and the USSR. Russians knew that all three were not “real” federations, and all three had functioning albeit weak constitutional review tribunals. Russian judges were also aware of the violent outcomes of the federal break-up in Yugoslavia and Soviet Union as well as of growing ethnic conflicts across Russia, particularly in the North Caucasus. Therefore, the trick for the RCC was to find the ways of preventing the disintegration of the Russia and managing ethnic tensions, and, at the same time, of building the democratic foundations of the federation through law.

However, building democratic foundations in the society that lacks the traditions of governmental accountability to the voters is not easy. Moreover, Russia’s past is not friendly to legal and judicial empowerment: Russia lacks the Rule of Law traditions and the practical experience of judicial independence. Instead, Russia inherited the tradition of arbitrary rule and the instrumental use of law. Based on their most recent experience, rulers in the center and in the regions know that judicial decisions are not self-executing and their execution depends on the cooperation with political branches. Between 1989 and 1991, Yeltsin and some of his counterparts in other USSR republics did their best to

discredit the Union laws by openly defying Gorbachev and Union authorities. Following the collapse of the USSR, Russia's regions did the same to federal statutes, albeit no regional leader, except in Chechnya, openly defied Yeltsin. In fact, the first federalism decision of the RCC in March 1992, in which the Court struck down the Tatarstan's declaration of sovereignty and referendum on sovereignty in Tatarstan Republic at the request of several federal MPs, was not enforced: Tatarstan authorities boycotted the court proceedings, the referendum was held as if there was no court decision.¹⁹ Moreover, neighboring Bashkortostan Republic immediately suspended the jurisdiction of the RCC over its territory. Despite the repeated lobbying of judges for the federal crackdown on this regional recalcitrance, federal President responded with more negotiations with these regions, while the deadlocked Russian Parliament was unable to pass the bill, sanctioning the regional non-compliance.

1.4 Power Struggles and Litigant Strategies

As the preceding example of the inability of federal center to enforce judicial decisions makes plain, short-term power struggles and calculations of litigants take place within pre-existing formal and informal institutional constraints. The litigants in the Tatarstan case, Russian MPs, and judges had all the assurances that this RCC judgment was going to be carried out: President Yeltsin promptly complied with the previous RCC decisions; Speaker of the Russian Parliament, Ruslan Khasbulatov, promised judges to bring Tatarstan leaders in a cage in Moscow like Catherine the Great used to bring peasant rebels to the Red Square; Russian Prosecutor-General threatened to arrest

¹⁹ 82% of the electorate participated with 61.3% of them approving the question. Kahn, Federalism, Democratization and the Rule of Law in Russia, 131-32.

Tatarstan leaders if they allowed referendum to proceed; and federal Defense Minister was rumored to mobilize troops on Tatarstan's borders. However, once the RCC struck down the Tatarstan's sovereignty, the federal center suddenly lost all of its enforcement powers despite the repeated pleas from judges: President Yeltsin chose to negotiate a side deal with Tatarstan; deadlocked Russian Parliament was unable to do anything; and law-enforcement agencies ignored the RCC decision. The only agency that acted was the federal Cabinet: it imposed economic blockade and denied some goods to Tatarstan. But Moscow was denied taxes from one of the richest regions for several years to come. Moreover, Tatarstan ignored federal authority, refused to sign multilateral Federation treaty in March 1992, withdrew from the April 1993 federal referendum and the June 1993 Russian Constitutional Assembly, and boycotted federal elections and constitutional referendum in December 1993.²⁰ Eventually, Yeltsin signed a side deal with Tatarstan in April 1994 while the Russian Constitutional Court was once again asked to strike down regional sovereignty only in 2000, when President Putin began reining in recalcitrant leaders.

This inconsistent behavior of the federal and regional political actors coupled with the vagueness, vacillation and incoherence of the constitutional provisions pertaining to federalism made it nearly impossible for judges to identify the "tolerance intervals" of powerful elites, contrary to the *strategic* explanations of judicial politics.²¹ Because of the changing preferences of politicians and of the rules of the federal-regional game, judges were often at a loss to predict the responses of the rulers to their judgments. For

²⁰ Kahn, *Federalism, Democratization and the Rule of Law in Russia*, 151 ff.

²¹ Epstein et al. explain the RCC decision-making in 1992-1996 through these "tolerance intervals". See Lee Epstein, Jack Knight, and Olga Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," *Law & Society Review*, vol. 35 (2001), 1.

example, political actors championed bilateralism and asymmetrical federalism in 1994-7 and denounced any asymmetry in center-regional relations in 2000-4 during the first term of President Putin. Federal-regional conflicts over judicial appointments in the 1990s, for example, clearly show that the federal center lacked any coherent strategy in staffing federal courts in the regions.²² Add to this the instrumental use of law by federal and local elites in their political struggles. However, federal political actors both under Yeltsin and Putin were very selective in launching constitutional litigation, making the process look more like Stalin-era “show trials” to undermine regional governors whom the Kremlin did not like, rather than a struggle to build the rule of law.²³ For example, by December 1995, Yeltsin’s legal team had prepared briefs to challenge the constitutionality of laws passed by 75 regions.²⁴ However, President Yeltsin targeted the laws of only a few regions (Khakassia and Kalmykia). Instead, he chose negotiations with most regions rather than litigation in order to secure his own re-election in June 1996 and the election of regional governors loyal to him.²⁵ In 2000, a group of federal MPs, in an effort to target some but not other entrenched governors, asked the RCC to

²² Alexei Trochev, “Judicial Selection in Russia: Towards Accountability & Centralization,” in Peter H. Russell and Kate Malleson, eds., Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World (Toronto: University of Toronto Press, 2006), 375-394..

²³ Alexei Titkov, “Konstitutsionnyi sud v otnosheniyakh Tsentra s regionami,” in Nikolai Petrov, ed., Regiony Rossii v 1999 g.: Prilozhenie k “Politicheskomu almanakhu Rossii” (Moscow: Carnegie Center, 2001), 261.

²⁴ V.A.Vinogradov, “O konstitutsionnoi deliktности zakonodatelstva sub’ektov Rossiiskoi Federatsii,” in Sergei Avak’ian, ed., Konstitutsionnoe zakonodatelstvo sub’ektov RF: problemy sovershenstvovaniia i ispolzovaniia v prepodavanii (Moskva: Izdatelstvo MGU, 1999), 269.

²⁵ Something similar happened in December 1998: the Russian Procurator-General asked the Federal Cabinet to challenge five regional laws in the Russian Constitutional Court but no litigation ensued. See I.V.Mikhalevich, “O praktike prokurorskogo reagirovaniia na nesootvetstvie federalnomu zakonodatelstvu pravovykh aktov sub’ektov Rossiiskoi Federatsii,” in Sergei Avak’ian, ed., Konstitutsionnoe zakonodatelstvo sub’ektov RF: problemy sovershenstvovaniia i ispolzovaniia v prepodavanii (Moskva: Izdatelstvo MGU, 1999), 255.

invalidate six republican constitutions containing clauses on citizenship, sovereignty and control of natural resources.²⁶

To sum up the context surrounding the RCC decision-making, we should not be surprised to find inconsistencies and contradictions in the Constitutional Court's own approach to issues of federalism. The federal Constitutional Court could take any possible approach towards Russian federalism in this complex and highly fluid mix of inconsistent behavior and ambiguous rules. As I will argue below, the 2nd Russian Constitutional Court gradually chose to spearhead the symmetrical and centralized federalism, thus, paving the way for President Putin's agenda to reform the Russian Federation.

2. Judicial Visions of Federalism

Then newly minted RCC Justices immediately chose to navigate Russia's transition between the Scylla of totalitarianism and Charybdis of territorial disintegration. Clearly, they had their own preferences for where Russia should be heading in terms of its democratization and federalization.²⁷ Recalling the weaknesses of Gorbachev's presidency in handling the USSR break-up, most judges agreed that the federal center had to be stronger to save Russia from political, economic and territorial collapse even if it meant the widespread use of coercion, commandeering and near-total federal preemption

²⁶ RCC decision 92-O of June 27, 2000 (Adygeia, Bashkortostan, Ingushetiia, Komi, North Ossetiia and Tatarstan Republics), *idem*, 2000, no. 29, st. 3117 (Justice Luchin, dissenting).

²⁷ Russian judges are not alone in this practice. Supreme Court judges in Canada, most notably Bora Laskin, superimposed their views of what Canadian federalism should be within the text of their judgments. See, for example, Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990). I am indebted to Jacqueline Krikorian for this observation.

of regional autonomy. This was a tragic choice between authoritarianism and territorial breakdown, but as some have argued, federalism is closely related to the tragic aspect of politics. As Malcolm Feeley and Edward Rubin have noted, federalism “belongs to a world where there are no optimal solutions, where conflicts are irreconcilable, where political conditions are more likely to get worse than better. It is a grim expedient that is adopted in grim circumstances, an acknowledgment that choices must be made among undesirable alternatives.”²⁸

In the Russian case, a strong authoritarian federal center was less of an evil than the “former Russia” was, according to judges. Chief Justice Zorkin, who also chaired the Court between 1991 and 1993, repeatedly expressed his fear of Russia disintegrating into a multitude of micro states as the USSR had broken up earlier. He spoke of this frequently and usually in apocalyptic terms like the need to “save Russia” from the abyss, catastrophe, chaos, disaster, perdition, or the “brink of a precipice” which he darkly predicted would be a hundred times worse than the ongoing Yugoslav wars. During summer 2004 in one of his many public interviews, Zorkin was still referring to the collapse of the USSR and Yugoslavia and in that mindset commented “from the mouths of certain regional leaders from time to time one hears talk about the necessity of building a federation on ‘divided sovereignty.’” He added, indignantly, “And this in spite of decisions adopted by the Constitutional Court.” In a recent article, Zorkin has expressed his additional concern over the Chechen situation and the dangers of global terrorism for Russia, and once again a tone of high anxiety can be heard coupled with

²⁸ Malcolm M. Feeley and Edward L. Rubin, “Federalism: A Theoretical Analysis,” paper presented at the annual meeting of the American Political Science Association, Washington, D.C., Sept. 2, 2005.

doomsday imagery.²⁹ Disgusted by the flourishing bilateralism during Yeltsin's re-election in 1996, Zorkin and his colleagues openly called for a "dictatorship of law" as a necessary element of a strong democratic federal statehood, and have been eager to assert the supremacy of the federal Constitution over regional laws.³⁰ In October 1999, Justice Gadzhiev, who authored many of the RCC opinions in taxation cases, advocated consistent restrictions on the regional fiscal policy space in order to secure common market and economic freedoms.³¹ And it was the majority of the RCC justices, who insisted on reviewing the constitutionality of Yeltsin's war in Chechnya in 1995, even though the then Chief Justice Vladimir Tumanov did his best to avoid accepting this case. In short, most judges were ready to become the messiahs to save Russia and to ensure that their Court remains on the political scene.

However, as the previous section makes clear, judges were disillusioned by the inconsistency of the federal government in enforcing RCC judgments, and disappointed by the unwillingness of sub-national governments to comply voluntarily. In these conditions, the Russian Constitutional Court was not original. The Court chose to steer towards a stronger federal center, just like young constitutional (supreme) courts did in other federations: the US Supreme Court in the early 19th century, the Australian High

²⁹ Quoted in Robert Sharlet, "The Russian Constitutional Court's Long Struggle for Viable Federalism," in Gordon B. Smith and Robert Sharlet, eds., Russia and Its Constitution: Promise and Political Reality (Leiden: Martinus Nijhoff, 2007).

³⁰ President Putin would begin his presidency with the "dictatorship of law" agenda in 2000. See "Poslednii shans – diktatura zakona: interv'yu s Valeriem Zorkinym," VEK, no. 43 (October 1996); "Diktatura Chubaisa ili zakona? Interv'yu s Gadisom Gadzhievym," Patriot, no. 50 (December 1996): 11; "Interview with Boris Ebzeev," East European Constitutional Review 1 (1997), 86-87.

³¹ Gadis Gadzhiev, "Osnovnye konstitutsionno-pravovye problemy ekonomicheskoi reformy v Rossii," in N. Varlamova and T. Vasileva, eds., Rossiiskii federalizm: konstitutsionnye predposylki i politicheskaiia realnost (Moskva: MONF, 2000), 114.

Court since the 1920, the Supreme Court of Canada in the 1950s, and the Spanish Constitutional Tribunal in the 1980s.³²

How did the RCC push its federalism agenda, having a bitter aftertaste of the open sabotage in the 1992 Tatarstan case? Between 1995 and 2004, the Court rarely supported any expansion of the rights of the regions vis-à-vis the federal center, while consistently trying to protect the symmetrical nature of the Federation from the encroachment of republics, which claimed a privileged status, and from the arbitrary policies of the federal government towards selected regions. Justices refused to engage in controversies over personalities (federal appointees in the regions) and over concrete pieces of property by forcing federal and regional actors to hammer out compromises in such disputes. Instead, the Court either focused on extraordinary cases (Chechnya – secession, Udmurtia – abolition of local self-government, and undivided sovereignty) or on the cases in which it could define the basic principles of the Russian-style federalism.

2.1 Against Unilateral Secession

In the Chechnya case, mentioned above, the Court approved and legitimized the authority of the Russian President to use military force to quell rebellion in the regions and secession from the federation. In a thin ten-vote majority decision, the Court “discovered” that Chechnya’s unilateral secession was an “extraordinary situation,” and

³² On the early years of the US Supreme Court, which continues to strike down far more state statutes as compared to federal ones, see Leslie Goldstein, Constituting Federal Sovereignty: The European Union in Comparative Context (Baltimore and London: The Johns Hopkins University Press, 2001). On Australia, see Mikhail Filippov, Peter C. Ordeshook, and Olga Shevtsova, Designing Federalism: A Theory of Self-Sustainable Federal Institutions (New York: Cambridge University Press, 2004), 200-201. Case law of the Spanish Constitutional Tribunal also exhibits a similar tendency to favor central government in resolving center-periphery conflicts. John M. Long, The Geography of Spain’s Constitutional Court, unpublished Ph.D. dissertation (University of South Carolina, 2001).

that the federal President could unilaterally act, without legislative consent, and use “all means” necessary to preserve the integrity of the country.³³ However, three months after approving the use of federal troops to quell secessionist attempts by Chechnya in 1995, the retired RCC Chairman Tumanov admitted that “no serious changes occurred in Chechnya after our judgment.”³⁴ The RCC repeatedly refused to deal with this “hot” potato, even though Prime Minister Chernomyrdin publicly admitted “mistakes” in handling the crisis in Chechnya and Yeltsin’s envoy General Lebed signed peace accords with Chechnya, and even though federal government consistently refused to compensate the victims of military raids in the region.³⁵

2.2 In Defense of Local Self-Government

In the January 1997 Udmurtia Republic case, the Court struck down the abolition of elected local self-government in the republic.³⁶ This 12-2 judgment, authored by Justice Zor’kin, was issued at the request of Yeltsin, Duma members and several individuals, who took the side of the Mayor of Udmurtia’s capital city Izhevsk in his fight against the regional legislature. The Court struck down parts of the contested Udmurtia statute but, out of respect for the regional prerogative, did not specify how to restore the elected municipal bodies. In the wake of the verdict, both sides claimed victory, and the

³³ RCC decision 10-P of July 31, 1995. SZ RF, 1995, no. 33, st. 3424. For analysis in English, see William E. Pomeranz, “Judicial Review and the Russian Constitutional Court: The Chechen Case,” Review of Central and East European Law 13:1 (1997): 9-48.

³⁴ Maksim Zhukov, “Vladimir Tumanov: ‘Nyneshnee izbiratel’noe zakonodatel’stvo ne adaptirovano k rossiiskim usloviyam’,” Kommersant’-Daily, 1995, October 20, 3.

³⁵ See, e.g., Maksim Zhukov, “‘Mladenets iz probirki’ stal polnopravnym chlenom sem’i,” Kommersant’-Daily, 1995, December 27, 3; Oleg Zhironov, “Konstitutsionnyi sud predlagaet zabyt’ Konstitutsiiu?” Moskovskaia pravda, 1996, September 17, 1.

³⁶ RCC decision 1-P of January 24, 1997, Vestnik Konstitutsionnogo Suda RF (hereinafter, VKS RF), 1997, no. 1, 2 (Justices Gadzhiev and Vitruk, dissenting).

regional legislature moved very slowly to obey the Court. After repeated complaints from the justices, Yeltsin swiftly ordered Udmurtia Republic to obey this RCC judgment and warned that he would impeach the Udmurtia leaders if they failed to meet the court's objections and to restore the elected local self-government bodies. As a result of this showdown, which the dissenting Justice Vitruk labeled as a "public whipping of the Udmurtia authorities," the region quickly began to restore local self-government in March 1997, according to the presidential directives rather than the RCC guidelines. While Boris Yeltsin approved of Udmurtia's compliance a few months later, the Udmurtia Supreme Court struck down the same contested law as a whole in January 1998, and the Russian Supreme Court confirmed this in September 1998.³⁷ By 2002, however, the local self-government in Udmurtia still remained in an embryonic stage.³⁸

What the "implementation" game in this case clearly showed is that both the will and the capacity of the federal center to compel the recalcitrant regions to obey the judicial decisions were there. But it also showed that the judicial decisions by themselves did not matter much. They acquired real binding force only after President Yeltsin issued a decree and closely monitored its implementation. As the RCC Chairman Baglai exclaimed in June 1998, the Russian President was "the only trump card" his Court had in implementing its verdicts.³⁹ Moreover, once the federal executive took the matter in his hands, he imposed his own vision of how to carry out the verdict. In other words, it was Yeltsin and his advisers, rather than the Court, who framed the issue and provided

³⁷ Nikolai Vitruk, Konstitutsionnoe pravosudie v Rossii (1991-2001 gody) (Moskva: Gorodets-Izdat, 2001), 480-87.

³⁸ Timur Molotov, "Poslednii oplot," Udmurtskaia pravda, 2002, January 24, 3.

³⁹ Mikhail Mitiukov, "Konstitutsionnye sudy postsovetskikh gosudarstv: problemy ispolneniia reshenii," in Ispolnenie reshenii konstitutsionnykh sudov: sbornik dokladov (Moskva: IPPP, 2003), 218.

solutions. Not surprisingly, following this showdown, the RCC has learned to provide a clearer guidance on how to comply with its decisions, so that both winners and losers followed the vision of the Court rather than their own ideas on how to meet the Court's objections. The regions, which had their statutes invalidated, in an effort to delay the implementation of the RCC orders, still complained that these orders were not specific enough and demanded that the Court "clarify" them.⁴⁰

2.3 Battles for Sovereignty

The RCC chose to re-visit the issue of sub-national sovereignty in the summer of 2000. Justice chose to do so only after President Putin borrowed a "dictatorship of law" agenda from the RCC justices to rein in autonomy-minded governors, and only after the RCC gave a green light to the Russian Supreme Court in April 2000 to strike down regional statutes found in violation of federal standards. To ensure the enforcement of their judgments, the RCC felt the importance of securing the support of the recently elected popular President, who no longer needed the support of governors to gain votes, and the backing of the Supreme Court, which both repeatedly demanded the power to review regional law making and resisted against regional "capture" of the federal judicial appointments.⁴¹ In a series of decisions, in June 2000, the RCC struck down the "sovereignty" clauses of seven regional constitutions.⁴² In addition, the Court struck

⁴⁰ See, e.g., Larisa Chetverikova, "Resheniia Konstitutsionnogo Suda Rossiiskoi Federatsii: kak ikh ispolniat'?" Zakonodatel'nye (predstavitel'nye) organy vlasti sub'ektov RF. Praktika, mneniia, problemy, 1999, no. 1, 49-52. See also Boris Ebzeev, ed., Kommentarii k postanovleniiam Konstitutsionnogo Suda RF. Tom 1 (Moskva: Iurist, 2000), 500.

⁴¹ Trochev, "Judicial Selection in Russia."

⁴² RCC decisions: 10-P of June 7, 2000 (Altai Republic), SZ RF, 2000, no. 25, st. 2728; 92-O of June 27, 2000 (Adygeia, Bashkortostan, Ingushetiia, Komi, North Ossetiia and Tatarstan Republics), idem, 2000, no. 29, st. 3117 (Justice Luchin, dissenting).

down numerous provisions on regional citizenship, and regional control over land use and natural resources. The Court declared that the units of the federation could not have sovereignty because under the 1993 Russian Constitution the “multinational people of the Russian Federation” gave the undivided sovereignty to the federal, not the regional, level. According to the Court, the fact that Article 5.2 of the 1993 Constitution labels ethnic republics as “states” does not mean that republics have state sovereignty and, thus, this “statehood” has no legal consequences. Similarly, the fact that ethnic republics have their symbols, like flag, coat of arms, and an anthem, does not empower republics much, except for their distinctions from other Russian regions. Finally, and most importantly, the Court ruled that intergovernmental agreements could neither derogate sovereignty from the federal center nor violate constitutional norms. This judicial blow to bilateralism was based on the earlier RCC judgments, issued in 1997 and 1998, in which the Court “discovered” that the federal center could delineate the functions falling in the joint federal-regional jurisdiction through federal statutes, even though the Art. 11.3 of the federal Constitution did not mention federal statutes – it mentioned only the Constitution and intergovernmental agreements.⁴³ In short, the Court treated republics as any other units of the federation and demanded that they bargained for their powers in the federal Parliament rather than through extra-constitutional side deals with the federal president.

What happened after this bold judicial strike against regional autonomy? On one hand, Tyva and Kalmykia, the regions that were not named in the cases before the RCC, quickly announced that they had amended their Constitutions to meet the Court’s

⁴³ RCC decisions: 13-O of February 4, 1997, unpublished; 1-P of January 9, 1998, SZ RE, 1998, no. 3, st. 429.

objections.⁴⁴ On the other hand, the affected regions openly ignored these rulings, and one of them (Bashkortostan) even refused to publish the rulings, because – it was alleged – they would spoil the fall 2000 celebration of the ten-year anniversary of their “sovereign” status within Russia.⁴⁵

This open non-compliance enraged the RCC Justices, yet they managed to confirm their stance only in April 2001, when Putin’s envoy, former Russian Prime-Minister Sergei Kirienko petitioned them to “clarify” their June 2000 ruling. Facing pressures from the Kremlin to streamline the regional laws, and facing regional defiance of federal policies in Tatarstan and Bashkortostan, Kirienko asked the Court to find a way to carry out its decisions and punish the regional leaders who refused to obey them. The justices reacted unusually promptly: it took them one week to issue an official clarification.⁴⁶ The Court stated that the regional heads were obliged to carry out Constitutional Court decisions and change their regional legal norms according to these decisions. Failure to comply could result in an official warning from the Russian president, the first step in the procedure for the removal of regional governors or the dissolution of regional legislatures. Such a quick reply by the Court showed a nearly unanimous bench prepared to use the opportunity provided by Putin’s support of the Court to assert the finality and binding force of its decisions and to affirm the supremacy of the federal Constitution over regional statutes. Moreover, justices managed to convince federal law makers to insert a six-month deadline for complying with the court

⁴⁴ Both regions have entrenched sultanistic political regimes. See Kahn, Federalism, Democratization, and the Rule of Law in Russia, 251.

⁴⁵ See Alexei Trochev, “Implementing Russian Constitutional Court Decisions,” East European Constitutional Review, vol. 11, no. 1-2 (Winter/Spring 2002), 96; and Igor Rabinovich, “Bashkortostan Ignores Court Ruling,” EastWest Institute Russian Regional Report, vol. 5, no. 36, 4 October 2000.

⁴⁶ RCC decision 65-O of April 19, 2001, Rossiiskaia gazeta, 2001, May 16, 10.

decisions in the 1994 RCC Act.⁴⁷ Needless to say, this clarification also aided Putin's efforts to streamline the regional laws and paved the way for the April 2002 RCC judgment on the constitutionality of punishment of rebellious regional leaders.⁴⁸ In a 13-4 decision, the RCC upheld the constitutionality of the federal power to dissolve regional legislatures and to remove regional governors,⁴⁹ measures that were key components of Putin's federal reform.⁵⁰ This was a vote of confidence in the President, for these sanctions represented a cornerstone of Putin's "vertical of power" and enabled the federal level to impeach elected regional officials. In November 2000, Chuvashia President Nikolai Fedorov failed to convince the Federation Council to challenge the constitutionality of these sanctions, and petitioned the RCC alone. In June 2001, the Sakha and Adygei legislatures followed suit, only to have Fedorov quietly withdraw his petition in December 2001 after his re-election.⁵¹ The Sakha and Adygei petitions alleged that the elected regional bodies should be accountable only to their own electorates, and under conditions established by their republican Constitutions or the federal Constitution,

⁴⁷ Justice Ebzeev enthusiastically noted that such deadlines would make all regions comply with the RCC orders in a timely fashion. See Trochev, "Implementing Russian Constitutional Court Decisions," 97-98.

⁴⁸ RCC decision 8-P of April 4, 2002, VKS RF, 2002, no. 5 (Justices Gadzhiev, Iaroslavtsev, Morshchakova and Vitruk, dissenting).

⁴⁹ Provisions on dissolving regional legislatures and dismissing governors for non-compliance with federal law were enshrined in June 2000 amendments to the 1999 Federal Law "On the Basic Principles of Organizations of Regional Bodies of State Power," SZ RF, 2000, no. 31, st.3205. These provisions were passed in exchange for allowing certain regional governors to run for a third term. See "Kremlyu razreshili uvolnyat' gubernatorov," Gazeta.Ru, 4 April 2002. The Russian CC examined the other element of this bargain when it checked the constitutionality of the 3rd term for incumbent governors later in July 2002.

⁵⁰ Alexei Trochev and Peter H. Solomon, Jr., "Courts and Federalism in Putin's Russia," in Peter Reddaway and Robert W. Ortung, eds., The Dynamics of Russian Politics. Volume 2 (Lanham, MD: Rowman & Littlefield, 2005), 91-121.

⁵¹ Fedorov justified his move by the fact that President Putin had never used these sanctions and was unlikely to do so in the future. Vladimir Nikolaev, "Eto postanovlenie lishit nekotorykh vozmozhnosti shalit," Kommersant-Daily, 5 April 2002.

not by federal statutes.⁵² In Sakha's view, the presidential powers to dissolve regional legislatures and remove governors were unconstitutional, because the 1993 Russian Constitution (Art. 85.2) empowered the federal president only to suspend illegal gubernatorial acts and to petition the courts to confirm the president's position.⁵³

In the seventeen months that it took the judges to decide this case, they devised a complicated procedure for punishing the regional authorities, in order "to preserve the unity of Russia's legal space," according to Chief Justice Marat Baglai.⁵⁴ The Court ruled that dismissing a governor and dissolving a legislature were possible only after their non-compliance had been confirmed via decisions of three different courts, including the Russian CC. And only after a court finds the non-compliance of a governor to be intentional does the president have the right to warn the governor and then dismiss him in case of continued non-compliance. In the event of a non-compliant regional legislature, the president must go through three court instances and then ask the federal legislature to pass a federal law dissolving the regional parliament. This RCC decision disallowed any arbitrary use of "implied" presidential powers, and inserted the federal judiciary into the process of solving federal-regional conflicts.⁵⁵

⁵² Nadezhda Lytkina, "Pervyi opyt uchastii Iakutii v Konstitutsionnom sude RF," *Iakutiia*, 5 February 2002 (electronic version), at <http://www.gazetayakutia.ru/read.asp?id=29781-12&dates=5/2/2002>

⁵³ Initially, President Putin used this power very actively as compared with his predecessor. In 2000 alone, he issued 18 decrees suspending the directives of Adygei and Ingush Presidents and Amur, Arkhangelsk, Orenburg, Smolensk, Tver, Tula, Vladimir and Voronezh Governors. Tatiana Vasil'eva, "Razreshenie pravovykh kollizii ...", 112. President Yeltsin used this power 14 times between 1994 and 1997. Anatolii Sliva, "Rol Prezidenta Rossiiskoi Federatsii v ukreplenii konstitutsionnoi zakonnosti," in *Problemy ukrepleniia konstitutsionnoi zakonnosti v respublikakh Rossiiskoi Federatsii* (Ufa: RIO BAGSU, 1998), 8.

⁵⁴ Anna Zakatnova, "Tri bar'era dlia Putina," *Nezavisimaia gazeta*, 5 April 2002, 1-2.

⁵⁵ Except in the case where the federal President has unilateral power to suspend a governor who faces criminal charges.

These scare tactics, however, did not mean much to regional leaders.⁵⁶ For example, the Adygei Republic still continued to uphold its 1991 Declaration of Sovereignty well into 2004.⁵⁷ In addition to the informal bargaining with the federal center, political elites in Dagestan,⁵⁸ Tatarstan⁵⁹ and Bashkortostan⁶⁰ repeatedly asked their own constitutional courts to reaffirm republican sovereignty. These three courts walked a fine line between defending the sovereignty of their republics and rejecting the “pro-independence” clauses of their Constitutions. While these courts offered their own vision of republican sovereignty, the RCC did little to quarrel with its regional clones and approved of their “aspiration to follow the spirit of the Russian Constitution.”⁶¹ Facing a continuous pressure from the federal authorities, Dagestan deleted “sovereignty” provisions from its Constitution in July 2003. Bashkortostan did the same in December 2002, after its Governor Rakhimov failed to punish the Bashkortostan Supreme Court, which annulled 33 provisions of the republican constitution.⁶² Prior to that, both the

⁵⁶ On Tatarstan reaction, see Lev Ovrutskii, “Zvuki pu,” “Moskovskii komsomolets” v Tatarstane, No. 21, May 24-31, 2001, <http://www.mkt.ru/article/179/1.html>; Shamil Idiatullin, “Prezident ne dast v obidu Gossovet i ‘Bol’shoi Dogovor’,” Tatarskie kraia, No. 22, June 2001, <http://www.tatinfo.ru/news/TK/22tk.html>; on Bashkortostan, see Natal’ia Pavlova, “Bashkortostan ne mozhet vpolnit’ rasporiazhenie Konstitutsionnogo suda RF,” Strana.Ru, July 19, 2001, <http://www.strana.ru/text/topics/153/01/07/19/51701.html>

⁵⁷ Vasilii Salnikov and Svetlana Turialai, “Adygeiskii suverenitet voshel v istoriiu,” Kommersant’-Iug, 2004, November 29.

⁵⁸ Dagestan CC decision of October 3, 2000, Digest ‘Akty konstitutsionnogo pravosudiia sub’ektov Rossiiskoi Federatsii’, 2000, no. 10, 44.

⁵⁹ Tatarstan CC decisions: 10-O and 11-O of November 28, 2001 and 8-P of February 7, 2003, Respublika Tatarstan, February 14, 2003.

⁶⁰ Bashkortostan CC decisions: 14-P of October 4, 2000, and 17-P of December 28, 2001. For their summaries in English, see Ger P. van den Berg, compiler, “Summaries of Rulings, Decisions, and Opinions of the Constitutional Court of the Russian Federation (Including the USSR Committee of Constitutional Supervision and Regional Courts),” Review of Central and East European Law, 27:2/3 (2001), 494-97.

⁶¹ Igor Rabinovich and Sergei Fufaev, “Respublika Bashkortostan,” Konstitutsionnoe pravo: vostochnoevropeiskoe obozrenie, 2000/01, no. 4/1, 198.

⁶² The text of the 2003 Dagestan Constitution was published in Dagestanskaia pravda, 2003, July 26. On Bashkortostan, see Trochev and Solomon, “Courts and Federalism in Putin’s Russia”

Bashkortostan legislature and the Governor petitioned the RCC in vain to allow for some regional sovereignty.⁶³ And Tatarstan's Supreme Court still refused to invalidate the republic's 1990 Declaration of Sovereignty in June 2004, even after striking down the sovereignty clauses in the Tatarstan constitution a few months earlier.⁶⁴ And in terms of bilateralism, Kremlin managed to annul 35 out of 42 bilateral agreements, to renew one agreement with the diamond-rich republic of Saha-Yakutia in 2002, and was preparing to sign at least two such agreements with Chechnya and Tatarstan.

To sum up, the critics of the Court are right: most RCC judges support Putin's struggles against recalcitrant governors. But this is not a clear sign of judicial dependency in adjudicating center-regional conflicts. Instead, it is a sign of the courts depending on the political branches to see their verdicts carried out. As I have shown, judicial preferences for a strong federal center were formed well before Putin's ascendancy to power. As one RCC justice told the author, "We struck down the key clauses of seven constitutions of the republics in June 2000 only after President Putin announced his crackdown on recalcitrant regions; we would not have been brave enough to do this under Yeltsin."⁶⁵ Putin's initiatives largely built on the jurisprudence of the Court developed during Yeltsin's rule (see also the next section). To be sure, Putin's federalism reforms generated the squall of regional complaints, and this may be one of the reasons for the

⁶³ RCC decisions: 249-O of December 6, 2001, SZ RF, 2002, no. 4, st. 374; and 250-O of December 6, 2001, unpublished.

⁶⁴ "V Tatarstane zakryli 'delo o suverenitete'," IA Rosbalt, 2004, June 17, <http://www.rosbalt.ru/2004/06/17/166045.html>; Irina Smirnova, "Tatariia lishilas' suvereniteta," Kommersant, 2004, April 1, 4.

⁶⁵ Interview with the RCC Justice, Moscow, May 22, 2001. Indeed, ex-Chairman Baglai identified all these regional violations of the 1993 Constitution as early as 1997. See his "Problemy ukrepleniia konstitutsionnoi zakonnosti," in V. P. Kazimirchuk, ed., Konstitutsiia i zakon: stabil'nost' i dinamizm (Moscow: IGP RAN, 1998), 27-29.

continued use of the constitutional litigation by the regions, the subject of the final section of this paper.

3. Why Use an Unfriendly Court: Gaining Voices and Resources

As the preceding sections of the paper make it clear, the RCC appears to be a tribunal in which Moscow is doomed to win against any regional assaults on federal supremacy. Many times, this seems to be the case. But, as the court statistics shown in the introduction to this paper, show, the Court accepts to review about 15-20 % of petitions coming from regional governments. Moreover, the Chief Justice or the Judge-Rapporteur routinely meet in person with the petitioners from the regional governments to discuss their cases. To be sure, judges do not rule in favor of each of these complaints. But this proportion is much higher than the share of regional input in the federal law making in the areas of joint federal-regional jurisdiction. In the federal political process, where Russian President completely dominates federal legislature, only 4 % of legislative initiatives coming from the regions become federal statutes. Moreover, mass media, which is controlled by the Kremlin, rarely covers federal losses in the constitutional politics. So, the Constitutional Court remains the only official forum in today's Russia, where regional concerns could get full attention at the federal level. Two areas of intergovernmental disputes: the scope of regional law-making and fiscal federalism, illustrate this point.

3.1 Regional Law-making in the Areas of Joint Jurisdiction

Since 1995, the Constitutional Court repeatedly allowed regions to legislate in the area of joint jurisdiction “until the adoption of a federal statute on the matter.”⁶⁶ According to Justice Ebzeev, the Court “discovered” this power of the regions in the constitutional spirit of joint jurisdiction, not in the literal meaning of the constitutional norms.⁶⁷ Although the Russian Constitutional Court warned that such regional law-making ought to comply with the federal jurisdiction, constitutional freedoms, and subsequently adopted federal statutes on the matter, many observers criticized this “discovery” of the Constitutional Court as allowing unfettered regional law-making in areas of federal jurisdiction.⁶⁸

In fact, the Court simply recognized that “life in the regions goes on outside of legal norms,” as Justice Vedernikov put it in early 1995.⁶⁹ By allowing all regions (not just republics) not to wait for the approval of the often deadlocked federal center, the 2nd RCC sought to bring more symmetry to Russian federalism and to limit the sporadic intrusion of federal actors in the regional political process. For example, in the spring of 1996, just before the presidential election, the Court did not allow President Yeltsin to appoint governors in those regions, which managed to pass necessary electoral laws, disagreed with Yeltsin’s attempt to delay the introduction of municipal elections, and refused the request of State Duma members to repeal electoral laws in the Sverdlovsk

⁶⁶ RCC decisions: 16-P of November 30, 1995, SZ RF, 1995, no. 50, st. 4969; 3-P of February 1996, idem, 1996, no. 7, st. 700; 9-P of April 4, 1996, idem, 1996, no. 16, st. 1909 (Justice Baglai, dissenting).

⁶⁷ Boris Ebzeev, ed. Kommentarii k postanovleniiam Konstitutsionnogo Suda Rossiiskoi Federatsii. T. 1. (Moskva: Iurist, 2000), 472.

⁶⁸ A.N. Lebedev, Status sub’ekta Rossiiskoi Federatsii (Moskva: IGP RAN, 1999), 137-144.

⁶⁹ Valentin Maslennikov, “Khvatit zhdat’, pora dogoniat’,” Rossiiskaia gazeta, 1995, March 16.

Region.⁷⁰ These judgments might have affected the number of votes by which Yeltsin won his second term. Moreover, these limitations on the power of the federal center to interfere with the electoral process brought some sense of stability to regional political regimes and solidified both nascent political competition in some regions and “creeping authoritarianism” in others.⁷¹ The Court, however, continued to defend its own doctrine of avoiding political questions. Facing political squabbles, the RCC consistently refused to tinker with the timing of elections at both federal⁷² and regional⁷³ levels, to cancel elections⁷⁴ or to question the legitimacy of the already elected legislatures.⁷⁵ In short, the Court behaved like a mature tribunal in a well-established political system: it refused to enter political fray and to change the rules of the electoral game before the winners have been announced.⁷⁶

Under Putin’s presidency, the Court continued to provide forum for regional concerns. As discussed in the previous section, in April 2000 the RCC gave a green light to the Supreme Court and its army of lower courts to review the legality of regional law making. As a result, several thousands of regional and local legal acts were found null

⁷⁰ RCC decisions: 11-P of April 30, 1996, VKS RF, 1996, no. 3, 15; 13-P of May 30, 1996, SZ RF, 1996, no. 23, st. 2811 (Justice Ametistov, dissenting); and 59-O of May 22, 1996, Konstitutsionnyi Sud Rossiiskoi Federatsii. Postanovleniia. Opredeleeniia. 1992-1996 (Moskva, 1997), 181. See also Valentin Maslennikov, “Konstitutsionnyi sud – ne dekorativnyi bantik v rossiiskoi demokratii,” Rossiiskaia gazeta, 1996, August 2.

⁷¹ See, e.g., Vladimir Gel’man, Sergei Ryzhenkov, & Michael Brie, Making and Breaking Democratic Transitions: The Comparative Politics of Russia’s Regions (Lanham, MD: Rowman & Littlefield, 2003), and Kahn, Federalism, Democratization, and the Rule of Law in Russia.

⁷² RCC decision 77-O of November 20, 1995, SZ RF, 1995, no. 49, st. 4867.

⁷³ RCC decisions: 11-P of April 30, 1996, and 59-O of May 22, 1996, see fn. 89; 216-O of December 7, 2001, SZ RF, 2001, no. 52 (part II), st. 5013.

⁷⁴ RCC decisions: 105-O of December 26, 1996 (unpublished). See van den Berg, “Constitution of the Russian Federation Annotated,” 265; and 93-O of July 1, 1998, VKS RF, 1998, no. 5, 67.

⁷⁵ See, e.g., RCC decisions: 9-P of July 10, 1995, SZ RF, 1995, no. 29, st. 2860; 16-P of May 29, 1998, SZ RF, 1998, no. 23, st. 2626; 4-P of March 23, 2000, SZ RF, 2000, no. 13, st. 1429; and 2-P of January 22, 2002, SZ RF, 2002, no. 6, st. 627.

⁷⁶ For the discussion of the “proper” roles of courts in elections, see, e.g., Filippov et al., Designing Federalism, 77.

and void. However, the RCC kept the power to have a final say in this campaign of “harmonizing” regional law making. And it used it. For example, in March 2003 the Bashkortostan and Tatarstan legislatures succeeded in their case against the Russian Supreme Court and the procuracy over the powers of the regions to expand the competence of regional constitutional/charter courts beyond matters defined in the federal regulations. In this case, the court ruled that the regions could expand the powers of their constitutional/charter courts to matters not authorized in federal law, as long as the additional powers did not encroach on the jurisdiction of the federal judiciary.⁷⁷ In July 2003 the Constitutional Court again sided with Bashkortostan and Tatarstan and disallowed challenges to regional constitutions/charters in the regular courts and empowered the General Procurator to challenge these regional acts only in the federal Constitutional Court.⁷⁸ In December 2003, the Constitutional Court agreed with the Ivanovo region and upheld its statute on the recruitment of municipal officers. Finally, in May 2004, the governor of Pskov region received the backing of the Constitutional Court in acknowledgement of his power to appoint and dismiss the head of the regional emergencies department.⁷⁹

In short, the RCC both opened the process of “harmonizing” regional laws under Putin and attempted to set clear limits on this process by confirming the constitutionality of regional statutes in 2003. But it is possible, some may note, that regional elections

⁷⁷ RCC decision 103-O of March 6, 2003, Rossiiskaia gazeta, April 29, 2003, 10.

⁷⁸ RCC decision 13-P of July 18, 2003, Rossiiskaia gazeta, July 29, 2003. For the review of this case in English, see Igor Rabinovich, “Bashkortostan, Tatarstan Weaken Putin's Reforms,” Russian Regional Report, 8:13, July 23, 2003.

⁷⁹ Both regions challenged the constitutionality of the Russian Supreme Court decisions which annulled Ivanovo and Pskov laws in the process of “harmonizing” them with federal statutes. See RCC decisions: 19-P of December 15, 2003, Rossiiskaia gazeta, December 24, 2003; 10-P of May 13, 2004, Rossiiskaia gazeta, May 25, 2004.

under Yeltsin and upheld regional statutes under Putin were not that important for regions. This is why we should see whether the Court provided both the forum and resources in the intergovernmental disputes involving money, namely, in the area of fiscal federalism.

3.2 Fiscal Federalism: Through the Prism of Constitutional Justice

The challenge of finding the proper balance between federal and regional powers has also been evident in the Court's fiscal federalism cases. On the one hand, the RCC declared that regions could not regulate advertising because only the federal legislature could set up the foundations of a single market: free distribution of goods and fair competition.⁸⁰ These foundations, according to the Court, taken together with federal supremacy in fiscal policy, do not permit the expansion of regional taxes and fees beyond those listed in federal law.⁸¹ Moreover, municipalities also could set their own taxes only when the federal statute specifically allowed them to do so.⁸² This judicial vision of fiscal federalism ran against an earlier ruling of the Court, in which the majority ruled that regions could legislate their own taxes but their rates should be reasonable, be proportional to the public benefit and should not paralyze constitutional rights (freedom of movement in this case).⁸³ More importantly, this court-ordered fiscal centralization ran against President Yeltsin's 1993 decree, which allowed regional governments to set up their own taxes. Yeltsin promptly repealed his decree and chose not to interfere with

⁸⁰ RCC decision 4-P of March 4, 1997, SZ RF, 1997, no. 11, st. 1372 (Justice Zorkin, dissenting).

⁸¹ RCC decision 5-P of March 21, 1997, SZ RF, 1997, no. 13, st. 1602.

⁸² RCC decision 22-O of February 5, 1998, VKS RF, 1998, no. 3, 30.

⁸³ RCC decision 9-P of April 4, 1996, SZ RF, 1996, no. 16, st. 1909. Interestingly, dissenting Justice Baglai, a co-author of the controversial and centralist Chechnya decision, defended the power of the regions to regulate migration.

regional fiscal autonomy.⁸⁴ The regions continued to levy their own taxes and set up various trade barriers, particularly in the wake of the August 1998 financial crisis. As a result, it was impossible by the end of the decade to ignore the diversity of the fiscal regimes in the Russian regions.⁸⁵ Clearly, the widespread explosion of regional and local taxes, fees and trade barriers (and even customs duties!) made judges worrisome of the future of Russia's common market and of the federation itself.

Still, Russian regions benefited from this Court-imposed requirement to "legislate" any kind of taxes because the federal Constitutional Court disapproved of the frequent introduction of new taxes and fees by the unilateral declaration of the Federal Cabinet. Regional leaders, who, until 2001, sat in the Federation Council and controlled the State Duma members from their regions, had a far greater say in making the Russian tax statutes than in influencing the content of Federal Cabinet regulations. In fact, throughout 1997, the RCC repeatedly sided with regional petitions on this matter and invalidated alcohol licensing, hydro and border-crossing fees on these grounds.⁸⁶ However, the Court later changed its position and allowed the Federal Cabinet to introduce and regulate certain fees and payments for truck use, patents and environmental pollution.⁸⁷

Under Putin's presidency, justices continued to balance fiscal federalism in a creative way. On one hand, the Court repeatedly rejected challenges to the power of the

⁸⁴ See remarks by Justice Gadis Gadzhiev in "My daleko ushli ot vsiakoi tainstvennosti i zakrytosti, Rossiiskaia gazeta, 2001, November 1.

⁸⁵ Leonid Polishchuk, "Legal Initiatives in Russian Regions: Determinants and Effects," in Peter Murrell, ed., Assessing the Value of Law in the Economic Transition from Socialism (Ann Arbor: University of Michigan Press, 2001).

⁸⁶ RCC decisions: 3-P of February 18, 1997, SZ RF, 1997, no. 8, st. 1010; 6-P of April 1, 1997, idem, no. 14, st. 1729; 16-P of November 11, 1997, idem, no. 46, st. 5339.

⁸⁷ RCC decisions: 22-P of July 17, 1998, SZ RF, 1998, no. 30, st. 3800; 283-O of December 10, 2002, VKS RF, 2003, no. 2; 284-O of December 10, 2002, idem, 2003, no. 2 and 3.

federal center to control regional fiscal policies. Thus, the RCC ruled that the constitutional requirements of *Sozialstaat* (Article 7) and a single-budget system limited the autonomy of the budgets of the subjects and obliged them to provide federally-set guarantees of social protection, i.e. the federal government could “commandeer” regions to increase salaries and benefits for public employees.⁸⁸ The Court further ruled that the federal Cabinet could unilaterally issue alcohol sale licenses,⁸⁹ and set fishing quotas and fees for annual automobile safety inspections, while regional sales, gambling and transport taxes could not exceed the maximum rate set by federal law. The Court also upheld a federal statute ordering the regions to pay for the support staff of the Justice of the Peace courts, which are legally courts of the subjects, even though, the JPs’ salaries are paid for by the federal government.⁹⁰

On the other hand, the RCC recognized that the regions needed a certain degree of fiscal policy autonomy. The Court upheld the right of regions to set up extra-budgetary funds and to determine their own revenue bases as a means of protecting constitutional rights, even though the 1999 Federal Budget Code did not assign this power to the regions; moreover, the Russian Supreme Court had ruled that the creation of regional extra-budgetary funds violated federal law.⁹¹ The RCC also encouraged the regions to take an active part in setting energy tariffs by staffing regional energy commissions and using these commissions to participate in federal energy policy-making. According to the Court, the Russian Constitution requires harmonization of the interests of the entire

⁸⁸ RCC decision 43-O of April 13, 2000, in Morshchakova, Konstitutsionnyi Sud Rossiiskoi Federatsii: Postanovleniya. Opredeleniya. 2000 (Moskva: Yurist, 2001), 262.

⁸⁹ RCC decision 17-P of November 12, 2003, Rossiiskaya gazeta, 18 November 2003.

⁹⁰ RCC decision 182-O of October 10, 2001, VKS RF, 2002, no.2.

⁹¹ RCC decision 228-O of December 6, 2001, VKS RF, 2002, no.2.

federation and its subjects in the area of state regulation of the supply of hydroelectric power.⁹²

In another decision, the Russian Constitutional Court refused to hear a petition by the federal Cabinet to reverse the Court's September 1993 ruling that struck down President Yeltsin's decree on the transfer of power stations located in the Irkutsk region from regional to federal ownership. The Court stood firm and reiterated that the delimitation of state property ownership between the federation and its parts should be achieved by balancing federal and regional economic interests through the process of federal legislation.⁹³

More importantly, the RCC has recently begun to accept petitions from the local self-government units in a clear move to oversee the constitutionality of local government reforms undertaken by President Putin.⁹⁴ Neither the 1993 Russian constitution nor any other federal statute grants the municipalities the right to petition the Court. And, up until 2002, the Court denied all complaints from the municipalities albeit judges consistently protected the autonomy of local self-government, like in the 1997 Udmurtia case discussed in the previous section.⁹⁵ For example, the Court ruled in favor of the Volgograd Mayor's request that the federal government respect the autonomy of the local self-government by reimbursing the municipalities for the cost of providing housing,

⁹² RCC decision 7-O of January 18, 2001, VKS RF, 2001, no.3, 64.

⁹³ RCC decision 112-O of May 14, 2002 (unpublished), available in the legal database SPS "Konsultant Plyus" at <http://www.consultant.ru>.

⁹⁴ For the overview of the local government reform, see Tomila Lankina, "President Putin's Local Government Reforms," in Peter Reddaway and Robert W. Orttung, eds., The Dynamics of Russian Politics, Volume 2: Putin's Reform of Federal-Regional Relations (Lanham, MD: Rowman & Littlefield, 2005), 145-177.

⁹⁵ Since early 1997, the Court has repeatedly overruled regional laws, which abolished the elected local self-government bodies or empowered the governors to nominate and dismiss the heads of municipalities. V.D. Karpovich, ed., Kommentarii k Konstitutsii RF (Moskva: Iurait-M, 2002), 93-4 (author of the commentary – Vladimir Kriazhkov).

home telephone service, and childcare for federal judges.⁹⁶ This judgment, if implemented, is likely to strengthen the judicial protection and financial base of the local self-government, given that President Putin's judicial reform involved the hiring of several thousand federal judges in the last four years. Similarly, the Court repeatedly ruled that the federal center had to compensate the municipalities in full for providing housing for police officers and prison guards.⁹⁷ Finally, in May 2006, the Court ruled that federal and regional governments had to reimburse municipalities for subsidizing the cost of providing municipal childcare. Clearly, the Court wants to stop the practice of "unfounded mandates" and to become the forum for protecting local self-government, a sure loser in the race to strengthen governance in Russia under Putin.⁹⁸ However, it is far from certain whether the federal center will comply with this judicial vision of fiscal federalism.

In sum, the Constitutional Court remains to be one of the most "region-friendly" federal institutions at the federal level. The court achieved this by providing important political resources to regional and local governments: by protecting regional elections from federal haphazard federal interference, by letting regions to legislate in the areas of joint federal-regional jurisdiction, and by accepting complaints from the municipalities.

⁹⁶ RCC decision 132-O of April 9, 2003, VKS RF, 2003, no.5, 65-68.

⁹⁷ RCC decisions: 303-O of July 8, 2004, VKS RF, 2005, no. 1; 58-O of February 15, 2005, unpublished; and 224-O of June 9, 2005, unpublished.

⁹⁸ On fiscal independence of local self-governments, see RCC decision 16-P of November 11, 2003, Rossiiskaya gazeta, 18 November 2003.

Conclusion

The Russian Constitutional Court has earned its place in the game of Russian federalism. Aspiring to avoid federal disintegration and recovering from the wounds inflicted on the Court by President Yeltsin in 1993, judges chose to champion strong federal supremacy even if it meant turning Russia's regions into nothing more than implementing agents of the federal level, partly returning to the Soviet system of subordinating the regional governments to that of Moscow.⁹⁹ Judges do so in difficult conditions facing regional resistance and federal actors who both championed asymmetrical bilateralism in 1994-7 under Yeltsin and denounced any asymmetry in center-regional relations in 2000-5 under President Putin. Enthusiastic about Putin's support for a strong federal center, the Court became bolder in upholding the strong federal direction of the regions.

Three factors indicate the growing role of the Court in 'fixing' Russian federalism. First, the RCC carved out its own niche to review Putin's reforms of Russian governance and was not afraid to review virtually all key policies of Putin's reforms. To be sure, the Court upheld most of them yet it allowed dissenting judges to criticize Putin's policies in public. For example, Justice Gadzhiev, who ardently advocated restrictions on regional fiscal policies in 1999, has recently blasted the federal center for "usurping" the regional autonomy through federal statutes.

Second, the RCC managed to earn support from autonomy-minded regions. If, in the mid-1990s, they simply boycotted the RCC sessions and accused the Court of being

⁹⁹ Leonid Polishchuk, "Should the Legal Foundations of a Federal State be Flexible or Rigid? Canadian Experience and Russian Dilemmas," in Peter H. Solomon, Jr., ed., Making Federalism through Law: Canadian Experience and Russian Reform under Putin (Toronto: CREES, University Of Toronto, 2003), 59.

“a hostage of political questions,”¹⁰⁰ by 2003, the regions continued to petition the Court, although one of the staunch supporters of regional autonomy, Justice Nikolai Vitruk, retired from the bench in March 2003. As I have shown, constitutional litigation provided both political resources and a public forum for regional and local governments to defend their autonomy at the federal level. What is worrisome is that the regions sensed the swings in the Court’s approach to federalism, and they tended to obey them out of fear of punishment by the federal center.

Finally, the federal center under President Putin attempted to incorporate RCC decisions into his reforms of Russia’s federalism.¹⁰¹ Unlike his predecessor, Vladimir Putin did not wish to tolerate the regional defiance of the federal supremacy. As it should be clear by now, using the RCC decisions to prepare federalism reforms was in itself a titanic effort due to numerous judgments and inconsistent approaches, taken by the Court. As one member of Putin’s task force on federal reform put it in April 2003, “it was impossible to account for each and every legal position of the RCC because they contradicted each other,” and eventually this task force chose to use only the most famous RCC decisions.¹⁰² Yet the fact that the political branches under Putin were beginning to pay systematic attention to RCC decisions is an indicator of the growing power of the Court.

¹⁰⁰ See, e.g., RCC decision 53-O of June 21, 1996, SZ RF, 1996, no. 27, st. 3345.

¹⁰¹ On Russian federalism reforms under Putin, see, e.g., Peter H. Solomon, Jr., ed., Making Federalism through Law: Canadian Experience and Russian Reform under Putin (Toronto: CREES University of Toronto, 2003), and Peter H. Solomon, Jr., The Dynamics of “Real Federalism”: Law, Economic Development, and Indigenous Communities in Russia and Canada (Toronto: CREES University of Toronto, 2004).

¹⁰² Report by Milena Gligich-Zolotareva, in Analiticheskii vestnik ‘Mezhdunarodnyi opyt federativnoi demokratii’, 2003, no. 23 (216), 15-16, <http://www.council.gov.ru>

This growing attractiveness of the RCC to the federal center and the regions (and, increasingly, local governments) comes from a well-established pattern of using court decisions as political resources in their relations among each other, a dynamics not unfamiliar to the students of federalism.¹⁰³ The challenge ahead is to build the federal government is capable or willing to enforce judicial decisions that go against its interests. A bigger challenge is to ensure that the strong federal center will restrain itself to avoid the return to the unitary state, which, in turn, may result in secession. And judges will certainly have their opinions on how to address these urgent tasks.

¹⁰³ Russell, “The Supreme Court in Federal-Provincial Relations.”