DISCRETION AND VALOR AT THE RUSSIAN CONSTITUTIONAL COURT: ADJUDICATING THE RUSSIAN CONSTITUTIONS IN THE CIVIL-LAW TRADITION[1]

The better part of valor is discretion, in the which better part I have sav'd my life.[2]

I. INTRODUCTION

A few years ago, when the former republics of the Soviet Union were reconstituting themselves as democratic sovereigns, American constitutional scholars debated the worth of the East European draft constitutions that were circulating at the time. The arguments necessarily proceeded from pure theory rather than from empirical evidence, because no empirical evidence existed. The constitutions, after all, were in draft. Now that the emerging democracies have adopted and begun to test their constitutions, though, it pays to revisit the earlier debate to see whether the direst predictions for the East European constitutions are coming true. In the empirical tests of both the new and the old Russian Constitutions by the Russian Constitutional Court, they are not.

Several scholars criticized the East Europeans for not getting it right—that is, for not closely modeling their charters on the U.S. Constitution. Cass Sunstein, for example, faulted the emerging republics for constitutionalizing "positive rights"—rights that placed affirmative obligations on the government to ensure specific benefits for its citizens.[3] Sunstein argued that "[t]he endless catalogue of . . . 'positive rights' [in the draft constitutions], many of them absurd, threatens to undermine" the ability of those constitutions to establish liberty rights and "the preconditions for some kind of market economy."[4] Similarly, Sunstein's colleague at the

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1. Throughout this note, "[t]he names 'Russian Federation' and 'Russia' shall be equivalent." KONSTITUTSIIA (ROSSIISKOY FEDERATSII) [CONSTITUTION OF THE RUSSIAN FEDERATION] (1993) art. 1, § 2, *translated in* 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flantz eds., Federal News Service (Washington, D.C.) trans., 1994) [hereinafter KONST. RF].

2. In context, this comment is a somewhat slanted observation on the relationship between courage and judgment offered by Sir John Falstaff in WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 5, sc. 4, ll. 119-20 (G. Blakemore Evans ed., Riverside 1974).

3. Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (Winter 1993) [hereinafter Sunstein, *Against Positive Rights*].

4. *Id.* at 36, 35. For a judicial rejection of the concept of positive rights, see, e.g., Webster v. Reproductive Health Services, 492 U.S. 490, 507 (1989) ("'our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which government itself may not deprive the individual'") (quoting Deshaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189, 196 (1989)).

University of Chicago, Lawrence Lessig, amplified the subtheme of "the endless catalogue of positive rights" and faulted the republics for constitutionalizing concepts whose semantic narrowness, Lessig feared, would doom the East European constitutions to an absence of productive evolution:

> Founders in postcommunist democracies take their constitutional texts very seriously. . . . [but] [a]ll this obsession over text is quite understandable. Coming from a communist past, and trained in a civil law [*sic*] tradition before that, [for these founders] respect for textual limits is an important lesson to relearn. But we might ask nonetheless whether this fetish for code-like constitutions is either useful or realistic. . . .
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> My point . . . is about the nature of a constitution as evolutionary. What is general is not a particular path of presidential growth, but that presidencies have a path of growth, and that at their birth constitutions should understand and accommodate this.[5]

Both Sunstein and Lessig believed that code-like precision in constitutions, especially if combined with a "chaotic catalogue of abstractions from the social welfare state,"[6] was "a large mistake, possibly a disaster."[7] In the founding charter of a democracy, they urged, such precision freezes "issues [that] should be subject to democratic debate, not constitutional foreclosure."[8] In this basic position, Sunstein and Lessig probably agree with most American lawyers who have thought about how best to draft a constitution: a constitution should state a few basic negative rights with enough precision to keep the government off your back, but those statements

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5. Lawrence Lessig, *The Path of the Presidency*, 3 E. EUR. CONST. REV. 104, 104, 106 (Fall 1993/Winter 1994). Lessig might have been alluding to a work such as 1 FRANCOIS GÉNY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 70 (2d ed. 1919) (calling "'th[at] fetishism of the written and codified statutory law' the 'most distinctive and . . . most salient trait' of nineteenth-century academic and judicial practice"), *quoted and translated in* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1345 (1995), though without attribution it is difficult to tell. On constitutional evolution with reference to Eastern Europe, see also Cass Sunstein, *Changing Constitutional Powers of the American President*, 3 E. EUR. CONST. REV. 99 (Fall 1993/Winter 1994) [hereinafter Sunstein, *Changing Constitutional Powers*].

6. Sunstein, *Against Positive Rights*, *supra* note 3, at 35.

7. *Id.*

8. *Id.* at 37. *See also* Lessig, *supra* note 5 and accompanying quoted text.

of rights should be abstract enough to allow surface modifications on an *ad hoc* basis for centuries.[9]

The Russian Constitution, the drafting of which Yeltsin oversaw,[10] deserves criticism on many grounds. It is plagued by contradictions that undermine the separation of powers in the new Russian government,[11] and the aggrandized position of the president in the Constitution is all but frankly anti-democratic.[12] Further, the contradiction between Russia's express desire to move to a market economy and the Constitution's establishment of "positive rights" does seem self-defeating. Such an outright contradiction makes sense only if its purpose is primarily rhetorical rather than strictly legal, only if it is primarily a way to persuade the Russian people that, after centuries of brutal evidence to the contrary, their government is committed to "work[ing] against [the] nation's most threatening tendenc[y]"[13]—the

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9. This proudly open-ended American understanding of constitution-drafting was fundamental, for example, for former U.S. Supreme Court Justice Felix Frankfurter: "Not the least characteristic of great statesmanship which the Framers manifested was the extent to which they did not attempt to bind the future." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring).

10. Edward W. Walker, *Politics of Blame and Presidential Powers in Russia's New Constitution,* 3 E. EUR. CONST. REV. 116 (Fall 1993/Winter 1994) [hereinafter Walker, *Politics of Blame*].

11. *Compare, e.g.,* KONST. RF art. 10 ("State power in the Russian Federation shall be exercised on the basis of the separation of the legislative, executive and judiciary branches. The bodies of legislative, executive and judiciary powers shall be independent"); KONST. RF art. 80, § 2 ("The President shall . . . take measures to protect the sovereignty of the Russian Federation, its independence and state integrity, *and ensure concerted functioning and interaction of all bodies of state power")* (emphasis added); and KONST. RF art. 110, § 1 ("Executive power in the Russian Federation shall be exercised by the Government of the Russian Federation").

12. *See* KONST. RF art. 90 (establishing the Russian president's decree powers) and KONST. RF art. 93 (outlining the difficult presidential impeachment process). *See also* Stephen Holmes, *Superpresidentialism and Its Problems,* 3 E. EUR. CONST. REV. 123 (Fall 1993/Winter 1994); Walker, *Politics of Blame, supra* note 10, at 116; and Amy J. Weisman, *Separation of Powers in Post-Communist Government: A Constitutional Case Study of the Russian Federation,* 10 AM. U. J. INT'L L. & POL'Y 1365 (1995). On Yeltsin's further accumulation of powers after the drafting and adoption of the new Constitution, see *Yeltsin Voted Special Powers for Reform,* 43 CURRENT DIGEST OF THE POST-SOVIET PRESS 7 (no. 44, 1991); *Yeltsin's Concentration of Power Lauded—But Not Its Planned Use,* 43 CURRENT DIGEST OF THE POST-SOVIET PRESS 13 (no. 45, 1991); and *Yeltsin Defends Exercise of Presidential Powers,* 45 CURRENT DIGEST OF THE POST-SOVIET PRESS 9 (no. 46, 1993).

13. Sunstein, *Against Positive Rights, supra* note 3, at 36 (assuming that institutionalized socialism is one of Russia's "most threatening tendencies"). As the text accompanying this footnote suggests, this writer sees Russia's recent institutionalized socialism as merely a symptom of what is traditionally the far more pervasive problem of the total disrespect for the rule of law in Russia's leaders—a "threatening tendency" that antedated the Communist regime by several centuries. *See* ROBERT SHARLET, *Crisis and Constitutional Reform in Tsarist Russia and the Soviet Union, in* SOVIET CONSTITUTIONAL CRISIS: FROM DE-STALINIZATION TO DISINTEGRATION 3-13 (1992).

Russian government's disregard for the rule of law at the expense of the Russian people.[14] On these bases, criticism of the Russian Constitution is sound.

Criticism of the Russian Constitution for its code-like qualities, however, cannot withstand scrutiny. The criticism fails both in theory and in practice. It fails in theory for at least two reasons. First, it fails because it proceeds from misplaced assumptions. The "code-like" argument is actually a surprisingly provincial insistence on analyzing East European constitutions, not against the civil-law premises from which they evolved, but against common-law premises that are totally foreign to the East European legal psyche. Analyzed against common-law premises, the code-like Russian Constitution is an abject failure—precisely because it is code-like. Where the terse, elliptical U.S. Constitution is a text of suggestion—a text that deliberately gives the trusted common-law judiciary room to interpret—the Russian Constitution frequently tries to be a text of statement—a text that deliberately deprives the distrusted civil-law judiciary of room to interpret.[15] The success of other constitutions that have aimed for relative specificity, however, suggests that we need not extrapolate a general rule for all the world from the American constitutional experience.[16]

The second flaw in criticizing the Russian Constitution for its code-like precision is that the argument rests on another assumption that is at best dubious. To argue that relatively positivistic constitutions "foreclose"[17] subsequent debate, one must assume that language is *capable* of being positive, that the affirmative rights stated in the Russian Constitution will remain conceptually stable enough to block democratic debate in the distant future. Surely the past century of linguistic philosophy has demonstrated the error in that assumption; the inescapable gap between language and even its tangible referents should by now enjoy the status of an established fact.[18]

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14. *See* SHARLET, *supra* note 13.

15. *See, e.g.*, KONST. RF art. 22, § 2 (establishing a 48-hour maximum for warrantless detentions), and accompanying discussion, *infra* note 93.

16. *See* Herman Schwartz, *In Defense of Aiming High*, 1 E. EUR. CONST. REV. 25, 25 (Fall 1992) (citing the presence of a catalogue of positive rights in the constitutions of France, Japan, and Switzerland) [hereinafter Schwartz, *Aiming High*].

17. Sunstein, *Against Positive Rights*, *supra* note 3, at 37.

18. *See generally* KENNETH BURKE, *The Human Actor: Definition of Man*, *in* ON SYMBOLS AND SOCIETY 56-74, 65 (Joseph R. Gusfield ed., 1989) ("There is an implied sense of negativity in the ability to use words at all. For to use them properly, we must know that they are *not* the things they stand for"); MAURICE MERLEAU-PONTY, *Indirect Language and the Voices of Silence*, *in* SIGNS 39-83, 39, 42, 43 (Richard C. McCleary trans., 1964) ("taken singly, signs do not signify anything, and . . . each one of them does not so much express a meaning as mark a divergence of meaning between itself and other signs. . . . [L]anguage . . . is the lateral relation of one sign to another . . . so that meaning appears only at the intersection of and as it were in the interval between words. . . . [Thus,] the idea of *complete* expression is nonsensical . . . [because] all language is indirect or allusive"); FRIEDRICH

This is especially true in law (as one half of the self-contradictory argument that the East Europeans, or at any rate the Russians, need to accommodate constitutional evolution clearly recognizes).[19] Whatever validity recent linguistic philosophy has in everyday contexts, it is necessarily all the more valid when the referents for language are as inherently intangible and abstract as those upon which legal inquiry depends. Because words that refer to even the most concrete concepts can denote only vastly interpretable "semantic fields,"[20] and because even code-like constitutions must exist only in words, even code-like constitutions must and will evolve by being subjected to the conflicting perspectives of legal interpretation.[21]

Moreover, with respect to the Russian Constitution the "code-like" criticism also fails in practice, largely because the Russian Constitution is being interpreted by a Court whose assumptions about law are essentially the same as those of the Constitution's framers. The Russian Constitution's code-like qualities seem not to have hampered the Russian Constitutional Court; unquestionably, the Russian Constitution already has evolved since its adoption by referendum on 12 December 1993. The upper house in the Russian bicameral Federal Assembly, the Federation Council,[22] now knows

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NIETZSCHE, BEYOND GOOD AND EVIL 216 (Walter Kaufmann trans. and ed., 1966) ("Words are acoustical signs for concepts; concepts, however, are more or less definite image signs for often recurring and associated sensations, for groups of sensations. To understand one another, it is not enough that one use the same words; one also has to use the same words for the same species of inner experiences . . ."); FRIEDRICH NIETZSCHE, *On Truth and Lying in an Extra-Moral Sense, in* FRIEDRICH NIETZSCHE ON RHETORIC AND LANGUAGE 246-57 (Sander L. Gilman et al. trans. and eds., 1989) (arguing that all language is essentially metaphor and therefore essentially inaccurate as a representational medium); and FRIEDRICH NIETZSCHE, THE WILL TO POWER 358 (Walter Kaufmann & R.J. Hollingdale trans., Walter Kaufmann ed., 1967) ("all our words refer to fictions . . . and . . . the bond between man and man depends on the transmission and elaboration of these fictions").

19. "With very few exceptions, the constitutional provisions relating to the president have not been changed at all since they were ratified in 1787, but in 1993 those provisions do not mean what they meant in 1787." Sunstein, *Changing Constitutional Powers, supra* note 5, at 99. It is difficult for this writer to see why the late twentieth-century Russian language will resist natural linguistic evolution any more successfully than the U.S. Constitution's late-Enlightenment American English has resisted such evolution since 1787.

20. This phrase is from Professor John T. Kirby, graduate course in classical rhetoric, Purdue University, West Lafayette, Ind., Spring 1994.

21. To appreciate the interpretable (and *therefore* evolutionary) nature of even code-like constitutions, consider the semantic field of a specific bird—say, a chicken. On the face of it, *chicken* seems to be a significantly narrower concept than the concepts in the more code-like provisions of the new Russian Constitution. *See, e.g.*, KONST. RF art. 37, § 4 (constitutionalizing the right to strike during labor disputes). Yet not even the relatively narrow semantic field of *chicken* can escape linguistic evolution during a legal dispute. *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (answering the perennial question, *What is chicken?*). To say the least, arguing that a code-like constitution cannot evolve is overstating the case.

22. *See generally* KONST. RF arts. 94-109 (defining the duties of the Federal Assembly).

that it has fourteen days to begin the approval process of all bills sent to it by the lower house, the State Duma.[23] The State Duma now knows that because "the bearer of sovereignty and the sole source of power in the Russian Federation is its multinational people,"[24] and because "[t]he acts of parliament must embody the interests of the majority in society and not only of just a parliamentary majority," "the legitimacy of adopted laws can be guaranteed only by an interpretation of the concept of 'the total number of deputies' as their constitutional number—450 deputies of the State Duma . . . ."[25] And the Russian citizenry now knows that the code-like constitutional right to housing means, among the untold other things it will come to mean as the right evolves, that a statute governing "the right of a renter to settle other citizens in the residential premises being occupied by" the renter cannot have a "blanket character" that permits arbitrary application.[26] When it was adopted, the code-like Russian Constitution neither denoted nor necessarily connoted any of the preceding interpretations. In practice, the new Constitution has merely provided a group of premises against which all governmental acts in the Russian Federation can be measured. The framers of the Russian Constitution endowed it with a specificity at its inception that the U.S. Constitution has acquired only after more than 200 years of accumulating "the gloss which life has written upon [it]."[27] The particularity of the Russian Constitution has not foreclosed democratic debate.[28] It has merely defined relatively mature places for constitutional disputes to begin.

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23. In the Case Concerning the Interpretation of Part 4 of Article 105 and Article 106 of the Constitution of the Russian Federation, Decree No. 1-P of the Constitutional Court of the Russian Federation, 23 March 1995; Ross. Gazeta, 29 Mar., 1995, p. 11, *translated in* 31 STATUTES & DECISIONS: THE LAWS OF THE USSR AND ITS SUCCESSOR STATES 57-62 (July-Aug. 1995).

24. *Cf.* KONST. RF art. 3, § 1 ("The multinational people of the Russian Federation shall be the vehicle of sovereignty and the only source of power in the Russian Federation").

25. In the Case Concerning the Interpretation of Articles 103 (Part 3), 105 (Parts 2 and 5), 107 (Part 3), 108 (Part 2), 117 (Part 3), and 135 (Part 2) of the Constitution of the Russian Federation, Decree No. 2-P of the Constitutional Court of the Russian Federation, 12 April 1995; Ross. Gazeta, 20 Apr., 1995, p. 3, *translated in* 31 STATUTES & DECISIONS 63-76, 64, 65 (July-Aug. 1995).

26. In the Case Concerning Verification of the Constitutionality of Parts One and Two of Article 54 of the Housing Code of the RSFSR [Russian Soviet Federated Socialist Republic] in Connection with the Appeal of L.N. Sitalova, Decree of the Constitutional Court of the Russian Federation, 25 April 1995; Ross. Gazeta, 5 May, 1995, p. 3, *translated in* 31 STATUTES & DECISIONS 79-85, 82 (July-Aug. 1995) [hereinafter *Housing Code Case*].

27. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

28. If the Russian Constitution causes the "disaster" that Sunstein predicted, the Russian people may put their Constitution's more code-like provisions (whatever each of those provisions may signify from one year to the next) to democratic debate via the Russian Constitution's amendment provisions. *See* KONST. RF arts. 134-137.

The Russian Constitutional Court is a civil-law court interpreting a civil-law instrument according to a civil-law approach to adjudication. It behooves American commentators to appreciate each of those elements. Our analysis of the East European constitutions—and the advice we offer on the basis of our analyses—will be more productive if we read those instruments for what they are, rather than for their failure to conform with what our common-law American experience says a constitution should be. The Russian Constitutional Court undoubtedly would agree in the abstract that "[t]he pole-star for constitutional adjudications is John Marshall's greatest judicial utterance, that 'it is a constitution we are expounding.'"[29] In practice, however, the Court's definitions of *constitution* and the manner in which one expounds a constitution would diverge sharply from ours. Accordingly, this note will demonstrate that Russian law in general follows the civil-law tradition, and that the Russian Constitutional Court in particular resolves even its relatively abstract constitutional disputes through an essentially civilian methodology.

More generally, this note hopefully will encourage further study of the Russian Constitutional Court; American common lawyers have at least as much to learn from lawyers trained in the civil-law tradition as civil lawyers

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29. *Youngstown Sheet & Tube Co.*, 343 U.S. at 596 (Frankfurter, J., concurring) (quoting McCulloch v. Maryland, 17 U.S. 316, 407 (1819)). For an example of one Russian justice's recognition of the foundational nature of the Russian Constitution, see a dissent that is worthy of great principled dissents such as Justice John Marshall Harlan's in Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954), or that of Justice Stephen Fields in the Slaughter-House Cases, 83 U.S. 36, 83-111 (1872), in In the Case Concerning Verification of the Constitutionality of Edict No. 2137 of the President of the Russian Federation "On Measures for the Restoration of Constitutional Legality and Law and Order on the Territory of the Chechen Republic" of 30 November 1994; Edict No. 2166 of the President of the Russian Federation "On Measures for the Cessation of the Activity of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict" of 9 December 1994; Decree No. 1360 of the Government of the Russian Federation "On Provision for the State Security and Territorial Integrity of the Russian Federation, Legality, the Rights and Freedoms of Citizens, and the Disarmament of Illegal Armed Formations on the Chechen Republic and the Regions of the North Caucasus Contiguous to It" of 9 December 1994; and Edict No. 1833 of the President of the Russian Federation "On the Fundamental Provisions of the Military Doctrine of the Russian Federation" of 2 November 1993, Decree No. 10-P of the Constitutional Court of the Russian Federation, 31 July 1995; Ross. Gazeta, 11 Aug., 1995, pp. 3-7, *translated in* 31 STATUTES & DECISIONS 48-94, 66 (Sept.-Oct. 1995) (Luchin, J., separate opinion) ("If one were to agree [with the majority] that the Edicts of the President and the decrees of the Government are in accord with the Constitution, then involuntarily the question arises: What kind of Constitution is it on the basis of which decisions can be adopted that open the way to war with its own people?") [hereinafter *Chechen Crisis Case*].

See generally Mark F. Brzezinski, *Toward "Constitutionalism" in Russia: The Russian Constitutional Court*, 42 INT'L & COMP. L.Q. 673 (1993); and Molly Warner Lien, *Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion*, 30 STAN. J. INT'L L. 41 (1994).

have to learn from us. At the very least, the Court's opinions can serve as a basis for reevaluating the comparatively broad discretion enjoyed by American judges. As one American commentator has noted, "Whatever the historical reality, it is clear that discretion has largely triumphed in the modern legal sensibility. Discretion is everywhere; 'formalist,' 'formalism,' and the like are epithets, even in the word processors of the most conservative judges."[30] Because it is a civil-law court, the Russian Constitutional Court's discretionary jurisdiction is (at least in theory) narrow and strictly defined; the nineteen judges on the Court (usually) strive to implement the law as they find it and to leave the business of outright legislation to the legislature. Moreover, the compact, syllogistic, civilian style of the Court's published opinions proves that the power of judicial review and disciplined analysis can coexist. The contrast between the Russian Court's opinions and the steady diet of discursive, judge-made law in American law schools could make for a productive pedagogy.

Finally, in the interest of clarity it is important to establish what this note is not. First, it is not a study of substantive Russian constitutional law. This note's primary subject is an attitude toward law that expresses itself in a particular approach to legal reasoning. Thus, the substantive law in the cases analyzed in Part IV of this note is irrelevant. Although this study must of course refer to the substance of Russian constitutional law, the substantive law of the analyzed disputes is important only to distinguish one case from another. Whether the Russian Constitutional Court is adjudicating the constitutionality of a presidential attempt to fuse two security ministries into one superministry of security, the constitutionality of a renegade republic's unilateral attempt to vote out the superior sovereign, or the constitutionality of presidential edicts and a governmental decree that order the use of military force to silence civil conflict, in all of these cases the Court resolves disputes through a consistent approach to legal reasoning. Regardless of the substantive constitutional law at issue, this note addresses the manner in which the Court identifies and applies the law.

Further, this note is not an excursion into twentieth-century influences on the contemporary Russian legal system. This study blithely assumes that almost seventy-five years of Soviet socialist rule had no effect on the development of the essentially civilian nature of contemporary Russian

30. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71 (1993). Contrast Laycock's observation with the following exchange between a Russian reporter and the second Chairman of the Russian Constitutional Court: Q—"Are not the members of the Constitutional Court afraid of being reproached for their purely formal approach to things?" A—"No, we stand firmly on a position of principle: everyone must adhere to the Constitution and to nothing else." Interview by Valentin Maslennikov with Vladimir A. Tumanov, former Chairman of the Russian Constitutional Court, Ross. Gazeta, 19 Apr., 1995, pp. 1-2, *translated in* 31 STATUTES & DECISIONS 76-79, 79 (July-Aug. 1995) [hereinafter *Tumanov Interview*].

constitutional adjudication. Some commentators, publishing in the year of Gorbachev's ascendancy, have argued persuasively that the methodological innovations of socialist law qualified it as a third legal tradition alongside the civil- and common-law traditions:

> Even though the methodology of socialist law is deeply rooted in the civil law [*sic*] tradition, the socialist legal tradition has in turn evolved two methodological devices that are totally unknown to the civil law [*sic*] system. One of these is . . . a form of elasticity in its law of judicial procedure that permits it to be expanded or contracted like an accordion to suit the needs of the state. Because of this built-in element of malleability, socialist law of judicial procedure . . . contemplates the parallel existence of legal regularity and legal irregularity in the way it handles different cases. The very notion of legal irregularity or legalized lawlessness is a unique contribution of socialist law, especially Soviet law, to the general theory of law. . . . [I]n socialist law . . . the law expressly sanctions the unequal treatment of certain privileged or disfavored litigants.[31]

Of course, it is precisely that "parallel existence of legal regularity and legal irregularity," based on the socialist premise that the community's rights always trump the individual's, that the new Russian Constitution emphatically abolished. Under the Russian Federation's new Constitution, as a matter of constitutional law Russian citizens no longer exist to serve the state. Now, "[m]an, his rights and freedoms shall be the supreme value. It shall be a duty of the state to recognize, respect and protect the rights and liberties of man and citizen."[32]

Thus, after the Soviet Union's collapse in 1991, the unique contributions of socialist law are becoming more important academically than as a description of present realities in Russian law:

> [W]ith the decline of Soviet socialism has come a decline in the significance of socialist law. In most of the socialist nations,

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31. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL LAW, COMMON LAW AND SOCIALIST LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, WEST GERMAN, ENGLISH AND SOVIET LAW 679 (1985).

32. KONST. RF art. 2. *Contrast* KONSTITUTSIIA (SOYUZ SOVYETSKIH SOZIALISTICHESKIH RESPUBLIC) [CONSTITUTION OF THE USSR] (1978, as amended through 1990) preamble ("The ultimate purpose of the Soviet State is the building of a classless communist society in which social communist self-administration is being developed"), *translated in* BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 4 (W.E. Butler trans. and ed., 1991).

> socialist law was little more than a superstructure of socialist concepts imposed on a civil law [*sic*] foundation. With the end of the Soviet empire the superstructure is being rapidly dismantled . . . .[33]

Although several decades of Communist rule undoubtedly have left residual effects on contemporary Russian law, the scope of those effects narrows considerably when viewed against the panorama of Russian history. As Harold J. Berman has observed, contemporary legal systems are only surface expressions of deeper, broader forces of cultural evolution:

> Law cannot be neatly classified in terms of social-economic forces. A legal system is built up slowly over the centuries, and it is in many respects remarkably impervious to social upheavals. This is as true of Soviet law, which is built on the foundations of the Russian past, as it is of American law, with its roots in English and Western European history.[34]

It follows that Berman's oft-cited observation is as true of post-Soviet law as it was of Soviet law: the cultural forces that permitted Communist domination in Russia did not begin in 1917, nor did they end in 1991.[35]

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33. JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA vii (1994) [hereinafter MERRYMAN ET AL.].

34. HAROLD J. BERMAN, JUSTICE IN THE USSR 5 (2d ed. 1963).

35. *See* SHARLET, *supra* note 13; and ALEXANDER YAKOVLEV, STRIVING FOR LAW IN A LAWLESS LAND: MEMOIRS OF A RUSSIAN REFORMER 11 (1996) ("Historically, [in Russia] the law was not considered to be a real ingredient of normal life but something imposed from above, more often than not a burden, if not actually a yoke").

Not surprisingly, the legal system of post-Soviet Russia does bear at least one disturbing substantive similarity to the legal system in Soviet Russia. For Western commentators, the Soviet Civil Code contained one particularly controversial clause which provided that "[t]he law protects civil (*i.e., private*) [*sic*] rights except in the case when they are exercised in contradiction to their social economic [*sic*] destination," *quoted in* Valerian E. Greaves, *The Social-Economic Purpose of Private Rights: Section 1 of the Soviet Civil Code: A Comparative Study of Soviet and Non-communist* [*sic*] *Law*, 12 N.Y.U. L.Q. REV. 165, 165 (1934). *See also* 13 N.Y.U. L.Q. REV. 441 (1935) (concluding installment of preceding citation).

The new RF Civil Code adopted in October 1994 contains the following provision: "Civil rights may be limited on the basis of Federal law and only to the extent to which this is necessary for the protection of the principles of the constitutional system, morality, health, rights and lawful interest of other persons, guarantee of the country's defense and the security of the state." GRAZHDANSKII KODEKS RF (Civil Code) art. 1, § 2 (1994), *translated in* 1994 WL 765547 [hereinafter GK RF]. Rather than rush to denigrate the new legal system by equating it with the old, however, to explain the similarity between these two provisions we would do well to follow Berman and search for an older, deeper cause. *See supra* text accompanying note 34.

Regardless of the residual impact that almost seventy-five years of Soviet ideology might still have on Russian law, this note will ignore that impact to concentrate on the methods of legal reasoning used by the civil lawyers who have comprised the Russian Constitutional Court.

Toward that end, this study will proceed in three gradually narrowing stages. Part II establishes the general foundation of the civil-law tradition, distinguishing it from the common-law tradition where appropriate to identify more sharply the features that typically characterize legal inquiry in civil-law countries. Building on that basis, Part III then focuses on several qualities of the Russian legal system that illustrate its civil-law heritage. Finally, Part IV narrows the two preceding inquiries to an examination of the analytic methodology employed by the Russian Constitutional Court in three disputes: the Internal Security Case,[36] the Tatarstan Referendum Case,[37] and the Chechen Crisis Case.[38]

II. FIRST PRINCIPLES OF THE CIVIL-LAW TRADITION

Most of the characteristics commonly associated with the civil-law tradition—comprehensive codes, an official preference for positive law in the judicial process,[39] the accompanying absence of a formal doctrine of *stare decisis*,[40] statutorily allocated and statutorily defined discretionary

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36. In the Case of the Verification of the Constitutionality of Edict No. 289 of the President of the RSFSR of 19 December 1991 "On the Establishment of the Ministry of Security and Internal Affairs of the RSFSR," Decree of the Constitutional Court of the RSFSR, 14 January 1992; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RSFSR AND THE SUPREME SOVIET OF THE RSFSR, 1992, No. 6, Item 247, *translated in* 30 STATUTES & DECISIONS 9-19 (May-June 1994) [hereinafter *Internal Security Case*].

37. In the Case of the Verification of the Constitutionality of the Declaration of State Sovereignty of the Republic of Tatarstan of 30 August 1990, the Law of the Republic of Tatarstan of 18 April 1991 "On Amendments and Additions to the Constitution (Fundamental Law) of the Republic of Tatarstan," the Law of the Republic of Tatarstan of 29 November 1991 "On the Referendum of the Republic of Tatarstan," and the Decree of the Supreme Soviet of the Republic of Tatarstan of 21 February 1992 "On the Conduct of a Referendum of the Republic of Tatarstan on the Question of the State Status of the Republic of Tatarstan," Decree of the Constitutional Court of the RSFSR, 13 March 1992; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RSFSR AND THE SUPREME SOVIET OF THE RSFSR, 1992, No. 13, Item 671, *translated in* 30 STATUTES & DECISIONS 32-48, 48 (May-June 1994) [hereinafter *Tatarstan Referendum Case*].

38. *See supra* note 29.

39. "[I]n civil law [*sic*] systems the starting point for legal reasoning is formed by the provisions of the written law." J.G. SAUVEPLANNE, CODIFIED AND JUDGE MADE [*sic*] LAW: THE ROLE OF COURTS AND LEGISLATORS IN CIVIL AND COMMON LAW SYSTEMS 1 (1982). Contrast this preference for positive law with the preference in a common-law jurisdiction such as the United States, where legal reasoning sometimes also begins with statutes—but, when it does, it usually does so only as a prelude to on-point case law.

40. "Civil law [*sic*] theory does not recognize the existence of a formal doctrine of *stare*

jurisdiction of courts,[41] the use of concentrated rather than diffuse judicial review,[42] even "code-like constitutions"[43]—ultimately exist to promote one overriding value: certainty in the law.[44] Roughly three times older than the common-law tradition, the civil-law tradition is now about 2,500 years old,

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decisis. Thus, judicial pronouncements are not binding on lower courts in subsequent cases, nor are they binding on the same or coordinate courts." GLENDON ET AL., *supra* note 31, at 208. *See also* MAARTEN HENKET, STATUTES IN COMMON LAW AND CIVIL LAW: THEIR INTERPRETATION AND STATUS 6 (1991) ("formally [in civil-law countries] precedent is not binding—it only has persuasive force").

41. *See, e.g.*, GK RF art. 6, § 2: "Where it is impossible to use analogy of [legislation regulating similar relations], the rights and obligations of the parties shall be determined proceeding from the general principles and meaning of civil legislation . . . and the requirements of good faith, common sense and fairness." Even in the United States, a mixed common-law/civil-law jurisdiction such as Louisiana, following its civil-law premises, must undertake the formidable task of legislating judicial discretion: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." LA. CIV. CODE ANN. art. 4 (West 1988). *See generally* Hessel E. Yntema, *Equity in the Civil Law and the Common Law*, 15 AM. J. COMP. L. 60 (1967).

Discretion and equity are not synonyms; in its procedural sense, equity is a subset of discretionary adjudication. Vernon V. Palmer has articulated a concise definition of procedural equity whose two elements are (1) discretionary adjudication (2) that is based on the judge's notions of standards of fairness. Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 11 (1994) (equity is now "the exercise of discretion in the pursuit of greater fairness"). Thus, it is possible to sever discretion from this definition and base discretionary adjudication on other standards besides substantive equity (*i.e.*, fairness).

An example of discretionary adjudication that is more relevant to a study of the Russian Constitutional Court is the discretion that occurs when a court resolves a conflict between two or more statutes that speak *in pari materia* but cannot be reconciled. There, instead of fairness, the standard that measures the court's discretion is legislative intent. *See, e.g.*, Freeman v. State, 658 N.E.2d 68 (Ind. 1995) (using rules of construction to divine legislative intent and resolve a conflict between two statutes that would have imposed a double enhancement of the defendant's penalties had both statutes been applied); and Ferdinand Fairfax Stone, *The So-Called Unprovided-For Case*, 53 TUL. L. REV. 93, 96 n.14 (1978) (quoting former LA. CIV. CODE ANN. art. 17 (since repealed), which provided that "[l]aws *in pari materia*, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another").

42. *See* Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201, 1205-06 (1995). Judicial review is "concentrated," as in the Russian Federation and in most East European and European countries, when only one court, isolated from the ordinary judicial system, is vested with the power to review the constitutionality of legislative and executive actions. Judicial review is "diffuse," as in the United States, when the review power is vested in courts at all levels of the judicial system. *See also* Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741, 743-47 (1992) [hereinafter Schwartz, *New Courts*].

43. Lessig, *supra* note 5, at 104.

44. JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 50 (1st ed. 1969) [hereinafter MERRYMAN].

having begun in 450 B.C., "the supposed date of publication of the XII Tables in Rome."[45] The tradition thus began with an attempt to establish certainty in the law through a positive statement of "the law." A little more than 1,000 years later, another defining moment in the tradition occurred when Justinian published another comprehensive positive statement of "the law," his monumental *Corpus juris civilis,* in A.D. 533.[46] Moreover, throughout the tradition's development, the value placed on certainty in the law had caused the specific legal systems in the tradition to constrict the necessarily interpretive judicial function[47] because "the law" cannot be certain if it must change to accommodate the whims and prejudices of individual judges. But it was only upon a much later defining moment in the tradition, the French Revolution, that the judiciary began to meet the level of disrespect that persists in civil-law countries today.[48] With the French Revolution, egalitarianism required an increased trust in representative legislative bodies at the further expense of trust in the judiciary. "Distrust of the judiciary[,] which was identified with the *ancien regime,* contributed to the view that as little room as possible should be left to the courts in interpreting and, as it was feared, thereby distorting the sense of the law."[49] The French judiciary's established (and apparently well-deserved) reputation for corruption only exacerbated the French impulse to keep the judiciary in check.[50]

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45. MERRYMAN ET AL., *supra* note 33, at 4-5.

46. *Id.* at 5. The reprinted excerpt (in MERRYMAN ET AL., *supra* note 33, at 4-5) from the first edition of Merryman's CIVIL LAW TRADITION provides a humbling perspective on the place of the common-law tradition in the scheme of things: "It is sobering to recall that when the *Corpus juris civilis* of Justinian was published . . . the civil law [*sic*] tradition . . . was already older than the common law is today." *Id.* The date traditionally assigned as the beginning of the common-law tradition is 1066 A.D., when William the Conqueror invaded England. *Id.* at 4-5.

47. MERRYMAN, *supra* note 44, at 36.

48. "Bulgarians are not as respectful of judges as we are in [the United States]. Many consider judges to be almost on the order of government clerks and some were appalled at the thought that judges could nullify laws passed by the National Assembly, the representative of all the people." BERNARD SIEGAN, DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM 2 (2d ed. 1994). Bulgaria is a civil-law country. Sheive, *supra* note 42, at 1207.

49. SAUVEPLANNE, *supra* note 39, at 7.

50. MERRYMAN, *supra* note 44, at 16-17. It is interesting to compare the ethical reputation of the eighteenth-century French judiciary, whose legal acumen was commonly for sale to the landed aristocracy, *id.*, to the reputation of the ordinary judges who sat under Communist rule:

> During the Communist period, the public viewed the Central and Eastern European judiciary as incompetent and corrupt, equating judges and the judicial system with the state and the Communist Party. [footnote omitted] The term 'telephone justice' was popularly coined to describe a common practice in which state officials would contact judges and tell them how to rule in particular cases.

Combined with the traditional civil-law value of certainty in the law, the French Revolution's rationalist, egalitarian ideology enabled Napoleon in 1804 to create and publish the French Civil Code. Because it was the product of human reason and covered all general areas of civil relations, the Code's drafters presumed to consider it complete; one of the rationalist premises of the Enlightenment was that, through reason, humans may know a subject completely.[51] Moreover, as an expression of the will of the people, the Code was also presumed to be complete in the sense of being a complete statement of "the law" (of private, rather than public or criminal, relations) that needed no supplementation from the judiciary. The Code expressly granted carefully defined discretionary authority to the courts—which meant that "the discretionary power [would always] . . . be exercised within the scope of the written law."[52] Further, the purported completeness with which the Code expressed the public will implied a strict separation of the legislative and judicial powers: because the legislature had legislated entirely, no room remained for the judiciary to legislate, either through discretion or through reliance on previous judicial decisions.[53] *Stare decisis* cannot exist in any formal, binding sense in civil-law countries because the doctrine conflicts with the premises upon which such countries conduct the business of law.[54]

[footnote omitted]
Sheive, *supra* note 42, at 1207-08.

51. Angelo Piero Sereni, *The Code and the Case Law, in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD 55-79, 57 (Bernard Schwartz ed., 1956). What we now see as the intellectual naiveté of this presumption, though, clearly was recognized by one of the principal drafters of the French Civil Code, Portalis: "The function of the law is to determine . . . the general precepts of the law . . . rather than to go into the details of questions that may arise with regard to each particular matter. It is for the judge and the lawyer . . . to attend to its implementation. . . . The codes of nations shape up with the passage of time; properly speaking, they are not drawn up by the legislature." *Id.* at 62.

52. *Id. Cf.* GK RF art. 6, § 2, and LA. CIV. CODE ANN. art. 4 (West 1988), *supra* note 41. *Contrast, e.g.,* IND. CODE ANN. § 1-1-4-1(1) (West 1996) (in a jurisdiction in which the judge's discretionary powers are inherent rather than statutory, this "rules of construction" statute's most stringent requirement is that "[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense").

53. Sereni, *supra* note 51, at 65. And this strict separation of powers was not only implied. *See* Bernard Rudden, *Courts and Codes in England, France and Soviet Russia,* 48 TUL. L. REV. 1010, 1012 (1974) (quoting Article 5 of the French Civil Code: "'Judges are forbidden to decide the cases submitted to them by laying down general rules.' (*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.*)") [hereinafter Rudden, *Courts and Codes*].

54. Even in common-law countries, though, where the doctrine is formally binding—*i.e.*, where the judiciary formally creates law to cover for incomplete legislative enactments—the doctrine of *stare decisis* is not absolute. Especially in the United States, *stare decisis* is only "a 'principle of policy' . . . and not 'an inexorable command.'" United States v. IBM, 116 S.Ct. 1793, 1801 (1996). Between 1971 and 1992, for example, the U.S. Supreme Court "overruled in whole or in part 34 of its previous constitutional decisions."

It is for these reasons that codes in civil-law countries are best understood as "the expression[s] of an ideology."[55] Codes in *common-law* countries "do[] not propose completely to supersede the pre-existing traditional law governing the topics covered by [them], nor do[] [they] propose to lay down general principles of [their] own."[56] That is precisely, however, what codes in civil-law countries do propose to do. Whereas common-law codes seek primarily to "clarify[] doubtful points, settl[e] the law with regard to particular questions relating thereto, and implement[] pre-existing rules and principles,"[57] codes in civil-law countries purport to enact a "legislative novation"[58] in which "the validity and binding force of [even the codes'] various [preexisting] provisions [are] exclusively dependent on the fact that they ha[ve] been merged with the new enactment."[59] Such legislative completeness renders the ordinary judge in civil-law countries as "a civil servant . . . a kind of expert clerk [whose] . . . function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union."[60] Under the prevailing assumptions about the separation of legislative and judicial powers, in civil-law countries judicial work traditionally is seen as requiring no great intellectual gifts:

> The prevailing image of the judge tends to become self-justifying. The career is attractive to those who lack ambition, who seek security, and who are unlikely to be successful as practicing lawyers or in the competition for an academic post. . . . The legal profession has a clearly defined class structure; judges are the lower class.[61]

Further, "[in civil-law countries,] judges are 'career judges' who enter the judiciary early in their professional careers and are promoted on the basis of

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Planned Parenthood of Southeast Pa. v. Casey, 505 U.S. 833, 959 (1992) (Rehnquist, C.J., dissenting).

55. MERRYMAN, *supra* note 44, at 27-28.

56. Sereni, *supra* note 51, at 58.

57. *Id.* at 59. *Cf.* U.C.C. § 1-102(2) (1996) ("Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions").

58. Sereni, *supra* note 51, at 57 (quoting and translating FRANCOIS GÉNY, *La Technique Législative dans la Codification Civile Moderne, in* 2 LE CODE CIVIL, 1804-1904, LIVRE DU CENTENAIRRE 987 (1904)).

59. *Id.*

60. MERRYMAN, *supra* note 44, at 36, 37.

61. *Id.* at 117-18.

seniority. Ordinary court judges . . . practice technical, rather than policy-oriented, statutory application."[62] Although it is hard for American common lawyers to picture Ben Cardozo acquiescing to such a self-concept at any point in his career, the prevailing ideology in civil-law countries traditionally has portrayed judges as unthinking "syllogism machine[s]."[63]

The "dogma [] of completeness"[64] is, of course, a fiction—but, for civil lawyers, it is a fiction "that has made all the difference."[65] As the American comparativist Merryman sees the common- and civil-law traditions, the crucial difference between the two lies not in "what courts in fact do, but in what the dominant folklore tells them they do"[66]—and the dominant folklore tells civil-law judges that they are little more than mouthpieces for the legislative will. Because this folklore has real consequences in the way judges see themselves, it accounts for several actual differences between the two traditions, more so "in the area of mental processes, in styles of argumentation, and in the organization and methodology of law than in positive legal norms."[67] Unlike American and English judges, who are used to their utterances commanding respect and deference,[68] even the more policy-oriented constitutional judges in a civil-law country such as the Russian Federation rarely include free-form philosophical disquisitions on the law in their published opinions. Instead, civil-law judges typically craft published opinions in which the court's decisions give the appearance of following

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62. Sheive, *supra* note 42, at 1205 (footnote omitted).

63. Lasser, *supra* note 5, at 1343 (quoting 1 JEAN CARBONNIER, DROIT CIVIL 18 (1967)). *But see* text accompanying and sources cited *infra* notes 117 and 121. Especially since World War II, with the advent of constitutional courts in many civil-law countries, all levels of the judiciary generally are more respected today because the prominence of constitutional judges' roles has increased awareness of the complexities inherent in even the simplest judicial decisions.

64. Sereni, *supra* note 51, at 63.

65. ROBERT FROST, *The Road Not Taken*, l. 20, *in* THE POETRY OF ROBERT FROST 105 (Edward Connery Lathem ed., 1969).

66. MERRYMAN, *supra* note 44, at 49.

67. GLENDON ET AL., *supra* note 31, at 61. *But see* F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 209 (1953) ("the leading differences between [the civil-law world] and the Common Law [*sic*] world are not differences of method or in the ways of handling source materials, but in the [substantive] concepts themselves . . .") [hereinafter LAWSON, A COMMON LAWYER LOOKS].

68. For well-known representative examples of the confident, discursive common-law nature of American and English opinions, *see* Marbury v. Madison, 5 U.S. 137 (1803); and Rylands v. Fletcher, 1 All E.R. 1861-1873. For a well-known example of a subtler extension of judicial authority beyond mere discursiveness—to a degree that would exceed a civil lawyer's comprehension—*see* Brown v. Board of Educ., 347 U.S. 483 (1954) and 349 U.S. 294 (1955). *See also* GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY (1982) (arguing that in *Brown* the Warren Court abandoned not only established rhetorical standards of evidentiary support but also traditional procedural standards of equity jurisprudence to reach the morally right result).

inevitably from statutory premises;[69] in which dictum, if present at all, is both careful and negligible; and in which the very organization and contents of the published opinions are themselves expressly required by statute.[70] The published opinions of the Russian Constitutional Court exhibit all of these typically civilian traits.[71]

III. EXPRESSIONS OF THE CIVIL-LAW TRADITION IN RUSSIAN LAW

The civilian nature of the Russian Constitutional Court's methodology has historical roots in the French Revolution. Through the French Civil Code and the French jurists' expositions of the ideology that informed their codes, nineteenth-century French adaptations of the civil-law tradition were immensely influential across Europe.[72] That ideology directly influenced Russia when "Napoleon brought the French Revolution . . . right to the doors of the Russian people."[73] Although contact with the substance of French law could not alter Russian law enough to avoid the 1917 Russian

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69. In civil-law jurisdictions, "[a]ll judicial decisions are presented as applications of statutory provisions." HENKET, *supra* note 40, at 6-7.

70. *See* Federal Constitutional Law No. 1-FKZ, On the Constitutional Court of the Russian Federation, art. 75, 21 July 1994; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RUSSIAN FEDERATION AND THE SUPREME SOVIET OF THE RUSSIAN FEDERATION, No. 13, Item 1447, *translated in* 31 STATUTES & DECISIONS 8-56, 41-42 (July-Aug. 1995) (express twelve-step guidelines to the Russian Constitutional Court on "setting forth an opinion"), *quoted infra* text accompanying note 113 [hereinafter *Law on the Court*].

On the unusual intermediary position in the Russian legal system of federal constitutional laws, whose undefined authority is less than the Constitution's but greater than that of ordinary federal laws, *see* KONST. RF art. 76, § 3 ("Federal laws may not contravene federal constitutional laws"); and Herbert Hausmaninger, *Towards a "New" Russian Constitutional Court*, 28 CORNELL INT'L L.J. 349, 386 n.122 (1995).

71. *See* Part IV, *infra*. Civil-law courts apparently expend no small effort to present the concise, certain image of the law that appears in their published opinions. For a fascinating behind-the-published-opinions glimpse of civil-law adjudication, see Lasser, *supra* note 5, at 1358-60 (text of *conclusions*, arguments urged by counsel to the justices of France's appellate *Cour de cassation*) and 1364-67 (text of a *rapport*, legal analysis presented by one justice of the *Cour de cassation* to his fellow justices). In both sets of arguments, "the method as well as the substance of the argument[s] empower case law over statutory authority." *Id.* at 1362. According to Lasser, "*Cour de cassation* decisions typically run a single typewritten page." *Id.* at 1369. The rare published *conclusions* and *rapports* "can be five times as long." *Id.* The unedited *conclusions* and *rapports*, however, "can routinely be fifty pages long." *Id.* at 1370. Lasser's study confirms the suspicion that law is a much messier and more human enterprise in civil-law countries than civil lawyers let on. *See also* GLENDON ET AL., *supra* note 31, at 208 (in civil-law countries, "the case law . . . plays an enormous role in the everyday operation of the legal system").

72. MERRYMAN ET AL., *supra* note 33, at 453-54.

73. BERMAN, *supra* note 34, at 209.

Revolution,[74] in style and underlying legal ideology, especially *vis-à-vis* the separation of power between the legislature and the judiciary, the French Civil Code was a seminal influence on the legal environment in which the members of the Russian Constitutional Court learned to think as (civil) lawyers:[75]

> The French Code (the Napoleonic Code of 1804) reflected the spirit of the French Revolution and the objective of the revolution was to get rid of lawyers by making the code complete, coherent, clear, and simple and in effect curtailing the power of the judges to make laws. . . . The underlying ideology of the Soviet codes was nearer that of the French in the sense that the drafters attempted to make the language of the code as simple, straightforward, and lucid as possible and its provisions as comprehensive as they could be.[76]

A thorough accounting of these civilian qualities in Russian law would far exceed the intended scope of the present inquiry. Here, to establish the civilian ideology's presence in the contemporary Russian legal system, three examples will suffice: the sources of law for Russian lawyers, that code-like Russian Constitution itself, and Articles 74 and 75 of the federal constitutional law "On the Constitutional Court of the Russian Federation."[77]

Russian law derives from a hierarchy of sources, with positive laws the publicly favored source. The sources of law in Russia thus accord with "the accepted theory of sources of law in the civil-law tradition[,] [which] recognizes only statutes, regulations, and custom as . . . law."[78] Whereas

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74. *Id.* at 209-24.

75. GLENDON ET AL., *supra* note 31, at 949. Of course, members of the Russian Constitutional Court, whose average age is about 55, learned to think as lawyers during the Soviet adaptations of the civil-law tradition. Indeed, all but one of the original thirteen justices on the Court were members of the Communist Party of the Soviet Union. Hausmaninger, *supra* note 70, at 381. The independence the Court has shown in its decisions, however, suggests that legal traditions have influenced their thinking more deeply than have party affiliations. *Id.* at 355, 361 (in its first seventeen decisions, the Court struck down part or all of eleven legal enactments for failure to comply with constitutional standards).

76. GLENDON ET AL., *supra* note 31, at 949 (quoting C. Osakwe, *Soviet "Pactomania" and Critical Negativism in Contemporary International Law,* 19 L. E. EUR. 291, 314 (1975)). In the twentieth century, however, the Russian Civil Codes have more closely resembled Germanic than French models. *See* Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution,* 110 L.Q. REV. 56, 61 (1994) ("In structure, general principles, and in many detailed provisions[,] [Russian civil-law] has since 1922 been largely a simplified copy of that found in Western Europe, especially in the German-speaking countries").

77. *Law on the Court, supra* note 70, at 40-42.

78. MERRYMAN, *supra* note 44, at 25. *See also* GLENDON ET AL., *supra* note 31, at 193.

common lawyers take their law where they find it,[79] Russian lawyers preferably ground their reasoning in positive law—the Constitution, statutes, ordinances, decrees and edicts, sub-statutory normative acts, and normative decisions issued by competent state authorities.[80] Although international law was only an "extra-legal source of law"[81] in the Soviet Union, today both the Russian Constitution[82] and the Russian Civil Code[83] expressly incorporate international law into the Russian legal system. (Given the cultural isolation that has marked Russian history,[84] and given the Soviet Union's frigid relations with the world community, this contemporary use of international law for norms that have positive force throughout the Russian Federation is at least as much the product of good rhetoric as it is the product of good law.[85]) As in other civil-law countries, unwritten sources such as general

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79. MERRYMAN, *supra* note 44, at 26.

80. Th. J. Vondracek, *The Relationship between Written and Unwritten Sources of Law in the Soviet Union, in* NETHERLANDS REPORTS TO THE VIIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 23-32, 23-24 (1970). This discussion of the sources of Russian law follows MERRYMAN ET AL., *supra* note 33, at vii, and disregards the peculiarly Soviet aspects of Vondracek's study.

See also In the Case of the Verification of the Constitutionality of Part Two of Point 2 of the Decree of the Congress of People's Deputies of the Russian Federation of 29 March 1993 "On the All-Russian Referendum of 25 April 1993, the Procedure for the Tabulation of Its Results, and the Mechanism for the Realization of the Results of the Referendum," Decree of the Constitutional Court of the Russian Federation, 21 April 1993; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RUSSIAN FEDERATION AND THE SUPREME SOVIET OF THE RUSSIAN FEDERATION, 1993, No. 18, Item 653, *translated in* 30 STATUTES & DECISIONS 39-62 (Sept.-Oct. 1994) (establishing the superiority of statutes among other representative enactments in the Russian legal system); and *discussed in* Hausmaninger, *supra* note 70, at 358.

Contrast a civil-law jurisdiction's clear preference for positive law with the source of law that enjoys primacy in a common-law jurisdiction: "English courts have expressed the view that a statute, except for its clear wording to the contrary, must not be construed as altering the existing common law." SAUVEPLANNE, *supra* note 39, at 22. *See also, e.g.*, The Group, Inc. v. Spanier, 1997 WL 349883, at *3 (Colo. App. June 26, 1997) (acknowledging that "[s]tatutes in derogation of the common law must be construed strictly").

81. Vondracek, *supra* note 80, at 29.

82. "The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system." KONST. RF art. 15, § 4.

83. "The generally accepted principles and rules of international law and the international treaties of the RF shall be, in conformity with the RF Constitution, a component part of the RF legal system." GK RF art. 7, § 1.

84. "Russia did not experience with Europe several of the antecedent developments in Western intellectual history." SHARLET, *supra* note 13, at 7.

85. "[T]he 1993 Constitution contains an unprecedented number of references to international law. To a large extent, the constitutional provisions on international law reflect the desire of democratic Russia to become an open and law-abiding member of the international community." Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451, 452 (1994).

principles (*e.g.*, honesty, legislative intent, substantive rather than merely formal satisfaction of rights,[86] and economy), customs, and internal instructions and unwritten laws are discernible but indefinite sources of law in Russia.[87] Notably, judicial precedent is not a publicly acknowledged source of law:[88] "the [Russian] courts are not supposed to have the power to establish norms which are generally binding. The doctrine of *stare decisis* is rejected."[89] Thus, in both its acknowledged and its unacknowledged sources of law, the Russian legal system reveals its typically civilian ideology.

Similarly, the specificity with which the framers of the Russian Constitution posited individual rights exhibits the civilian preference to leave the judiciary as little room as possible to interpret—that is, to leave the judiciary as little room as possible in which to *legislate*. The new Russian Constitution *is* a code-like constitution. For American common lawyers who are used to thinking of constitutional rights as both abstract and negative—as vague limitations on governmental power rather than as specific requirements for affirmative governmental action[90]—the first reading of the Russian Constitution can shock one's legal sensibilities. Through the Bill of Rights, the U.S. Constitution guarantees such abstract negative rights as freedoms of speech and religion[91] and freedom from cruel and unusual punishment.[92] In some provisions the Russian Constitution extends what seem to be even broader abstract negative rights than those found in their analogs in the U.S. Constitution as interpreted by the U.S. Supreme Court.[93] In other provi-

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86. *Cf.* the traditional maxim that "equity looks to the substance rather than the form," *discussed in* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 88 (14th ed. 1918) [hereinafter STORY ON EQUITY]. On substantive equity under Soviet socialist rule, see Kazimierz Grzybowski, *Soviet Socialism and the Function of Equity, in* EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 485-94 (Ralph A. Newman ed., 1973); and John N. Hazard, *"Socialist Equity" as Defined by Soviet Law, in* EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 495-518 (Ralph A. Newman ed., 1973).

87. Vondracek, *supra* 80, at 26-29.

88. *Id.* at 25-26.

89. *Id.* at 30-31 (footnote omitted).

90. *See* Sunstein, *Against Positive Rights, supra* note 3. On the common inclusion of positive, particularized rights in constitutions and international instruments since World War II, see Schwartz, *Aiming High, supra* note 16, at 25. *See also* Wiktor Osiatynski, *Rights in New Constitutions of East Central Europe*, 26 COLUM. HUM. RTS. L. REV. 111, 112 (1994) (arguing in part for "the need for the constitutionalization of human rights in East Central Europe"—*i.e.*, Poland, Hungary, the Czech Republic, and the Slovak Republic).

91. U.S. CONST. amend. I.

92. U.S. CONST. amend. VIII.

93. *See, e.g.*, KONST. RF art. 22, § 2, guaranteeing that "[a]rrest, detention and keeping in custody shall be allowed only by an order of a court of law. No person may be detained for more than 48 hours without an order of a court of law." Under the U.S. Supreme Court's interpretations of the broad search and seizure provision of the U.S. Constitution's Fourth Amendment, warrantless felony arrests are constitutional even absent exigent circumstances.

sions, however, the Russian Constitution guarantees particularized rights "to privacy of correspondence, telephone communications, mail, [and] cables,"[94] "to use [a] native language,"[95] "to leave the boundaries of the Russian Federation,"[96] "to have land in [one's] private ownership,"[97] "to remuneration for work . . . not below the statutory minimum wage, and . . . to security against unemployment,"[98] "to a home,"[99] and "to receive, free of charge and on a competitive basis, higher education in a state or municipal educational institution or enterprise."[100] These rights are not on the order of the right of a "[p]articipant in a business partnership . . . to take part in the operation of the partnership or company,"[101] of the right of "[t]he party adhering to [an] agreement [of adhesion] . . . to demand cancellation or alteration of the agreement,"[102] or of the right of a person who maintains stray animals to acquire ownership of the animals "[w]here . . . their owner is not discovered or himself fails to declare his right to these."[103] Instead, they are rights that "the multinational people of the Russian Federation"[104] consider "so fundamental and irreplaceable that [these rights] should [be made] very difficult to alter";[105] given the Russian people's history, these are rights that the Russian people felt compelled to *constitutionalize*. As such, they are rights that a civil-law country will not allow just any court of ordinary jurisdiction to adjudicate. Under the concentrated, carefully

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See United States v. Watson, 423 U.S. 411 (1976). The Russian Constitution's subsequent explicit 48-hour provision also has a direct analog in American law. Under the U.S. Constitution, though, the same right required 200 years to become "constitutional law" through case law in the *Gerstein-McLaughlin* rule. *See* Gerstein v. Pugh, 420 U.S. 103 (1975) (requiring a prompt determination of probable cause after a warrantless arrest); and County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (defining "promptness" as 48 hours). As Schwartz quite correctly observes, given the general crisis of cultural transformation in Eastern Europe, "The East Europeans don't have [the luxury of 200 years]" in which to refine a broad seizure provision down to a relatively precise temporal definition. Schwartz, *Aiming High, supra* note 16, at 26. If the framers of the Russian Constitution wanted to ensure such a definition of promptness, they were wise to constitutionalize it so that disputes over the right will now *begin* at such a relatively advanced stage of constitutional maturity.

94. KONST. RF art. 23, § 2.

95. KONST. RF art. 26, § 2.

96. KONST. RF art. 27, § 2.

97. KONST. RF art. 36, § 1.

98. KONST. RF art. 37, § 3. *See also* the roster of specific affirmative duties imposed upon the Russian government by KONST. RF art. 7, § 2, which requires, *inter alia,* that "[t]he Russian Federation shall . . . establish a guaranteed minimum wage."

99. KONST. RF art. 40, § 1.

100. KONST. RF art. 43, § 3.

101. GK RF art. 67, § 1.

102. GK RF art. 428, § 2.

103. GK RF art. 231, § 1.

104. KONST. RF preamble.

105. Schwartz, *Aiming High, supra* note 16, at 26.

restricted constitutional review preferred by civil-law countries,[106] these rights "[are] subject to the jurisdiction of only the Constitutional Court of the Russian Federation."[107] The code-like precision alone of such provisions, however, brings the Russian Constitution squarely within the civil-law tradition: the framers of the Russian Constitution assumed that they could not entirely entrust the definition of rights they considered fundamental to the judiciary. Whereas the U.S. Constitution contains a bill of individual rights to protect such rights from tyranny of the majority,[108] the Russian Constitution contains such rights because the majority sought to protect them from the vicissitudes of the judge.

The civilian distrust of the judiciary even underlay the Russian State Duma's code-like delineation of not only the Russian Constitutional Court's jurisdiction but also, as much as possible, the very manner in which the Court thinks its way to answers for, and writes its published opinions on, the constitutional questions it hears. Civil-law ideology compels legislatures to offer step-by-step directions for a mere judge's thinking process because, "[i]n the uncommon case in which some more sophisticated intellectual work is demanded of the judge, he is expected to follow carefully drawn directions about the limits of interpretation."[109] That is why even a mixed common-law/civil-law jurisdiction such as Louisiana enacts a counterintuitive "equity statute";[110] civilian distrust of the judiciary requires at least a nominal effort to legislate and restrict judicial discretion. It is also why the State Duma adopted a discretion statute for Russia's ordinary judiciary, Article 6 of the RF Civil Code:

> *Article 6. Application of Civil Legislation by Analogy*
>
> 1. Where the relations specified in . . . Article 2 of the present Code are not directly regulated by legislation or contract between the parties, and in the absence of any usage or custom of

106. *See* Sheive, *supra* note 42, at 1205-06; Schwartz, *New Courts, supra* note 42, at 743-47.

107. In the Case Concerning Verification of the Constitutionality of Articles 220(1) and 220(2) of the Criminal Procedure Code of the RSFSR [Russian Soviet Federative Socialist Republic] in Connection with the Appeal of Citizen V.A. Avetian, Decree No. 4-P of the Constitutional Court of the Russian Federation, 3 May 1995, *published in* Ross. Gazeta, 12 May, 1995, p. 4, *translated in* 31 Statutes & Decisions 85-91, 87-88 (July-Aug. 1995).

108. *See* THE FEDERALIST No. 84 (Alexander Hamilton) (arguing against demands to include a bill of rights in the U.S. Constitution as protection against potential usurpations of individual rights by the representative federal government). The phrase "tyranny of the majority" is from ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 250 (George Lawrence trans. and J.P. Mayer ed., 1969).

109. MERRYMAN, *supra* note 44, at 38.

110. LA. CIV. CODE ANN. art. 4 (West 1988), *quoted supra* note 41.

> business commerce applicable thereto, application to such relations shall be made of civil legislation regulating similar relations . . . unless this is contrary to the substance of these relations.
>
> 2. Where it is impossible to use analogy of [legislation regulating similar relations], the rights and obligations of the parties shall be determined proceeding from the general principles and meaning of civil legislation . . . and the requirements of good faith, common sense and fairness.[111]

The implicit message of Article 6 is clear: only when all else fails is a judge to rely to any substantial extent upon his or her own judgment. Otherwise, the judge shall omit his or her personal impression of analogous statutes or of equity from the court's decision.

A similar message informs Articles 74 and 75 of the Law on the Constitutional Court:

> *Article 74. Requirements made of decisions*
>
> The Constitutional Court of the Russian Federation shall adopt a decision in a case by evaluating both the literal meaning of the act under consideration and the meaning given to it by official and other interpretation or the developed practice of application of the law, as well as proceeding from its place in the system of legal acts.[112]
>
> The Constitutional Court of the Russian Federation shall adopt decrees and give conclusions only on the subject indicated in the submission and only in relation to that part of an act or compe-

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111. GK RF, art. 6.

112. For an alternative rendering of the difficult syntax in this important second clause of Art. 74, see the Law on the Court as translated in FOREIGN BROADCAST INFORMATION SERVICE (FBIS)-SOV-94-145-S (28 July 1994), at 14 [hereinafter FBIS-SOV-94-145-S (28 July 1994)]:

> The Russian Federation Constitutional Court adopts a ruling on a case by assessing both the literal meaning of the act under consideration and the meaning conferred on it by official and other interpretation or by prevailing legal-administrative practice, and also on the basis of its place within the system of legal acts.

Two native speakers of Russian who attend the Indiana University School of Law—Indianapolis (one of whom practiced law in Russia) have separately observed that the original Russian for this clause resists translation, not because it contains a Russian idiom, but because it is the product of vague drafting.

tence of a body the constitutionality of which was subjected to doubt in the submission. In adopting a decision, the Constitutional Court of the Russian Federation shall not be bound by the justifications and arguments set forth in the submission.

Article 75. Setting forth of a decision

A decision of the Constitutional Court of the Russian Federation, set forth in the form of a separate document, shall contain the following information, depending upon the character of the question under consideration:

1. the name of the decision, and the date and place of its adoption;

2. the personal composition of the Constitutional Court of the Russian Federation that adopted the decision;

3. necessary data on the parties;

4. formulation of the question under consideration, and the justification and grounds for its consideration;

5. the norms of the Constitution of the Russian Federation and the present Federal Constitutional Law according to which the Constitutional Court of the Russian Federation has the right to consider the given question;

6. the demands contained in the submission;

7. the factual and other circumstances established by the Constitutional Court of the Russian Federation;

8. the norms of the Constitution of the Russian Federation and the present Federal Constitutional Law by which the Constitutional Court of the Russian Federation was guided in the adoption of the decision;

9. the arguments in favor of the decision adopted by the Constitutional Court of the Russian Federation, and, if necessary, the arguments refuting the assertions of the parties as well;

10. the formulation of the decision;

> 11. an indication of the finality and binding nature of the decision;
>
> 12. the procedure for the entry of the decision into force, as well as the procedure, periods, and particularities of its execution and publication.
>
> A final decision of the Constitutional Court of the Russian Federation shall be signed by all of the judges who participated in the vote.[113]

In these two articles, the Russian federal legislature has done everything in its power to regulate the interpretative and writing processes of the Russian Constitutional Court: these articles exist solely because their creators assumed that the Court *needs* the precise limitations that these articles provide. Article 74 explicitly governs the Court's interpretative process; of the two articles, it is the more analogous to the typical civil-law discretion statute, particularly in Article 74's second clause (the first clause of Article 74 reproduced here). That clause requires the Court to temper the discretion in its interpretations by considering the challenged act from at least three of five specific perspectives: literal meaning, official meaning, meaning according to "other interpretation" besides official meaning, settled meaning according to "developed practice of application," and contextual meaning with reference to other legal acts.[114] Unless the Court evaluates these bases of decision in a given case, "it will be impossible to understand the real meaning, effect, and consequences of the . . . [challenged acts] under consideration."[115] A court in a common-law jurisdiction most likely would consider such perspectives when evaluating constitutional challenges

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113. *Law on the Court* arts. 74 and 75, *supra* note 70, at 40-42.

114. *Law on the Court* art. 74, *supra* note 70, at 40-41. Note that the requirement to consider settled meaning does not refer to *stare decisis*. Even where the "practice of application of the law" refers to application performed by courts (rather than to application in "administrative practice," FBIS-SOV-94-145-S (28 July 1994), *supra* note 112, at 14), in a civil-law jurisdiction the practice of application would officially be only persuasive, not binding.

The unofficial reality, however, is that "a settled line of cases . . . has great authority everywhere." GLENDON ET AL., *supra* note 31, at 208. The reality is that

> [a]s a practical matter it is generally recognized in civil law [*sic*] systems that judges do and should take heed of prior decisions, especially when the settled case law shows that a line of cases has developed. . . . Court decisions . . . are de facto legal rules whose authority varies according to the number of decisions, the importance of the court issuing them, and the way the opinion writer expresses himself or herself.

Id. at 209.

115. *Chechen Crisis Case* (Zorkin, J., separate opinion), *supra* note 29, at 76.

to legislative and executive acts—but it's that "most likely" the civilian preference for certainty cannot tolerate. In a civil-law jurisdiction, the legislature positively enacts these perspectives to narrow the gap between likelihood and certainty that the discretion inherent in all interpretation will follow accepted standards. Similarly, Article 75 meticulously disciplines the structure and contents of the Court's published decisions. Together, true to the civil-law premises that support the Russian legal system, Articles 74 and 75 are ways for Russian federal legislators to assure themselves that they have minimized the scope of judicial discretion at the Russian Constitutional Court.

IV. THE CIVILIAN METHODOLOGY OF THE RUSSIAN CONSTITUTIONAL COURT

> *Compliance with the rules is not a formality but a mandatory requirement. If we do not have order, then what right will we have to demand it from everybody else?*[116]

The very nature of judicial review implies an extraordinary degree of judicial discretion. Unlike even those private disputes for which no positive law governs, constitutional conflicts inevitably touch upon "considerations of policy that operate independently of the legal nature of the system."[117] Additionally, constitutional questions touch upon concerns that run much deeper than easily identified issues of "policy." They are questions of cultural psychology that touch upon only the articulable periphery of a culture's identity, the mere edge of that inarticulable core of "[a] legal system [that] is built up slowly over the centuries."[118] That is at least partly why the civil-law tradition, with its predominant anti-judicial bias, has until recently resisted judicial review; the U.S. has accepted judicial review since John Marshall's fiat in *Marbury v. Madison,*[119] but the civil-law countries of Western Europe generally began to incorporate constitutional review only after World War II.[120] No matter how code-like a constitution may be, it exists only in an eminently interpretable medium—language—and, much more than do other legal instruments, it implicates the most sensitive levels

116. *Tumanov Interview, supra* note 30, at 78.

117. SAUVEPLANNE, *supra* note 39, at 4.

118. BERMAN, *supra* note 34, at 5.

119. 5 U.S. 137 (1803). Originally a verb in the subjunctive mood used jussively, "fiat" aptly describes a declaration that emanates from a law-giver who comfortably claimed all the authority that the common-law tradition afforded him.

120. Schwartz, *New Courts, supra* note 42, at 741.

of a country's legal system.[121] Thus, on one level judicial review is distasteful in civil-law countries for the same reason that it meets objections in the U.S.—"when the Court invalidates the action of a . . . legislature, it is acting against the majority will."[122] Quite apart from the antimajoritarian objection, though, judicial review particularly offends civilian sensibilities because the intrinsic discretion in constitutional adjudication is so broad and because it touches the legal system so deeply.[123]

Although some established European constitutional courts have begun to claim a broad discretionary jurisdiction, "neither hesitat[ing] nor apologiz[ing] when issuing wide-ranging decisions . . . often drawing on unwritten or historical principles and values,"[124] the Russian Constitutional Court has used a conservative, text-based methodology. At this point in Russia's experiment with democracy, a conservative approach is probably the wiser course:

> Although there certainly exist settled rules that are used by courts in the interpretation and application of the laws, these existing rules provide limited guidance in the interpretation of the meaning behind the broad statements of rights and responsibilities contained in a document acknowledged to be the highest source of law. The first Constitutional Court[125] was almost

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121. For that matter, "[h]owever complete a code might seem, there will always be gaps and interstices which require the judge's exercise of discretion." Roberto G. MacLean, *Judicial Discretion in the Civil Law,* 43 LA. L. REV. 45, 51 (1982).

122. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 33 (2d ed. 1986).

123. It is thus no wonder that civil-law countries, perhaps out of psychological self-defense, hesitate "to call constitutional courts 'courts' and the judges on such courts 'judges.'" MERRYMAN, *supra* note 44, at 39. "The constitutional court . . . stands apart from the rest of the governmental apparatus, including the judiciary, and is responsible only to the nation's constitution and the values it incorporates." Schwartz, *New Courts, supra* note 42, at 745. If constitutional courts are perceived as openly fulfilling a quasi-legislative function, then they do not exceed the normal judiciary's traditionally restricted authority, and the fiction of a strict separation of legislative and judicial powers survives. Thus, because from a civil-law perspective the Russian Constitutional Court is a quasi-legislative body, its decisions can be (and are) binding on all governmental bodies throughout the Russian Federation. *See Law on the Court* art. 6, *supra* note 70, at 10.

Theoretically, the Court answers to no one but the Russian Constitution. The Court discharges its functions to "protect[] . . . the foundations of the constitutional order and the fundamental rights and freedoms of the person and the citizen and [for purposes] of provision for the supremacy and direct effect of the Constitution of the Russian Federation on the entire territory of the Russian Federation." *Law on the Court* art. 3, *supra* note 70, at 8.

124. Schwartz, *New Courts, supra* note 42, at 745.

125. The "first" Russian Constitutional Court was created by act of the RSFSR Congress of People's Deputies on 12 July 1991, further proof of the extent to which *perestroika* transformed the idea of constitutional structure in the Soviet Union: the power of constitutional

> completely free to develop its own patterns, practices, and principles for giving concrete meaning to constitutional provisions—its own "art of constitutional interpretation."[126]
>
> [T]he [second] Constitutional Court in effect [has] state[d] that it will interpret vague or nonbinding issuance strictly in accordance with its content and legal force, effectively assuming that the error or improper intent is on the side of the implementors in all such situations. This approach is in one sense quite appropriate in the Russian environment, in which a strict formal legality in interpretation may encourage a serious attention to the form and content of legal acts that has been absent in the past and is very much needed.[127]

In a word, the Russian Constitutional Court has publicly adopted a deferential *civilian* method. According to positive law, the Court has never been "almost completely free to develop its own patterns, practices, and principles for giving concrete meaning to constitutional provisions."[128] The second clause of Article 74 of the 1994 Law on the Court was a clear attempt by the Federal Assembly to prevent such freedom in the Court's interpretations, as was that clause's predecessor in the 1991 Law on the Court.[129] Within the

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review was vested in a Russian judicial body *before* the attempted coup in August 1991. *See generally* RSFSR Constitutional Court Act, 12 July 1991, *available in* 1991 WL 496580 [hereinafter RSFSR Law on the Court]. During the crisis of September and October 1993, in which security forces killed between 60 and 130 deputies of the Supreme Soviet (Parliament), President Yeltsin suspended the first Constitutional Court after it found that the President's dissolution of the Supreme Soviet was unconstitutional. *See Yeltsin Dissolves Parliament, Calls Elections*, 45 CURRENT DIGEST OF THE POST-SOVIET PRESS 1 (no. 38, 1993); *Yeltsin Decree Spells End of Constitutional Court*, 45 CURRENT DIGEST OF THE POST-SOVIET PRESS 13 (no. 41, 1993); Hausmaninger, *supra* note 70, at 350 (stating that security forces killed 62 deputies); and Dwight Semler, *The End of the First Russian Republic*, 3 E. EUR. CONST. REV. 107, 107 (1993) (stating that security forces killed 127 deputies).

The "second" Russian Constitutional Court was created, under the authority of the 1993 Constitution, on 21 July 1994. *See* KONST. RF art. 125 (vesting broad powers in the Court); KONST. RF art. 128, § 3 ("The powers, and procedure of the formation and activities of the Constitutional Court of the Russian Federation . . . shall be established by federal constitutional law"); and *Law on the Court, supra* note 70. The second Constitutional Court heard its first case in early 1995.

126. Sarah J. Reynolds, *Editor's Introduction*, 30 STATUTES & DECISIONS 5, 6 (May-June 1994).

127. Sarah J. Reynolds, *Editor's Introduction*, 31 STATUTES & DECISIONS 4, 11 (Sept.-Oct. 1995). *See also* Lessig, *supra* note 5, at 104 ("respect for textual limits is an important lesson [for drafters in the former Soviet republics] to relearn").

128. Reynolds, *supra* note 126, at 6.

129. "The RSFSR Constitutional Court, when trying the constitutionality of [a] normative act, shall have in view both its literal meaning and the construction put on it by official and

strictures imposed by Article 74, however, the Court *is* almost completely free to adjudicate the Russian Constitution as it sees fit; the Russian Constitutional Court occupies the same position in Russian constitutional law that the Jay and Marshall Courts occupy in American constitutional law. That the Russian Court's chosen methods illustrate the civil-law tradition so well says much about the strength of the Court's legal heritage.

The two most visible aspects of the Court's civilian methodology are its reliance on positive sources of law and its use (and disuse) of statutorily defined discretion.

A. *Reliance on Positive Sources of Law*

The Court's reliance on positive sources of law—primarily, of course, the Constitution—is effectively total.[130] This reliance is both direct and indirect. Direct reliance on positive law occurs when an on-point provision of a positive statement of law provides the Court with the major premise under which it can resolve a given dispute. Indirect reliance occurs when no on-point provision exists, but the Court inductively analogizes from similar provisions, perhaps even from international instruments,[131] to derive a principle by which it can decide the case.[132] A striking example of direct reliance appears in the first case that the first Constitutional Court heard, in which the Court determined the constitutionality of the edict by which Yeltsin proposed to merge the ministries of security and internal affairs.[133]

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other binding acts of interpretation, and also by the established practice of its application." RSFSR Law on the Court, art. 32 ("Limits of the RSFSR Constitutional Court's determination and rendering of finding"), § 5, *supra* note 125. *See also Tatarstan Referendum Case, supra* note 37, at 48 (Ametistov, J., separate opinion) (concurring in the result but reminding the majority that, pursuant to the RSFSR Law on the Court, art. 32, § 5, before reaching a decision the Court must consider the official interpretation of the Presidium of the Supreme Soviet of the Republic of Tatarstan of the referendum at issue).

130. Though rare, references to judicial precedent do occur. *See, e.g.*, the *Housing Code Case, supra* note 26, at 83 (pursuant to art. 74, part 2, of the Law on the Court, the majority cites an interpretation of the Plenum of the Supreme Court of the USSR, but only to establish "an official or other interpretation or a practice of the application of the law that has developed"; the Law on the Court does not bind the Court to follow the earlier court's interpretation, only to evaluate it); *Chechen Crisis Case, supra* note 29, at 61 (Kononov, J., separate opinion) (citing one of the Court's own interpretations); and *Tatarstan Referendum Case, supra* note 37, at 46 (Ametistov, J., separate opinion) (citing another of the Court's own interpretations).

131. Under the new Russian Constitution (and the RSFSR Constitution before it), international law is binding on all governmental bodies throughout the Russian Federation. *See* KONST. RF art. 15, § 4, *quoted supra* note 82.

132. *Cf.* GK RF art. 6, § 2, *quoted supra* note 41.

133. *See Internal Security Case, supra* note 36. *See also Yeltsin Loses Case in Constitutional Court: Russian Constitutional Court Voids Yeltsin Decree Merging Security, Interior Agencies as Violating Separation of Powers*, 44 CURRENT DIGEST OF THE POST-

An example of indirect reliance appears in the third issue of the third case that the first Court heard, the Tatarstan Referendum Case.[134]

In the Internal Security Case, the Court relied on more than two dozen positive statements of law in declaring Yeltsin's edict unconstitutional for violating the constitutional principle of the separation of powers. Two decrees of the Congress of People's Deputies granting emergency powers to Yeltsin[135] required him to submit to "preliminary supervision on the part of the Supreme Soviet . . . over the correspondence of draft edicts of the President . . . with the Constitution and laws of the RSFSR."[136] Yeltsin ignored the requirement and unilaterally issued the edict that would have merged the two ministries. The dispute arose when, a week after Yeltsin issued his edict, the Supreme Soviet issued a decree in which it "proposed to the President that he reverse [his] . . . Edict."[137] Deciding the case under the RSFSR Constitution, the Court found that Yeltsin's edict contradicted no fewer than sixteen constitutional provisions,[138] three statutes,[139] five decrees,[140] and one provision of an official state declaration.[141] The case

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SOVIET PRESS 13 (no. 3, 1992).

134. *See supra* note 37. *See also* In the Case of the Verification of the Constitutionality of the Practice of Application of the Law Concerning the Abrogation of a Labor Contract on the Grounds Envisioned by Point 1(1) of Article 33 of the Code of Laws on Labor of the RSFSR, Decree of the Constitutional Court of the RSFSR, 4 February 1992; GAZETTE OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RSFSR AND THE SUPREME SOVIET OF THE RSFSR, 1992, No. 13, Item 669, *translated in* 30 STATUTES & DECISIONS 19-27, 21, 22-23 (May-June 1994) (extrapolating a major premise for one basis of the decision from three constitutional provisions and another for a second basis of decision from three international instruments).

135. The two decrees were the 1 November 1991 decrees "On the Organization of the Executive Power During the Period of Radical Economic Reform" and "On Legal Provision for the Economic Reform." *Internal Security Case, supra* note 36, at 11.

136. *Id.*

137. *Id.* at 12.

138. *See generally Internal Security Case, supra* note 36 (citing KONSTITUTSIIA (ROSSIISKAYA SOVYETSKAYA FEDERATIVNAYA SOZIALISTICHESKAYA RESPUBLICA) [CONSTITUTION OF THE RSFSR] (as amended through 10 December 1992) art. 52 (inviolability of the person); art. 53 (personal life); art. 54 (secrecy of correspondence, telephone conversations, and telegraphic messages); arts. 89 and 90 (Congress of People's Deputies' right to create executive bodies); art. 104, § 2 (Congress of People's Deputies' right to resolve questions within its jurisdiction); art. 109, §§ 7, 9, 16, and 26 (Supreme Soviet's jurisdiction over the creation of ministries); art. 130 (legislative bodies' right to determine structure and competence of the Council of Ministry); and art. 121, §§ 5(4), 5(5), 5(11), 5(16), and 8 (establishing the competence of the President), *translated in* COLLECTED LEGISLATION OF RUSSIA 1-64 (W.E. Butler trans., 1993) [hereinafter KONST. RSFSR]).

139. Law "On the Council of Ministers of the RSFSR," 3 August 1979; Law "On the Republican Ministries and State Committees of the RSFSR," 14 July 1990; and Law "On the State of Emergency," 17 May 1991. *Internal Security Case, supra* note 36, at 10, 14.

140. Decree "On the Establishment of the Committee for Security of the RSFSR," Congress of People's Deputies, 15 December 1990; Decree "On the Organization of the Executive Power During the Period of Radical Economic Reform," Congress of People's

turned on the constitutional limitation on the president's lawmaking powers, which provided that "edicts of the President of the RSFSR may not contradict the Constitution of the RSFSR and the laws of the RSFSR."[142] The Court held that "the President of the RSFSR . . . exceeded the powers provided him"[143] and voided the edict.[144]

From a common lawyer's perspective, what is so striking about the Internal Security Case is not the substantive result but the focused manner in which the Court reached the result. The opinion contains no dicta: all cited positive statements of law participate directly in the Court's *ratio decidendi*. In this way, regardless of the sources the Court consulted in chambers, the Court's public issuance projects the image of a disinterested but resolute arbiter whose resolve results naturally from reasoning directly from the legislative will. Such a court need not publicly invoke the vagaries of judicial discretion.

Unlike the Internal Security Case, in which positive law directly resolved the issue before the court, one issue in the Tatarstan Referendum Case required the Court to rely on positive enactments that did not directly dispose of the question before the Court. Various aspects of federalism were at issue in the case. The dispute arose when the RSFSR Supreme Soviet and Congress of People's Deputies challenged, among other things, the Republic of Tatarstan's Declaration of State Sovereignty, which "ma[de] no mention whatsoever of the fact that the Republic of Tatarstan is part of . . . the RSFSR."[145] The RSFSR legislative bodies also challenged the decree by which Tatarstan proposed to hold a referendum in the republic on its sovereign status. The proposed referendum asked citizens of Tatarstan whether they agreed that the republic "is a sovereign state, a subject of international law that constructs its relations with the Russian Federation and other republics and states on the basis of treaties between equal parties."[146] The decree that contained this question put three issues before the Court: (1) whether the Republic of Tatarstan had a right to self-determination; (2) if so, whether Tatarstan's right to self-determination implied a right for the

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Deputies, 1 November 1991; Decree "On Legal Provision for Economic Reform," Congress of People's Deputies, 1 November 1991; Decree "On the Procedure for Bringing into Force the Law of the RSFSR 'On the Militia'," Supreme Soviet, 18 April 1991; and Decree "On the Security of the RSFSR," Supreme Soviet, 18 December 1991. *Internal Security Case, supra* note 36, at 10, 11, 13, 14.

141. Declaration of State Sovereignty of the Russian Soviet Federated Socialist Republic (12 June 1990) art. 13, *translated in* COLLECTED LEGISLATION OF RUSSIA, *supra* note 138, at 65-67.

142. KONST. RSFSR, art. 121, § 8, *supra* note 138.

143. *Internal Security Case, supra* note 36, at 14.

144. *Id.* at 12-13.

145. *Tatarstan Referendum Case, supra* note 37, at 35.

146. *Id.* at 39.

republic to question its status in the Federation; and (3) whether the referendum's goal was to violate the territorial integrity of the RSFSR and thereby "cause harm to the constitutional order of the RSFSR."[147] The Court eventually resolved the determinative third issue by directly relying on seven provisions in the RSFSR Constitution.[148] The first two issues, however, were more problematic.

On those first two issues, the Court relied on nine positive enactments as the bases for the premises under which it held that the Republic of Tatarstan did have a right to self-determination, but that the republic could not assert that right at the expense of the RSFSR's national unity.[149] Of the nine positive enactments, though, only one directly voiced a specifically Russian legislative will: a decree of the Congress of People's Deputies that broadly established "the right of peoples to self-determination" throughout the RSFSR.[150] Here, in the absence of precedent and further positive pronouncement, a common-law court likely would have resorted to abstract equitable principles in determining a people's right to assert the freedom of self-determination.[151] For example, a common-law court plausibly could

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147. *Id.* at 41.

148. *Id.* (citing KONST. RSFSR, *supra* note 138, art. 4 (obligation of state and public organizations and officials in the constituent republics to observe the RSFSR Constitution); art. 70 (inclusive nature of the relationship between the territory of the RSFSR and that of the Republic of Tatarstan and the requirement that the RSFSR must consent to any change in that relationship); art. 71 (constituent nature of the Republic of Tatarstan's relationship with the RSFSR); art. 78 (requirement that the Republic of Tatarstan's Constitution correspond to the Constitution of the RSFSR); and arts. 72, § 1; 104, § 3; and 109, § 12 (requirement of constitutional amendments to change the RSFSR's national-state structure, and the exclusiveness of the RSFSR's jurisdiction over such amendments)).

After proceeding to this third issue, the Court held against the Republic of Tatarstan: "The Republic of Tatarstan, as a part of the RSFSR and having state-legal relations with it, does not have the right to decide unilaterally, in violation of the Constitution of the RSFSR, the question of its state-legal status." *Tatarstan Referendum Case, supra* note 37, at 41.

149. *Tatarstan Referendum Case, supra* note 37, at 41.

150. *Id.* at 39. The decree was "On the Fundamental Principles of the National-State Structure of the RSFSR (on the Federation Treaty)." *Id.* This decree, however, did not directly help to resolve the ultimate question of whether the Republic of Tatarstan could *assert* its right to self-determination.

151. Recent U.S. Supreme Court decisions, however, have adopted more-precise analytical standards. *Contrast, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (redefining traditionally ambiguous constitutional standing analysis according to more-precise standards of actual injury, nexus with defendant's conduct, and redressability of injury) *with* Lister v. Lucey, 575 F.2d 1325, 1334-36 (7th Cir. 1978) (discursively applying ambiguous, generally articulated adversity-of-interests Article III jurisdictional analysis). *See also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

It is interesting to give historical and global context to common-law jurisdictions' clear trend toward codification, as well as to their (potential) trend toward sharper analytical standards. The civil-law tradition is roughly three times as developed as the common-law

have reasoned that even if the Republic of Tatarstan had a right to self-determination, principles such as those embodied in the clean hands doctrine barred the republic from prevailing in this specific dispute.[152] The RSFSR Constitution clearly conferred upon the RSFSR several sovereign rights in dispute.[153] Under traditional equitable principles, the Republic of Tatarstan therefore could assert its right to self-determination only if such an assertion accommodated all of the RSFSR's own legitimate demands.[154] Therefore, a common-law court might reason, the Republic of Tatarstan's claim against the RSFSR must fail for violating the RSFSR's just demand that Tatarstan uphold its own constitutional obligations. The Russian Constitutional Court, however, proceeding under the RSFSR Constitution's express incorporation of international law into the RSFSR legal system,[155] at this point turned to eight international instruments to define the parameters of a people's right to assert its right to self-determination.[156] Under three of those documents, the Court found that "the right to self-determination is one of the basic principles of international law."[157] Under two other of those international documents, however, "'the development and protection of one category of rights can never serve as a pretext or excuse for the release of states from [obligations concerning] the development, and protection of other rights.'"[158] Reasoning

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tradition. *See supra* text accompanying note 45. In that context, recent trends in the common-law tradition become meaningful under the theory that "[l]egal systems are more or less developed or mature, standing at different stages of evolution. When they converge, it is because the less developed system is catching up with the more developed one." John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 359-73, 387-88 (1981), *reprinted in* MERRYMAN ET AL., *supra* note 33, at 16-25, 17.

152. An equally applicable variant of the clean hands doctrine is the maxim that *he who seeks equity must do equity, discussed in* STORY ON EQUITY, *supra* note 86, at 76.

153. *See supra* note 148.

154. "[W]hatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking [the court's] interposition and aid, unless he had acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party . . . ." STORY ON EQUITY, *supra* note 86, at 79.

155. *See* the analogous provision in KONST. RF, *quoted supra* note 82.

156. International Covenant on Economic, Social, and Cultural Rights, 19 December 1966, art. 1; International Covenant on Civil and Political Rights, 19 December 1966, art. 1; Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the U.N., adopted by the U.N. General Assembly, 24 October 1970; Universal Declaration of Human Rights [date unknown], art. 29; Resolution 41/117, adopted by the U.N. General Assembly, 4 December 1986 [hereinafter *Resolution 41/117*]; Helsinki Final Act, Conference on Security and Cooperation in Europe, 1975; Final Document of the Vienna Meeting, Conference on Security and Cooperation in Europe, 1986; and Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990. *Tatarstan Referendum Case, supra* note 37, at 40-41.

157. *Tatarstan Referendum Case, supra* note 37, at 40.

158. *Id.* (quoting *Resolution 41/117, supra* note 156).

inductively from the instruments that established these principles, the Court then generalized that "[i]nternational documents emphasize the impermissibility of making reference to the principle of self-determination in order to jeopardize [another sovereign's right to] state and national unity."[159] In the context of three international statements on human rights, the Court finally concluded that "it is appropriate to proceed under the premise that international law restricts [the right of a people to self-determination] by the observance of the requirements of the principle of territorial integrity and the principle of the observance of human rights."[160] If applied deductively to the case at hand as the major premise that would resolve the dispute, the Court's inductive conclusion clearly required that the Republic of Tatarstan's claim against the RSFSR fail, and the Court so held.[161]

The hypothetical common-law court and the civilian Russian Constitutional Court reached the same result on the constitutionality of the Republic of Tatarstan's proposed referendum; the courts differed only in the precision of their analyses. To bridge the gap between the Congress of People's Deputies decree and the case at hand, the common-law court had no other basis besides fairness upon which to render its decision. To bridge the same gap, the Russian Constitutional Court analyzed specific positive statements of international law to temper the Court's discretion;[162] the Russian Court

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159. *Id.*

160. *Id.* at 41.

161. *Id.* *See also supra* note 148 (quoting the holding). The Court almost certainly would have known that the RSFSR Constitution's international-law provision, similar to KONST. RF art. 15, § 4, *quoted supra* note 82, also provided access to the international equity jurisprudence that has dared to speak its name since Justice Manley O. Hudson's influential concurring opinion in *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70, 4, 73-80 (June 28) (separate opinion of Justice Hudson). *See also generally* CHRISTOPHER ROSSI, EQUITY AND INTERNATIONAL LAW (1993). Justice Hudson advocated explicit application of equity principles in international law because "[w]hat are widely known as principles of equity have long been considered to constitute a part of international law . . . . A sharp division between law and equity . . . should find no place in international jurisprudence . . . ." 1937 P.C.I.J. at 76. Implied authority for deciding cases at the International Court of Justice on the basis of equity, according to Justice Hudson, exists in the instrument that obligates the International Court to apply "the general principles of law recognized by civilized nations." *Id.* (citing STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, § 1, para. a., *quoted in* Joseph Hendel, *Equity in the American Courts and in the World Court: Does the End Justify the Means?*, 6 IND. INT'L & COMP. L. REV. 637, 645 n.85 (1996)).

For the Russian Constitutional Court, however, the international equity jurisprudence would have had two dispositive strikes against it as a public basis for decision. First, it is judge-made law. Second, given the availability of positive, enacted norms, equity would have been available as a basis for the Court's discretion only as a last resort. *See, e.g.*, GK RF art. 6, § 2, *supra* text accompanying notes 41 and 111; and LA. CIV. CODE ANN. art. 4 (West 1988), *quoted supra* note 41. The existence of the instruments that the Court did rely on would have precluded reliance on equity to resolve the right-to-assert-self-determination issue.

162. In fairness to our hypothetical common-law court, it bears noting that the positive

clearly exercised discretion in its inductive leap from positive instruments to applicable principles of law,[163] but such discretion is also grounded in relatively precise points of reference that elevate the decision beyond mere subjectivity.[164] Whereas the common-law court's conclusion was compelled only by the court's own inherent, unaided discretion, the Russian Constitutional Court's result was compelled by the more certain, persuasive force of inductively supported logic. Such a difference is one of the defining distinctions between the common- and civil-law traditions.[165]

B. *The Use (and Disuse) of Statutorily Defined Discretion*

In addition to its almost exclusive, seemingly discretionless reliance on positive law, the Court also exhibits its civil-law foundations through its use of the statutory provision that tries to define the Court's interpretive discretion—part 2 of Article 74 of the Law on the Court.[166] As expected, the Court has expressly applied part 2 of Article 74 to guide its interpretation of challenged acts (*e.g.*, statutes, edicts, and orders).[167] A far more interesting dynamic emerges, however, when a majority of the Court proves the value of civil-law theory in the breach by ignoring part 2 of Article 74 and analyzing an act with only minimal reference to the legislatively imposed criteria;[168] the proof illustrates both the power and the danger of unregulated judicial discretion. When such proof occurs, judicial discretion itself becomes the key element in an analysis of the *Court's* analysis. In theory, the demonstrably civilian Russian Constitutional Court should follow as closely as possible the black letter of the only two instruments that govern it, the Constitution and the Federal Constitutional Law on the Court.[169] For the

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statements in the international instruments reviewed by the Russian Court were themselves based on notions of fairness. *See, e.g., supra* text accompanying note 158.

163. *See supra* quotation in the text accompanying note 160.

164. *Cf.* the analytic standards articulated in *Law on the Court* art. 74, part 2, *quoted supra* in text accompanying note 113.

165. "The civilian likes to be able to see clearly the shape and limits of the abstract concepts and doctrines with which he has to work before he starts to work with them. . . . [T]he concepts must move according to clear and definite rules . . . . The common lawyer is much more inclined to use a concept of half-known outline as soon as he knows it is capable of performing the actual limited task he wants it to perform, leaving for further consideration what its other possibilities may be. Common law [*sic*] concepts are much more like human beings whose personalities become known only by experience and may easily change in course of time." LAWSON, A COMMON LAWYER LOOKS, *supra* note 67, at 66.

166. *See supra* quotation accompanying note 112.

167. *See, e.g.*, the *Housing Code Case*, *supra* note 26, at 83 (quoting and applying art. 74, part 2, in interpreting, and invalidating, a provision of the RSFSR Housing Code).

168. *See supra* quotation of the criteria in the text accompanying note 112.

169. "The authority and procedure for the formation and activity of the Constitutional Court of the Russian Federation shall be determined by the Constitution of the Russian

most part, with its ingrained civilian aversion to discretion, it does. But, as its dissenters have pointed out,[170] the Court also occasionally fails to follow part 2 of Article 74, as it did with dramatic constitutional implications in the Chechen Crisis Case.[171]

The Chechen Crisis Case arose when the Federal Assembly petitioned the Court to verify the constitutionality of three edicts issued by Yeltsin[172] and of one decree issued by the Government of the Russian Federation.[173] Underlying the court action was the executive branch's response to conflict between the Federation and one of its constituent subjects, the Chechen Republic. Between 1991 and 1994, Chechnya had taken numerous official steps to reject the Federation's authority. Eventually the Chechens responded to the Federation's assertions of authority with sophisticated military equipment—"tanks, rocket launchers, artillery systems, and battle aircraft."[174] In response to the escalating unrest in Chechnya, on 2 November 1993 Yeltsin issued Edict No. 1833, in which he endorsed the

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Federation and the present Federal Constitutional Law." *Law on the Court* art. 2, *supra* note 70, at 8.

170. Although dissenting opinions weaken the image of certainty in the law and are not permitted in any other court in Russia, "[a] judge of the Constitutional Court of the Russian Federation not in agreement with a decision of the Constitutional Court of the Russian Federation shall have the right to set forth his separate opinion in writing." *Law on the Court* art. 76, part 1, *supra* note 70, at 42. *See also* Rudden, *Courts and Codes, supra* note 53, at 1016 (observing Russia's traditional opposition to dissenting opinions).

171. *See supra* note 29. *See also Tatarstan Referendum Case, supra* note 37, at 48 (Ametistov, J., separate opinion) (noting the Court's failure to apply Article 74, part 2's predecessor provision in the original 1991 Law on the Court).

172. Presidential Edict No. 1833 "On the Fundamental Provisions of the Military Doctrine of the Russian Federation," 2 November 1993 [hereinafter Edict No. 1833]; No. 2137 "On Measures for the Restoration of Constitutional Legality and Law and Order on the Territory of the Chechen Republic," 30 November 1994 [hereinafter Edict No. 2137]; and No. 2166 "On Measures for the Cessation of the Activity of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict," 9 December 1994 [hereinafter Edict No. 2166]. *Chechen Crisis Case, supra* note 29, at 49.

173. Governmental Decree No. 1360 "On Provision for the State Security and Territorial Integrity of the Russian Federation, Legality, the Rights and Freedoms of Citizens, and the Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and the Regions of the North Caucasus Contiguous to It," 9 December 1994 [hereinafter Decree No. 1360]. *Chechen Crisis Case, supra* note 29, at 49.

The Russian Constitution provides for four entities of federal power across the three branches of government: "State power in the Russian Federation shall be exercised by the President of the Russian Federation, the Federal Assembly (Council of the Federation and State Duma), the government of the Russian Federation and courts of the Russian Federation." KONST. RF art. 11, § 1. The Government of the Russian Federation is an administrative body, as it "exercises" the executive power. KONST. RF art. 110, § 1. Further proof of the Government's position in the executive branch is that the Government's chairman "shall be appointed by the President of the Russian Federation with consent of the State Duma." KONST. RF art. 111, § 1.

174. *Chechen Crisis Case, supra* note 29, at 56.

Fundamental Provisions of the Military Doctrine of the Russian Federation.[175] One of the Doctrine's provisions "concern[ed] the possibility of the use of the Armed Forces of the Russian Federation in the resolution of internal conflicts."[176] Because on its face Edict No. 1833 merely endorsed military force without prescribing norms with which Russian citizens had to comply, the Court found that "[n]ormative content . . . [was] absent"[177] from that edict. On 30 November 1994, Yeltsin issued Edict No. 2137, which called for "the introduction of a state-of-emergency regime on the territory of the republic" of Chechnya.[178] Under legislative definitions of a state of emergency, however, a state of emergency could not be imposed.[179] On 9 December 1994, Yeltsin issued Edict No. 2166, which charged the Government of the Russian Federation "to use all means available to the state for provision for state security, legality, the rights and freedoms of citizens, the protection of public order, the struggle against crime, and the disarmament of illegal armed formations"[180] in Chechnya. To execute the goals of Edict No. 2166, also on 9 December 1994 the Government of the Russian Federation issued its Decree No. 1360, which prescribed "[measures] [*sic*] associated with the restriction of constitutional rights and freedoms."[181] The Federation Council responded to these acts by challenging the constitutionality of Edict No. 2137, Edict No. 2166, and Decree No. 1360, alleging that the three acts "constituted a single system of normative legal acts and led to the unlawful application of the Armed Forces of the Russian Federation."[182] The Council alleged further that implementation of these acts "resulted in illegal restrictions of and mass violations of the constitutional rights and freedoms of citizens of Russia."[183] In its petition, the State Duma challenged the constitutionality of Edict No. 1833 and of Decree No. 1360 on grounds that the acts violated the Federation's constitutionally imposed internal obligations.[184]

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175. *Id.* at 56-57.

176. *Id.* at 50.

177. *Id.* at 57.

178. *Id.* at 52. This decree was not Yeltsin's first attempt to impose a state of emergency in Chechnya. *See Yeltsin's Chechen Emergency Decree Nixed,* 43 CURRENT DIGEST OF THE POST-SOVIET PRESS 14 (no. 45, 1991).

179. *Chechen Crisis Case, supra* note 29, at 53 ("the named Law is not designed for extraordinary situations such as the one that had developed in the Chechen Republic, where the federal authorities were being opposed by forces relying on illegally created regular armed formations equipped with the latest military equipment").

180. *Id.*

181. *Id.* at 57.

182. *Id.* at 50.

183. *Id.*

184. *Id.*

The Russian Constitutional Court held that it lacked subject-matter jurisdiction over Edict No. 1833;[185] that Edict No. 2137 had in effect been repealed by, and was therefore mooted by, Edict No. 2166;[186] that Edict No. 2166, charging the Government to "use all means available to the state" to silence the conflict in Chechnya, was constitutional;[187] and that the provisions in Decree No. 1360 ordering expulsion of citizens beyond the Chechen borders and depriving journalists in Chechnya of accreditation were unconstitutional.[188] Thus, according to a majority of the Court, Yeltsin's use of military force in the Republic of Chechnya complied with the Russian Constitution.

The constitutional and human consequences of that substantive backdrop acutely emphasize the need for formal, procedural limitations in the judicial process. In the Chechen Crisis Case, the Court could affirm Yeltsin's use of military force only through a demonstrably unlawful abuse of discretion—its failure to comply with the interpretive limitations legislatively imposed by part 2 of Article 74 of the Law on the Court. That clause provides that:

> The Constitutional Court of the Russian Federation shall adopt a decision in a case by evaluating *both* the literal meaning of the act under consideration *and* the meaning given to it by official and other interpretation or the developed practice of application of the law, *as well as* proceeding from its place in the system of legal acts.[189]

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185. *Id.* at 59. One of the jurisdictional provisions of the Law on the Court, art. 3, § 1(a), requires that challenged laws and acts be normative. *Law on the Court, supra* note 70, at 9. Because the Court found that Edict No. 1833 contained no normative content, *supra* text accompanying note 177, the Court therefore concluded that it had no subject-matter jurisdiction over that act. When the Court heard the Chechen Crisis Case, the Federal Assembly had provided no standards for determining normativity. *See High Court Won't Consider a "Nonnormative" Decree: Constitutional Court Puts Off Decision on Whether Yeltsin's Decree on Aiding Atomic Industry Conversion in Zheleznogorsk is a Normative Act (If Not, It Is Outside Court's Purview); Fate of Decree on Chechnya Is Involved,* 47 CURRENT DIGEST OF THE POST-SOVIET PRESS 8 (no. 23, 1995) (explaining the Court's jurisdictional requirement of normativity and predicting jurisdictional issues in the Chechen Crisis Case).

186. *Chechen Crisis Case, supra* note 29, at 58-59. The majority conceded that "the measures envisioned in [Edict No. 2137] . . . could have touched upon the constitutional rights and freedoms of citizens." *Id.* at 53. Because those measures were never implemented, however, "the effect of this Edict did not lead to [those rights'] restriction or violation." *Id.*

187. *Id.* The Court found constitutional grounds for this edict under provisions such as KONST. RF art. 80, § 2, which establishes that "[t]he President . . . shall take measures to protect the sovereignty of the Russian Federation, its independence and state integrity."

188. *Chechen Crisis Case, supra* note 29, at 59.

189. *Law on the Court* art. 74, § 2 (emphasis added), *supra* note 70, at 40-41.

The grammar of this clause dictates its statement of the law. The copulative use of the first conjunction (*both . . . and*)[190] *requires* the Court to consider at least three criteria every time it interprets a challenged act: *both* (1) the act's literal meaning *and* (2) either its official and other interpretation or the developed practice of its application, *as well as* (3) the act's contextual meaning in the overall system of legal acts. In the Chechen Crisis Case, however, the majority not only failed to explicitly invoke Article 74 as a limitation on its interpretations but also failed to implicitly consider Article 74's statutorily imposed criteria. Instead, as four of the six dissenters vigorously reminded the majority,[191] the Court reached its holdings by applying only one of the interpretive standards articulated by part 2 of Article 74. That lone standard was each act's literal meaning.[192] Under part 2 of Article 74, though, the Court's obligation to consider more than the literal meaning of each separate act was not a matter of choice.[193] In the Chechen Crisis Case, the Court thus unlawfully abused its discretion twice—once by failing to acknowledge a governing law whose existence and terms the Court undoubtedly knew,[194] and once by failing to discharge the obligations that that law imposed.

These abstract methodological considerations directly affected the result in the case; indeed, they largely (if not entirely) determined the result. By failing to consider the challenged acts in context with each other as members of "[a] system of legal acts"—as part 2 of Article 74 of the Law on the Court expressly requires—the majority could justify a piecemeal analysis through which the Court could decline to review two of Yeltsin's edicts on jurisdictional grounds, No. 1833 for lack of subject-matter jurisdiction (for its facial lack of normative content)[195] and No. 2137 for mootness. If, however, the Court had followed part 2 of Article 74 and considered all four acts as participants in one normative scheme, the Court would have had subject-matter jurisdiction over Edict No. 1833.[196] Moreover, the deprivations of constitutional rights in Edict No. 2137, which the majority

190. *See* ALLEN AND GREENOUGH'S NEW LATIN GRAMMAR 198-200 (reprint 1992) (Greenough et al. eds., 1931).

191. *See Chechen Crisis Case, supra* note 29, at 60-66 (Kononov, J., separate opinion); at 66-74 (Luchin, J., separate opinion); at 74-79 (Zorkin, J., separate opinion); and at 81-85 (Gadzhiev, J., separate opinion).

192. *See supra* text accompanying notes 185-88 (literal contents of each act separately supporting the Court's holdings).

193. *Law on the Court* art. 2, *quoted supra* note 169.

194. The Court decided the Housing Code Case, *see supra* note 26, at 83, in which the Court explicitly invoked Article 74, part 2, on 25 April 1995, only three-and-one-half months before the Chechen Crisis Case. Of course, the majority also most likely heard repeated arguments on Article 74 from the dissenters while the Chechen Crisis Case was under advisement.

195. *Law on the Court* art. 3, § 1(a), *supra* note 70, at 9.

196. *Id.*

conceded,[197] would have been viable for decision because Edict No. 2166 could not have repealed part of a coherent whole. Viewed as part of a whole, Edict No. 2137 fulfills "the role of a starter [that] . . . released the military machine."[198] In dissent, Judge A.L. Kononov read the challenged acts from more than their literal perspective:

> Taken as a whole, the Edicts of the President . . . and the Decree of the Government . . . in their meaning, content, subject of regulation, goals, and even their naming, represent a single aggregate of consistent and mutually elaborating resolutions of one and the same question—the restoration of the influence of federal power in the Chechen Republic by means of armed force.[199]

That simple shift in perspective—to the analytic standards required by positive law—most likely would have reversed the result on all three of Yeltsin's edicts; No. 2166, which the Court upheld, would have become unconstitutional by participating in an unconstitutional normative scheme. The majority wrote as if bad legislation predetermined the result.[200] Legislative defects did affect the case,[201] but not as much as did the majority's choice to ignore the law.

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197. *See supra* note 186.

198. *Chechen Crisis Case, supra* note 29, at 68 (Luchin, J., separate opinion).

199. *Id.* at 60.

200. "[I]t is likewise confirmed that 'the legal basis for the use of the Armed Forces of the Russian Federation and other troops during provision for guarantees of the constitutional order is imperfect.' This ought to have been corrected legislatively, which was not done in a timely manner" (quoting the State Duma's decree "On the Strengthening of Russian Statehood and on Measures for Exit from the Crisis That Has Arisen in Connection with the Situation in the Chechen Republic," 13 January 1995). *Id.* at 56. *See also* point 6 of the Court's decree (ordering the Federal Assembly "to put in order the legislation on the use of the Armed Forces"). *Id.* at 59-60.

At least one member of the Russian press agreed:

> The massive violation of civil rights that are recognized by the world community, the brutality and stupid unprofessionalism of the military command, the shortsightedness and irresponsibility of the federal authorities—in short, those aspects of the Chechen war that, under all humane laws, make us treat that conflict as a criminal war—are in fact in complete conformity with the letter of Russian Federation legislation as it stands today.

Sergei Parkhomenko, *Constitutional Court Rules for Yeltsin: Public Upset by Court's Finding for Yeltsin, but Judges Have to Rule on Basis of a Few Legal Documents; Rights Violations, Troops' Ineptitude, Moscow's Irresponsibility All Excused by Current Laws*, 47 CURRENT DIGEST OF THE POST-SOVIET PRESS 5 (no. 31, 1995).

201. *See supra* note 179 (quoting the Court on the current laws governing states of emergency).

The Chechen Crisis Case illustrates both the Russian Constitutional Court's civilian methodology, in the dissenters' deferential use of statutorily defined discretion, and the need for that methodology, in the majority's unacknowledged decision to modify positive law. As the dissenters well knew, Article 74 not only controls judicial discretion; ideally, by providing several specific analytic standards, it enables that discretion to reach the soundest decision in each case. Especially in a country whose history does not predispose it to respect the rule of law,[202] the formalist tendencies of the civil-law tradition, if followed, would help prevent the Court's decisions from being perceived as exercises in merely political discretion whose only purpose is self-preservation.[203]

V. CONCLUSION

Far from perfect, and decidedly un-American, the Russian Constitution nonetheless conforms with the broad strokes of the civil-law tradition in which the Russian legal system has evolved. The Russian Federation has constitutionalized many particularized rights, as the civil-law tradition's demand for certainty in the law requires. Under that Constitution, the Federation has vested the power of judicial review in one court, a concentration of the broad review power that the civil-law tradition also favors. Because of that tradition, disciplined restraint, not discretion, is the better part of even the Russian Constitutional Court's relatively abstract constitutional adjudication. Understanding that difference in perspective enables us to engage in more productive constitutional debate, both at home and abroad.

Jeffrey Waggoner[*]

202. *See* SHARLET, *supra* note 13.

203. "More than a week has gone by since the verdict in the Chechen case was handed down, but the public continues to be distressed over how Russia's Constitutional Court 'really chickened out.' Why, people are asking, did it 'do so much kowtowing to the President'? [*sic*] Is it really true that every decision it makes can still be explained primarily by the '1993 syndrome,' by a fear of dissolution, repression or, at least, a loss of privileges?" Parkhomenko, *supra* note 200. *See also supra* note 125 (on Yeltsin's unilateral dissolution of the first Constitutional Court in October 1993).

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