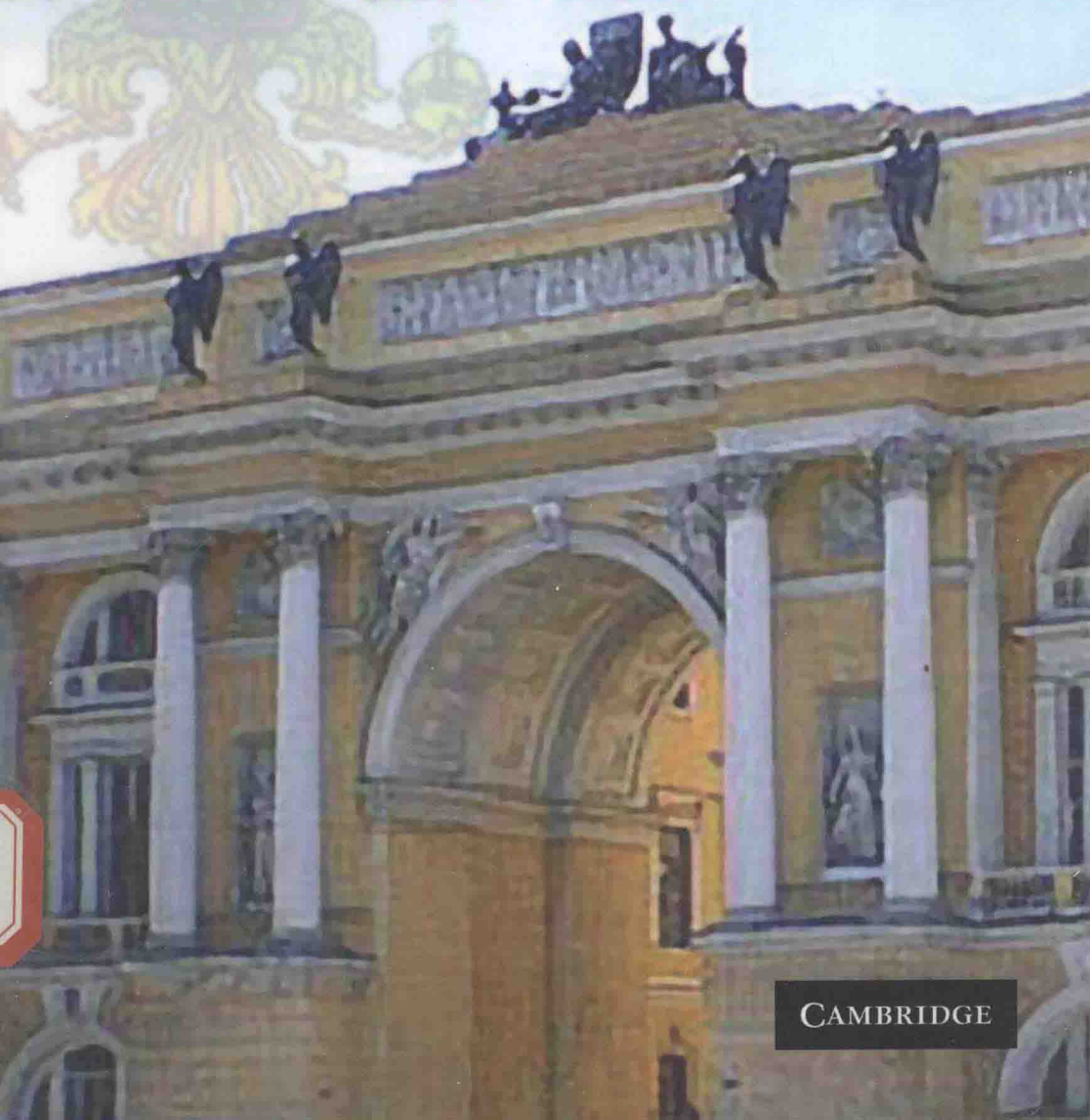


JUDGING RUSSIA

Constitutional Court in Russian Politics
1990-2006

Alexei Trochev



CAMBRIDGE

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CONSTITUTIONAL COURT IN RUSSIAN
POLITICS, 1990–2006

Alexei Trochev

Queen's University



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JUDGING RUSSIA

This book is the first in-depth study of the actual role that the Russian Constitutional Court played in protecting fundamental rights and resolving legislative-executive struggles and federalism disputes in both Yeltsin's and Putin's Russia. Alexei Trochev argues that judicial empowerment is a nonlinear process with unintended consequences and that courts that depend on their reputation flourish only if an effective and capable state is there to support them. This is because judges can rely only on the authoritativeness of their judgments, unlike politicians and bureaucrats, who have the material resources necessary to respond to judicial decisions. Drawing upon systematic analysis of all decisions of the Russian Court (published and unpublished) and previously unavailable materials on their (non) implementation, and resting on a combination of the approaches from comparative politics, law, and public administration, this book shows how and why judges attempted to reform Russia's governance and fought to ensure compliance with their judgments.

Alexei Trochev is Adjunct Professor for the School of Policy Studies of Queen's University in Ontario. He received his BA in Russian law from Syktyvkar State University in 1995, master's in public administration from the University of Kansas in 1997, and Ph.D. in political science from the University of Toronto in 2005. He taught constitutional law at the Pomor State University Law School in Arkhangelsk, Russia. Trochev's writings have been published in the *Law and Society Review*, *American Journal of Comparative Law*, *East European Constitutional Review*, and the *International Journal of Constitutional Law*, and he has contributed several book chapters on postcommunist judicial politics.

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This book is dedicated to the memory of my grandmothers, Uliana and Anna, who raised their families alone after they had lost their husbands in World War II.

Abbreviations

CPD	Congress of People's Deputies – [Sezd narodnykh Deputatov]
CSC	Committee of Constitutional Supervision – Komitet Konstitutsionnogo Nadzora
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
RCC	Russian Constitutional Court – [Konstitutsionnyi Sud Rossiiskoi Federatsii]
RF	Russian Federation
RSFSR	Russian Soviet Federated Socialist Republic
SAPP	Collected Acts of the President and Government of the Russian Federation – [Sobranie Aktov Prezidenta i Pravitelstva Rossiiskoi Federatsii]
SSLC	Legislation Committee of the RSFSR Supreme Soviet – [Komitet po zakonodatelstvu Verkhovnogo Soveta RSFSR]
SZ RF	Collected Legislation of the Russian Federation – [Sobranie Zakonodatelstva Rossiiskoi Federatsii]
USSR	Union of Soviet Socialist Republics
VKS RF	Herald of the Constitutional Court of the Russian Federation – [Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii]
VSND i VS RSFSR	Official Gazette of the Legislative Agencies of the Russian Federation (and of the prereform Supreme Soviet of the RSFSR) – [Vedomosti Sezda narodnykh deputatov i Verkhovnogo Soveta RSFSR]

Notes on Transliteration

Throughout this book I have used the Library of Congress system of Russian transliteration. However, for well-known names and words, I use the more common spelling (e.g., Yeltsin instead of El'tsin and Chechnya instead of Chechnia).

Moreover, the Russian soft sign, which is represented in transliteration by an apostrophe ('), is generally omitted for the sake of readability, especially in the case of proper names.

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Introduction: Three Puzzles of Postcommunist Judicial Empowerment

At the beginning of the new millennium, when the dust of the postcommunist transition had settled, the dynamics of judicial empowerment in the area of the former Soviet domination held many a surprise. Whether a democracy or not, each postcommunist country had a functioning constitutional court, a new judicial body armed with the power to revoke laws found to be in violation of constitutional provisions.¹ However, just as political regimes varied in the ex-Soviet world,² the young constitutional courts also varied in terms of their real judicial power. Some courts immediately started to rule against the powerful but were eventually tamed by the rulers (Russia in 1993 and Hungary in 1999). Some courts were brave enough to impeach popularly elected presidents (Russia and Lithuania),³ to bar popular politicians from running for the presidency (Bulgaria),⁴ or

¹ Only Turkmenistan, a Central Asian state with a sultanistic regime, and Estonia, a consolidated democracy and a member of the European Union, do not have separate constitutional courts. Estonia's Supreme Court has an ad hoc chamber in charge of limited constitutional review.

² See Valerie Bunce, "Rethinking Recent Democratization: Lessons from the Postcommunist Experience," *World Politics*, vol. 55, no. 2 (January 2003), pp. 167–192 and notes therein.

³ In September 1993, the Russian Constitutional Court impeached President Boris Yeltsin for abolishing the legislature. In turn, Yeltsin suspended the Court's operation for 18 months until he finished "packing" the Court in 1995. See Chapters 3 and 4 of this book. In March 2004, the Lithuanian Constitutional Court impeached President Ronald Paksas on corruption charges. Conclusion of the Lithuanian Constitutional Court of March 31, 2004, Case No. 14/04, available in English at <http://www.lrkt.lt/dokumentai/2004/co40331.htm>, accessed on December 17, 2007.

⁴ In 1996, in a 8–4 decision, the Bulgarian Constitutional Court declared highly popular New-York born Foreign Minister Georgi Pirinski ineligible to run in presidential elections. Decision No. 12 of July 23, 1996, *Darzhaven Vestnik*, no. 67, August 6, 1996. In 2001, in a 7–5 vote, the Court barred the exiled King Simeon II from running for the presidency even though about two-thirds of Bulgarians disagreed with this ruling.

to repeal constitutional amendments (Moldova). Others (Serbia, Georgia, Ukraine, and Kyrgyzstan) simply watched, as mass peaceful protests over fraudulent elections overthrew powerful presidents during so-called colored revolutions of 2000–2005. To nobody's surprise, constitutional courts in "autocracies" (Belarus and Uzbekistan) tended to offer nonbinding recommendations to powerful executives.

What is more surprising is that the postcommunist constitutional review appears to stick to nondemocratic polities. Ruling elites in Albania and Belarus, Kazakhstan and Tajikistan, Russia under President Putin and Slovakia under the Meciar government, create these constitutional courts, then, in a matter of a few years, attack them and yet keep these tribunals operating.⁵ Even more surprising is the persistence of *accessible* constitutional review in nondemocracies. Voters in "hybrid" and authoritarian regimes quickly received the right to sue their governments in these constitutional courts, while new democracies failed to provide their citizens with direct access to constitutional review. For example, since 1992, ordinary Russians have complained to their constitutional courts and have won their cases. Beginning in 1995–1996, citizens in "autocratic" Tajikistan and Uzbekistan have received access to, and successfully used, their constitutional courts. To do the same, Polish citizens had to wait until 1998, and their Latvian counterparts – until mid-2001. These were lucky when compared to individuals in Bulgaria, Estonia, Lithuania, and Romania. These newly consolidated democracies simply disallow their citizens from directly petitioning constitutional courts (see Table 1.1).

What explains this prompt embrace of constitutional review by authoritarian leaders and the "difficult" childhood of postcommunist constitutional justice? Why were the judicial review tribunals unable to prevent the growth of nondemocratic trends in most post-Soviet countries? By illustrating the case of post-Soviet Russia, this book addresses this question by exploring the politics of the origins, the functioning, and the impact of the 16-year-old Russian Constitutional Court (RCC). More specifically,

Decision No. 3 of February 8, 2001, *Darzhaven Vestnik*, no. 15, February 16, 2001. For analysis, see Venelin I. Ganey, "The Bulgarian Constitutional Court, 1991–1997: A Success Story in Context," *Europe-Asia Studies*, vol. 55, no. 4 (2003), p. 603; and "Constitutional Watch: Bulgaria," *East European Constitutional Review*, vol. 10, nos. 2–3 (Spring–Summer 2001), p. 9.

⁵ Russia's subnational constitutional courts persist in the regions with authoritarian regimes and fail to take root in regions with highly competitive elections. See Alexei Trochev, "Less Democracy, More Courts: The Puzzle of Judicial Review in Russia," *Law and Society Review*, vol. 38, no. 3 (September 2004), pp. 513–548.

TABLE 1.1. *Postcommunist constitutional courts: Creation and access*

Country	"Freedom House" ranking 2006	Constitution adopted/amended	Date of enabling legislation – date of the beginning of work	No. of judges	Constitutional complaint
Poland	free	1992/1997	04/1985 – 12/1985	15	yes, since 1998
Hungary	free	1949/1997	10/1989 – 01/1990	11	yes
Bulgaria	free	1991/2003/2005/2006/2007	07/1991 – 11/1991	12	no
Russia	not free	1993	10/1991 – 11/1991	19	yes
Slovenia	free	1991/1997/2000/2003/2004/2006	04/1994 – 05/1993	9	yes
Croatia	free	1990/1997/2000/2001	12/1991 – 01/1992	13	yes
Macedonia	partly free	1991	12/1991 – 01/1992	9	yes
Albania	partly free	1991/1998	04/1992 – 06/1992	9	yes
Romania	free	1991/2003	05/1992 – 07/1992	9	no
Kazakhstan	not free	1993/1995/1998/2007	06/1992 – 07/1992	7	no
Slovakia	free	1992/1998/1999/2001	09/1992 – 03/1993	13	yes
Czech Rep.	free	1992/1997/1998/2000/2001/2002	06/1993 – 07/1993	15	yes
Lithuania	free	1992/2003	03/1993 – 08/1993	9	no
Estonia	free	1992/2003	05/1993 – 05/1993	9	no
Kyrgyzstan	partly free	1993/2003/2006/2007	12/1993 – 09/1995	9	yes
Belarus	not free	1994/1996	03/1994 – 09/1994	12	no
Tajikistan	not free	1994/1999/2003	11/1995 – 01/1996	7	yes
Moldova	partly free	1994/2000/2001/2002	07/1994 – 02/1995	6	no
Uzbekistan	not free	1992/1993/2002/2003	08/1995 – 01/1996	7	yes
Armenia	partly free	1995/2005	12/1995 – 02/1996	9	yes, since 2006
Georgia	partly free	1995/2004/2006	01/1995 – 08/1996	9	yes
Latvia	free	1990/1994/1996/1997/1998/2002/ 2003/2004/2006/2007	11/1989 – 01/1997	7	yes, since 2001
Ukraine	free	1996/2004	06/1992 – 01/1997	18	yes
Azerbaijan	not free	1995/2003	11/1995 – 07/1998	9	yes, since 2004

I analyze three interrelated puzzles of judicial empowerment in postcommunist Russia:

1. Why the same powerful political actors created the judicial review tribunal in 1991, nearly disbanded it after 2 years of its operation, and then revived the court shortly thereafter;
2. How and why the Russian Constitutional Court exercised its broad judicial review powers; and
3. Why government officials, including judges in other courts, promptly carried out RCC decisions in some cases, delayed implementation in other cases, and sometimes simply ignored the RCC's orders.

By cracking these puzzles, this book aims to provide insights into the "black box" of judicial empowerment during the change of nondemocratic political regimes. Taken together, the solutions to these puzzles may reveal *when, how, and why judicial review is likely to flourish or fail*. Perhaps, the evolution of judicial power is far from a linear process, being fraught with twists and turns, while the entrenchment of the rule of law is a by-product of struggles amongst government officials, judges, and the civil society.

JUDICIAL (DIS) EMPOWERMENT IN CONTEXT

A growing number of theories address these questions by linking the establishment of constitutional review to a specific outcome of the regime change – democratization. Some theorists focus on the *international* context of global waves of democratization, while others insist that the *domestic* context is more vital in explaining the success and failures of young constitutional tribunals. One group of scholars argues that postcommunist judicial empowerment is not surprising at all.⁶ They view the proliferation of new constitutional review tribunals as an extension of "global diffusion of judicial power" or of a post-World War II hegemony of the human rights agenda. By subjecting their choices to judicial scrutiny, postcommunist rulers demonstrate their commitment to democracy and the rule of law to the voters and to the rest of the world. Constitutional

⁶ See, for example, John Ferejohn and Pasquale Pasquino, "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice," in Wojciech Sadurski, ed., *Constitutional Justice, East and West* (The Hague: Kluwer Law International, 2003), p. 21.

courts, then, uphold democratic values, protect individual rights, and serve as a bulwark against a return to the totalitarian past.⁷

Other scholars disagree with this emphasis on international pressures and templates in the process of massive constitutional borrowing and non-borrowing from the West. Instead, they look at the *domestic* context of enormous sociopolitical uncertainty brought about by the change of the political regime. *Institutionalist* approaches to postauthoritarian judicial empowerment examine the need of the rulers to govern new polities and suggest that powerful courts guard separation of powers, resolve disputes among policymakers in a peaceful way, and smooth the functioning of the new regimes. *Strategic* approaches to judicial empowerment in societies as diverse as the United States and Japan, Mexico and Mongolia, and Korea and Bulgaria claim that, in the uncertainty of democratization, politicians who fear electoral loss create a strong and independent judiciary to protect themselves from the tyranny of election winners in the future. When political uncertainty is high, constitution makers are less likely to constrain judicial review bodies. Accessible constitutional courts, then, protect political minorities by providing them with a forum to obstruct majoritarian decision making.⁸

The *public support* theorists go even further in assuming a link between the voters and judicial power. These scholars argue that newly created constitutional courts must gain the support of the citizens by ruling in line with the majority will; otherwise courts will be viewed as illegitimate or redundant government institutions. Over time, the mass of popular judgments

⁷ See, for example, Catherine Dupre, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Portland, OR: Hart Publishing, 2003); Wiktor Osiatynski, "Paradoxes of Constitutional Borrowing," *I-CON: International Journal of Constitutional Law*, vol. 1, no. 2 (April 2003), pp. 244–268; Radosław Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press, 2002); Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: Chicago University Press, 2000).

⁸ See, for example, Mark J. Ramseyer, "The Puzzling (In) dependence of Courts: A Comparative Approach," *Journal of Legal Studies*, vol. 23, no. 2 (June 1994), pp. 721–747; Pedro C. Magalhães, "The Politics of Judicial Reform in Eastern Europe," *Comparative Politics*, vol. 32, no. 1 (October 1999), pp. 43–62; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003); Lee Epstein and Jack Knight, "Constitutional Borrowing and Nonborrowing," *I-CON: International Journal of Constitutional Law*, vol. 1, no. 2 (April 2003), pp. 196–223; Jodi Finkel, "Judicial Reform as Insurance Policy: Mexico in the 1990s," *Latin American Politics and Society*, vol. 47, no. 1 (Spring 2005), pp. 87–113.

will create a shield, which constitutional court judges can use later to issue controversial decisions and to compel others to enforce them.⁹

These theories are useful in explaining why democratizing politicians set up powerful constitutional courts. Their explanations are certainly correct in that it is the elites who drive the process of judicial empowerment, and that new constitutional courts provide important benefits for democratizing elites. To be sure, judicial review as “negative” and “positive” law making can certainly assist in democratization: constitutional courts can do a lot “(1) to check arbitrary rulers, (2) to replace arbitrary rules with just and rational ones, and (3) to obtain a share for the underlying population in the making of rules.”¹⁰ My study joins these theories in their focus on the political origins of judicial empowerment and draws on the insight that is the political context that ultimately determines the successes and failures of judicial review.¹¹

However, my analysis explains why authoritarian politicians, who do not fear losing elections, set up powerful and accessible constitutional courts, and how these courts manage to persist in regimes that do not “transit” toward democracy. My short answer is that authoritarian rulers tolerate constitutional courts as long as the courts: (a) provide important benefits for the new rulers, and (b) do not interfere too much with public policies. However, change of the regime and unstable policy preferences of the new ruling elites complicate a cost–benefit calculus of judicial review.

By exploring the politics of the “birth” and childhood of constitutional review in postcommunist Russia between 1990 and 2006, I place the thorny process of Russia’s judicial empowerment within the context of attendant political struggles among the rulers, judges, and the bureaucracies. The struggles between these actors flare up in the course of designing/destroying, exercising, and (dis)obeying constitutional review. The short-term calculations of political elites and their legal advisers drove the

⁹ James Gibson, Gregory Caldeira, and Vanessa Baird, “On the Legitimacy of National High Courts,” *American Political Science Review*, vol. 92, no. 2 (June 1998), pp. 343–358; Joseph F. Fletcher and Paul Howe, “Public Opinion and Canada’s Courts,” in Paul Howe and Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill University Press, 2001), pp. 255–296; Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge, UK: Cambridge University Press, 2005); and Anke Grosskopf, “A Supranational Case – Comparing Sources of Support for Constitutional Courts” (Ph.D. diss., University of Pittsburgh, 2000).

¹⁰ Barrington Moore, Jr., *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World* (Boston: Beacon Press, 1966), p. 414.

¹¹ Carlo Guarneri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (New York: Oxford University Press, 2002), pp. 182–183.