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# ASSESSING LEGISLATIVE RESTRICTIONS ON CONSTITUTIONAL RIGHTS: THE RUSSIAN CONSTITUTIONAL COURT AND ARTICLE 55(3)\*

PETER KRUG\*\*

## *I. Introduction*

The Constitution of the Russian Federation<sup>1</sup> includes a catalog of individual rights<sup>2</sup> and states explicitly that those rights rank in the top layer of the legal hierarchy<sup>3</sup> and operate with direct effect, enforceable through recourse to judicial bodies.<sup>4</sup> In according such elevated status to fundamental rights, the authors of the constitution also anticipated the challenge confronting the courts in reconciling the exercise of those rights with governmental restrictions that advance competing interests. Their vehicle for accomplishing this is set forth in Article 55.3, which states in full: “Human and civil rights and freedoms may be restricted by federal law only to the extent necessary for upholding the foundations of the constitutional system, morality, or the health

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1. KONSTITUTSIYA RF [KONST. RF] [Constitution] (1993), *translated in* CONSTITUTION OF THE RUSSIAN FEDERATION app. (Vladimir V. Belyakov & Walter J. Raymond eds., 1994).

2. The civil, economic, political, and social rights are enumerated in Chapter II (Articles 17-64) of the constitution, which is entitled “Human and Civil Rights and Freedoms.” *Id.* arts. 17-64, app. at 21-36.

3. Article 15.1 of the constitution states in full:

The Constitution of the Russian Federation shall be the supreme law and shall be in force throughout the territory of the Russian Federation. No laws or other legislative acts passed in the Russian Federation shall contravene the Constitution of the Russian Federation.

*Id.* art. 15.1, app. at 20.

4. Article 18 of the constitution states in full:

Human and civil rights and freedoms shall be instituted directly. They shall determine the purpose, content and application of the laws, the work of legislative and executive authority and local self-government and shall be guaranteed by the justice system.

*Id.* art. 18, app. at 22.

rights and lawful interests of other persons or for ensuring the defense of the country and state security.”<sup>5</sup>

Article 55.3 is an express statement of “broad proportionality” methodology,<sup>6</sup> containing elements similar to those found in Articles 8-11 of the European Convention of Human Rights (ECHR),<sup>7</sup> which have received extensive application in the case law of the European Court of Human Rights.<sup>8</sup> In addition, broad proportionality methodology has been a staple in the jurisprudence of a number of courts, including the European Court of Justice, the German Federal Constitutional Court, and the United States Supreme Court, but without an explicit textual basis.<sup>9</sup>

As indicated by the textual elements of Article 55.3, and applied by foreign courts, a “broad proportionality” approach requires a reviewing court to make a series of determinations, including not only an ends-means test of necessity and excessive impact (“strict proportionality”), but also threshold determinations as to whether a governmental act interferes with (or “implicates”) the exercise of constitutional rights, whether the act seeks to advance an interest deemed suitable (or “legitimate”) for an interference with such rights, and whether it indeed advances that interest.<sup>10</sup>

5. *Id.* art. 55.3, app. at 33.

6. Article 55.3 represents a departure from Soviet-era constitutions. For example, Article 39.2 of the 1977 U.S.S.R. Constitution also set forth the proposition that individual constitutional rights are not absolute, stating that: “Enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or the state, or infringe the rights of other citizens.” CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS art. 39, ¶ 2 (1977). However, unlike Article 55.3, Article 39.2 was silent regarding limits on the exercise of state authority.

7. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 8-11, 213 U.N.T.S. 221, 230-32. The second paragraph of ECHR Article 10, regarding freedom of expression, for example, states in full:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

*Id.* art. 10, 213 U.N.T.S. at 230-32.

8. Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 125-46 (Ronald St. J. Macdonald et al. eds., 1993).

9. See Jeremy Kirk, *Constitutional Guarantees, Characterization and the Concept of Proportionality*, 21 MELBOURNE UNIV. L. REV. 1, 4, 45 (1997).

10. This description draws upon a number of sources on proportionality, including: DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF*

In Russia, the judicial body primarily responsible for application of Article 55.3 is the Russian Federation Constitutional Court (the Court). The Court, which was established in 1991, was not operating at the time of the constitution's adoption and entry into force in December 1993.<sup>11</sup> Following the enactment of a new governing statute in July 1994,<sup>12</sup> the Court resumed activity and issued its first decisions construing and applying the new constitution in 1995.<sup>13</sup> Under Article 125.4 of the constitution, the Court is competent to review generally applicable parliamentary laws for their constitutionality when such enactments are the targets of individual complaints or the subject of referrals from other courts.<sup>14</sup> The Court is not competent to entertain individual complaints claiming the unconstitutionality of other governmental acts, including judicial decisions.<sup>15</sup>

My goal in this Essay is to examine the Court's treatment of certain key questions that have arisen in its construction and application of the broad proportionality methodology set forth in Article 55.3. In Part II, I will identify

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GERMANY 46 (2d ed. 1997); RAYMOND YOUNGS, SOURCEBOOK ON GERMAN LAW 108-09 (2d ed. 2002); Gráinne de Búrca, *The Principle of Proportionality and Its Application in EC Law*, in 13 YEARBOOK OF EUROPEAN LAW 1993, at 105, 105-14 (A. Barav & D.A. Wyatt eds., 1994); Eissen, *supra* note 8; Kirk, *supra* note 9; Christoph Engel, *The Constitutional Court — Applying the Proportionality Principle — as a Subsidiary Authority for the Assessment of Political Outcomes* 1, 2-10 (Oct. 2001), at [http://www.mpp-rdg.mpg.de/pdf\\_dat/2001\\_10.pdf](http://www.mpp-rdg.mpg.de/pdf_dat/2001_10.pdf) (regarding the German Federal Constitutional Court).

11. President Yeltsin's Edict of October 7, 1993 suspended the Court's activity. Robert Sharlet, *Russia's Second Constitutional Court: Politics, Law, and Stability*, in RUSSIA IN THE NEW CENTURY: STABILITY OR DISORDER? 59, 61 (Victoria E. Bonnell & George W. Breslawer eds., 2001) [hereinafter Sharlet, *Constitutional Court*].

12. On the Constitutional Court of the Russian Federation, *Sobr. Zakonod. RF*, 1994, No. 13, Item 1447, *translated in* STATUTES & DECISIONS, July-Aug. 1995, at 8-56.

13. For a summary of the Court's history, see Sharlet, *Constitutional Court*, *supra* note 11, at 59-61.

14. KONST. RF art. 125.4 (1993), *translated in* CONSTITUTION OF THE RUSSIAN FEDERATION, *supra* note 1, app. at 69.

15. The specialized Court has limited competence to consider certain constitutional questions. Article 125.4 explicitly limits the Court's competence with regard to individual complaints or judicial referrals to review of one form of governmental act: the *zakon* ("statute"), which is a generally applicable act of the Federal Assembly (the Russian Federation's legislative branch), signed by the President. *Id.* Therefore, other forms of governmental action, whether generally applicable acts, such as presidential edicts, or non-normative acts, such as judicial decisions, are not subject to the Court's review via the individual complaint or court referral process. For discussion of the jurisdictional issues in Article 125, see GENNADY M. DANILENKO & WILLIAM BURNHAM, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 71-73 (1999), and Peter Krug, *Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, 37 VA. J. INT'L L. 725, 743-45 (1997) [hereinafter Krug, *Centralized Model*].

those questions and consider the Court's treatment of them. Part III will consider the possible implications of the Court's growing case law in this area on Russian governance.

## II. Case Law

Application of Article 55.3 has become a dynamic element in the Russian Federation Constitutional Court's jurisprudence in the area of individual fundamental rights protection. My findings are based on a review of both the dozens of decrees [*postanovleniia*] and determinations [*opredeleniia*]<sup>16</sup> in which Article 55.3 has at least been mentioned since the Second Constitutional Court began its work in 1995, and the forty-five decrees which have served as a basis for the Court's decisions as to the constitutionality of normative acts.<sup>17</sup> The Court's Article 55.3 case law has ranged across both a broad spectrum of normative acts — including criminal procedure, bankruptcy, and election laws — and asserted constitutional rights, such as access to the courts, property, freedom of contract, and protections for detainees and criminal defendants.

As a general matter, the Court's case law reflects a steady growth in its apparent comfort level in addressing Article 55.3 questions, including the articulation of certain basic principles and methodologies.<sup>18</sup> As part of this

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16. For translations and explanations of the different forms of the Court's decisionmaking, see Donald D. Barry, *Decision-Making and Dissent in the Russian Federation Constitutional Court*, in *INTERNATIONAL AND NATIONAL LAW IN RUSSIA AND EASTERN EUROPE* (Roger Clark et al. eds., 2001) (Law in E. Eur., Series No. 49, 2001). *Postanovleniia* are final decisions of the Court concerning the substantive aspects of an admissible complaint or inquiry. *Opredeleniia* are other types of decisions made by the Court, including those regarding inadmissibility, procedural aspects of a case (such as postponement or termination), and clarifications of earlier Court decisions. For a detailed discussion, see Sarah J. Reynolds, *Editor's Introduction*, *STATUTES & DECISIONS*, Sept.-Oct. 2001, at 5-10.

17. For reasons similar to those set forth by Professor Barry, see *supra* note 16, at 7, I will focus on decrees in this Essay. In conducting this review of the Court's decisions, I have benefitted greatly from the extremely helpful work of Ger P. van den Berg's summary of Court decisions, Ger P. van den Berg, *Constitution of the Russian Federation Annotated with Summaries of Rulings and Other Decisions of Constitutional (Charter) Courts: 1990-2001*, 27 *REV. OF CENT. & E. EUR. L.* 175 (2002), Sarah Reynolds's translations and coordination of translations in *Statutes and Decisions*, and Gennady Danilenko and William Burnham, *DANILENKO & BURNHAM*, *supra* note 15. Among other things, the information and English translations in these works have provided very helpful backup for my translation of a number of the Court's decrees and determinations.

18. See discussion *infra* Parts II.A-II.D. The first decision of the Second Constitutional Court to cite Article 55.3 was the Court's third decree, dated April 25, 1995, in a case involving an asserted right to housing under Article 40.1 of the constitution and invalidity of a provision of the RSFSR [Russian Soviet Federated Socialist Republic] Housing Code. Decree 3-P,

evolution, a number of the Court's decisions include lively debates among the judges, reflected in separate opinions as well as the decrees themselves.<sup>19</sup> The Court's members most often participating in these debates have been Judges Kononov and Vitruk,<sup>20</sup> whose separate opinions often reflect quite disparate views on the scope and application of Article 55.3.

A reading of these cases presents an overall impression that the judges have made considerable effort to present balanced determinations regarding challenged legislative provisions. While it is difficult to provide precise numbers, in the cases where the Court has applied Article 55.3 directly as a basis for decision, roughly 50-60% of the challenged provisions have been found invalid.<sup>21</sup> On a number of occasions, the Court has examined multiple statutory provisions in individual decrees, finding that some comply with Article 55.3 and that others do not.<sup>22</sup>

The Court's Article 55.3 jurisprudence reflects the judges' efforts to address certain problems that arise generally in fashioning broad proportionality methodologies, and in applying the particular text of Article 55.3. In sections II.A-II.D, I will discuss the Court's treatment of four of these questions. The first concerns the scope of constitutional rights: when will governmental acts be deemed interferences with those rights, triggering the application of Article 55.3? The second addresses the question of which forms of governmental action may interfere with the exercise of constitutional rights. Next, in specific cases, which governmental acts advance the enumerated legitimate interests in Article 55.3? Finally, what does the word "necessary" add to the assessment of constitutional validity?

## II.A.

The threshold question in broad proportionality analysis is whether a particular governmental act somehow interferes with, or implicates, the exercise of a constitutional right. The Court's decrees have been extremely

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Sobranie Zakonodatel'stva RF [Sobr. Zakonod. RF][Constitutional Court], 1995, No. 18, Item 1708.

19. For a detailed study of dissenting opinions in the Court's practice, see Barry, *supra* note 16, at 9-17.

20. Professor Barry has identified Judge Kononov as one of the frequent dissenters on the Court and Judge Vitruk as the "foremost dissenter." *Id.* at 11, 14.

21. Providing precise numbers is challenging for a number of reasons, including the fact that in many decisions the Court has cited Article 55.3, but it is not clear that it has been a consciously applied basis for decision.

22. See, for example, *Decree 13-P*, Sobr. Zakonod. RF, 2001, No. 32, Item 3412, in which the Court examined four provisions of the Russian Federation Law "On Executorial Proceedings" and found two valid and two invalid.

liberal in addressing this question, without exception treating this requirement as having been satisfied.<sup>23</sup> This leads one to infer that the Court treats this requirement as a condition for admissibility.<sup>24</sup> Thus, once a complaint is deemed admissible, the question of whether an interference exists already has been decided. At the same time, however, the Court's decrees at times include detailed statements setting forth the Court's reasoning. For example, in its Decree of April 4, 1996, striking down a City of Moscow residency registration fee, the Court explained that governmental monetary exactions always implicate the right of freedom of movement guaranteed under Article 27.1 of the constitution and property rights protected under Article 35.<sup>25</sup> In a later decree, the Court extended this reasoning to a business enterprise's entrepreneurial rights guaranteed under Article 34.<sup>26</sup> As another example, the Court has subjected certain aspects of bankruptcy law, such as provisions granting special rights to creditors, to broad proportionality analysis on the

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23. In the Court's decrees, I have found only one published statement that rejected a Chapter II interference claim: Judge Vitruk's separate opinion in the Court's *Chernobyl Victims* decree, in which he argued that the legislative act in question — the law on compensation to victims of the Chernobyl catastrophe — did not place restrictions on rights to compensation, as claimed by the complainants. Decree 18-P, *Sobr. Zakonod. RF*, 1997, No. 50, Item 5711, at 10,109.

24. Under Article 97.1 of the Court's statute, an individual's complaint shall be admissible if "the law affects the constitutional rights and freedoms of citizens." On the Constitutional Court of the Russian Federation, *Sobr. Zakonod. RF*, 1994, No. 13, Item 1447, *translated in STATUTES & DECISIONS*, *supra* note 12, at 50. For examples of inadmissibility determinations on these grounds, see Determination 199-O, *Sobr. Zakonod. RF*, 2001, No. 48, Item 4550, at 10,025, which noted that rejection of an individual's application to be a Justice of the Peace does not implicate constitutional rights, and the Court's un-numbered *Determination* of December 21, 2000, regarding the complaint of N.A. Shagunova, in KONSTITUTIONNYI SUD ROSSIJSKOI FEDERATSII: POSTANOVLENIIA, OPREDELENIIA 2000, at 575 (2001), which stated that dismissal of a judge from her duties does not implicate constitutional rights.

25. Decree 9-P, *Sobr. Zakonod. RF*, 1996, No. 16, Item 1909, at 4201, 4203. For a detailed discussion, see N.S. Krylova, *Judicial Constitutional Control and Legal Regulation of Tax Relations in the Russian Federation and Abroad*, 3 *SUDEBNIK* 531, 543-45 (1998). Article 27.1 states in full: "Each person who is legitimately within the territory of the Russian Federation shall have the right to move freely and to choose where to live temporarily or permanently." KONST. RF art. 27.1 (1993), *translated in CONSTITUTION OF THE RUSSIAN FEDERATION*, *supra* note 1, app. at 24. Article 35.2 states in full: "Each person shall have the right to own property and to possess, use and dispose of it both individually and jointly with other persons." *Id.* art 35.2, app. at 26-27.

26. Decree 5-P, *Sobr. Zakonod. RF*, 1997, No. 13, Item 1602, at 5983. For a detailed discussion, see Krylova, *supra* note 25, at 587-90. Article 34.1 states in full: "Each person shall have the right to freely use his abilities and property for entrepreneurial or any other economic activity not prohibited by law." KONST. RF art. 34.1 (1993), *translated in CONSTITUTION OF THE RUSSIAN FEDERATION*, *supra* note 1, app. at 26.

theory that provisions affecting parties who have contracted with insolvent enterprises implicate the freedom of contract.<sup>27</sup>

In sum, as a general matter, the Court has given expansive meaning to a range of Chapter II rights.<sup>28</sup> In this way, it has extended the coverage of Article 55.3 to many types of legislative acts.

## II.B.

The second question — which forms of governmental action may interfere with the exercise of constitutional rights? — arises from the reference in Article 55.3 to federal legislative acts [*zakony*].<sup>29</sup> Does this mean that *only* federal *zakony* have the capacity to interfere with constitutional rights, or that other forms of governmental action can do so but will not be limited to the conditions set forth in Article 55.3?<sup>30</sup>

The Court's answer to this question has been consistent and clear: the only form of governmental action that can interfere with the exercise of rights is a federal *zakon* (which includes a "code" [*kodeks*], such as the Code of Criminal Procedure) or a legislative act of one of the Subjects of the Federation, enacted in strict conformity with an act of delegation by the Federal Assembly.<sup>31</sup> The Court established this interpretation in the first case involving application of Article 55.3. In that case, a federal act (Article 54.1 of the RSFSR Housing Code) was at issue, but the Court found the provision invalid because it did not specify the type of normative act required for an "established procedure" for resolving housing disputes.<sup>32</sup> Because of this ambiguity, the Court ruled that Article 54.1 failed to satisfy the Article 55.3

27. Decree 10-P, *Sobr. Zakonod. RF*, 2001, No. 29, Item 3058, at 5984-85.

28. These include, among others, rights to judicial protection under Article 46 and rights of participants in the criminal process, including suspects, accused persons, defendants, and victims of crime, in Articles 47-52. A full discussion of the Court's jurisdiction on these questions is beyond the scope of this Essay.

29. KONST.RF art. 55.3 (1993), translated in CONSTITUTION OF THE RUSSIAN FEDERATION, *supra* note 1, app. at 33; see also discussion *supra* note 15 and accompanying text.

30. For a discussion of related issues, see DANILENKO & BURNHAM, *supra* note 15, at 233-35.

31. Decrees in which the Court has applied Article 55.3 to legislative acts of the Subjects include: (1) *Decree 12-P*, *Sobr. Zakonod. RF*, 1998, No. 18, Item 2063; (2) *Decree 19-P*, *Sobr. Zakonod. RF*, 1997, No. 51, Item 5877; and (3) *Decree 9-P*, *Sobr. Zakonod. RF*, 1996, No. 16, Item 1909. I have benefitted greatly from William Burnham's insights on the matter of Subjects' legislative acts.

32. Decree 3-P, *Sobr. Zakonod. RF*, 1995, No. 18, Item 1708, at 3118; see also Decree 12-P, *Sobr. Zakonod. RF*, 1998, No. 18, Item 2063, at 3943.



requirement that constitutional rights be restricted only pursuant to a statute [*zakon*].<sup>33</sup>

This construction of Article 55.3 is potentially very important in defining the scope of the Court's review because in certain sections of Article 125 the Court is competent to review a range of generally applicable governmental acts ("normative acts") that is broader than that permitted under Article 125.4.<sup>34</sup> Another approach to Article 55.3 might have freed these normative acts from the Article 55.3 restrictions and deprived the Court of a significant component of its review powers. As I indicated, this is only *potentially* important because the Court has, to my knowledge, only applied Article 55.3 to executive branch normative acts in one significant case — the 1995 *Chechnia* decision.<sup>35</sup> In that case, the *zakon* requirement in Article 55.3 was central to a number of the Court's determinations as to which presidential edicts were valid because of their grounding in a federal *zakon*, and those which were not because the legislature did not specifically authorize them.<sup>36</sup>

### *II.C.*

Over the course of its existence, the Court has devoted its most extensive Article 55.3 analysis to the third question posed above: does the legislative act in question advance a public interest that the constitution identifies as legitimate for interference with constitutional rights? In these cases, the Court has adhered to two fundamental propositions: (1) that the Article 55.3 list of legitimate interests is exhaustive; and (2) that the interests identified in the list are to be construed narrowly. These have been evidenced in Court decrees that follow two different approaches.

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33. Decree 3-P, *Sobr. Zakanod. RF*, 1995, No. 18, Item 1708, at 3118-19. Later decisions upholding and/or expressly applying this construction of Article 55.3 include: (1) *Decree 4-P*, *Sobr. Zakanod. RF*, 1999, No. 10, Item 1254 (Russian Federation Law "On Banks and Banking Activity"); (2) *Decree 6-P*, *Sobr. Zakanod. RF*, 1998, No. 9, Item 1142 (USSR Law "On the Legal Status of Foreign Citizens in the USSR"); (3) *Decree 16-P*, *Sobr. Zakanod. RF*, 1997, No. 46, Item 5339 (Russian Federation Law "On State Borders"); and (4) *Decree 10-P*, *Sobr. Zakanod. RF*, 1995, No. 33, Item 35 (Presidential Edicts regarding the Chechen Republic).

34. Regarding the Article 125.4 limits on the Court's review when entertaining individual complaints or court referrals, see *supra* note 15 and accompanying text. "Normative acts" include not only legislative acts of the Federal Assembly (*zakony*) but also generally applicable acts of the president (both edicts (*ukazy*) and regulations (*rasporiazhennia*)) and government (decrees (*postanovleniia*)). For a discussion of the jurisdictional issues associated with the classification of "normative acts" in Article 125, see Krug, *Centralized Model*, *supra* note 15, at 743-45.

35. Decree 10-P, *Sobr. Zakanod. RF*, 1995, No. 33, Item 3424.

36. *Id.*

### II.C.1.

The first of these approaches is a case-by-case assessment of legitimacy, focusing on the specific governmental act and the Court's conclusion as to the goal that the act seeks to achieve. In applying this approach, the Court's style of presentation in its decrees has been somewhat inconsistent. In some cases, the Court has failed to clearly identify either the precise interest at stake or the Court's reasons for finding it either legitimate or illegitimate.<sup>37</sup>

On the other hand, in those cases (increasing in number) where the Court's discussion has been more focused, the Court's first step in assessing legitimacy has been to identify the relevant interest.<sup>38</sup> As a result, these decrees often are marked by a detailed textual analysis in which the Court has spent little time attempting to divine legislative intent.<sup>39</sup> Instead, the Court has concentrated on identifying the apparent interest advanced by the particular provision on the basis of its text, its place in a larger legislative act, and that act's relationship to other acts in the overall statutory scheme.

In some fifteen decrees, the Court has directly stated that either the interest was legitimate or was not legitimate. In these decrees, the Court has found legislative interests legitimate on eight occasions<sup>40</sup> and not legitimate on nine.<sup>41</sup> In two decrees the Court found at least one interest legitimate and at

37. See, e.g., Decree 7-P, *Sobr. Zakonod. RF*, 1995, No. 24, Item 2342, at 4458. Note, however, that this was one of the Court's first decrees applying Article 55.3. In a later example, the Court clearly stated that a legislative restriction on the right to social security (Article 39.1 of the constitution) did not advance a legitimate interest, but did not articulate its reasons for this conclusion. Decree 18-P, *Sobr. Zakonod. RF*, 1998, No. 25, Item 3003, at 5476. In contrast, see the clear statement from Judge Kononov in a separate opinion in a later case involving the Customs Code, in which he stated that economic policy is not one of the constitutionally recognized goals found in Article 55.3. Decree 7-P, *Sobr. Zakonod. RF*, 2001, No. 23, Item 2409. Perhaps a similar view formed the basis for the Court's holding in *Decree 18-P*, *Sobr. Zakonod. RF*, 1998, No. 25, Item 3003.

38. See, for example, *Decree 17-P*, *Sobr. Zakonod. RF*, 1996, No. 1, Item 54, which identified state security as the relevant interest. *Id.* at 275-76; see also decrees cited *infra* note 40.

39. See decrees cited *infra* note 40.

40. Decree 13-P, *Sobr. Zakonod. RF*, 2002, No. 31, Item 3160; Decree 13-P, *Sobr. Zakonod. RF*, 2001, No. 32, Item 3412; Decree 8-P, *Sobr. Zakonod. RF*, 2000, No. 21, Item 2258; Decree 8-P, *Sobr. Zakonod. RF*, 1998, No. 12, Item 1458; Decree 4-P, *Sobr. Zakonod. RF*, 1998, No. 6, Item 783; Decree 16-P, *Sobr. Zakonod. RF*, 1997, No. 46, Item 5339; Decree 17-P, *Sobr. Zakonod. RF*, 1996, No. 1, Item 54; Decree 7-P, *Sobr. Zakonod. RF*, 1995, No. 24, Item 2342. There are also a number of Article 55.3 cases in which the Court implicitly accepted the interest as legitimate and proceeded to the next step in the analysis: strict proportionality, which is discussed *infra* Part II.D.

41. Decree 13-P, *Sobr. Zakonod. RF*, 2001, No. 32, Item 3412; Decree 11-P, *Sobr. Zakonod. RF*, 2000, No. 27, Item 2882; Decree 7-P, *Sobr. Zakonod. RF*, 2000, No. 19, Item

least one not legitimate.<sup>42</sup> In those cases in which the Court expressly found a clearly identified interest legitimate, the interest usually has been protecting the rights and legal interests of others. An example is the Court's determination that legislative provisions providing for judicial supervisory review [*nadzor*] of lower court sentences in criminal cases advance the "rights and legal interests of other persons," including the victims of crime.<sup>43</sup> In another case, the Court found that a Bankruptcy Code provision permitting the transfer of property from the bankruptcy estate to a municipality advanced the protection of the rights and legal interests of others (thus, including a municipality within the definition of "others").<sup>44</sup>

One of the clearest examples of the Court's determination that an interest was *not* legitimate came in the well-known *Smirnov* case.<sup>45</sup> In this decree, the Court for the first time stated that the Article 55.3 limitations on the exercise of constitutional rights cannot be interpreted broadly.<sup>46</sup> The Court held that none of the Article 55.3 enumerated interests, including state security, could be used to justify the imposition of criminal penalties for the basic act of leaving the homeland and refusing to return.<sup>47</sup> At the same time the Court ruled that the criminalization of furnishing assistance to foreign states — such as in the transfer of state secrets — while abroad was justified under the state security interest.<sup>48</sup>

## II.C.2.

The Court has been more sweeping in its second approach to determining the legitimacy of limiting constitutional rights, identifying certain rights that are categorically insulated from governmental interference. As a result, no public interest that serves to support restrictions on these rights is legitimate for purposes of Article 55.3. Thus, in at least nine cases, the Court has ruled that certain constitutional rights, such as the Article 46 right to judicial

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2102; Decree 4-P, *Sobr. Zakonod. RF*, 1999, No. 10, Item 1254; Decree 18-P, *Sobr. Zakonod. RF*, 1998, No. 25, Item 3003; Decree 19-P, *Sobr. Zakonod. RF*, 1997, No. 51, Item 5877; Decree 17-P, *Sobr. Zakonod. RF*, 1996, No. 1, Item 54; Decree 1-P, *Sobr. Zakonod. RF*, 1996, No. 4, Item 408; Decree 8-P, *Sobr. Zakonod. RF*, 1995, No. 27, Item 2622.

42. Decree 13-P, *Sobr. Zakonod. RF*, 2001, No. 32, Item 3412; Decree 17-P, *Sobr. Zakonod. RF*, 1996, No. 1, Item 54.

43. Decree 13-P, *Sobr. Zakonod. RF*, 2002, No. 31, Item 3160, at 8097-98.

44. Decree 8-P, *Sobr. Zakonod. RF*, 2000, No. 21, Item 2258, at 4523. Because the Court here construed "others" in Article 55.3 to encompass not natural persons, but a municipality, this is a broad interpretation of that term.

45. Decree 17-P, *Sobr. Zakonod. RF*, 1996, No. 1, Item 54.

46. *Id.* at 276.

47. *Id.* at 275-76.

48. *Id.* at 276-77.

protection of rights and freedoms,<sup>49</sup> and the Article 48 right to qualified legal assistance,<sup>50</sup> belong in this category.<sup>51</sup> On a more limited basis, the Court has held that the placement of any monetary conditions on the exercise of the right of freedom of movement in Article 27 is also invalid.<sup>52</sup> On the other hand, in a number of cases, the Court has expressly stated that certain chapter II rights are not absolute and are therefore subject to restrictions consistent with Article 55.3.<sup>53</sup>

This categorical approach is grounded in two propositions. First, as to Article 46, the Court has stated that this degree of insulation is necessary because access to judicial protection is essential for effective realization of all other chapter II rights.<sup>54</sup> Second, the Court has given a broad reading to another constitutional provision: Article 56.3.<sup>55</sup> According to the Court,

49. Examples include: (1) *Decree 10-P*, *Sobr. Zakonod. RF*, 2001, No. 29, Item 3058 (invalidating limits on the rights of bank depositors whose accounts were subject to the laws on restructuring and insolvency of credit organizations); and (2) *Decree 4-P*, *Sobr. Zakonod. RF*, 2001, No. 12, Item 1138 (invalidating provisions of the 1998 Law on Bankruptcy that limited the opportunity to appeal certain categories of economic (*Arbitrazh*) court decisions). The Court first employed this approach in the second of its Article 55.3 cases, in which the Court invalidated criminal procedure code provisions that denied judicial review of arrest warrants to persons who were not actually held in detention. *Decree 4-P*, *Sobr. Zakonod. RF*, 1995, No. 19, Item 1764, at 3406.

50. *Decree 11-P*, *Sobr. Zakonod. RF*, 2000, No. 27, Item 2882 (invalidating RSFSR criminal procedure code provisions that denied defense counsel the opportunity to participate fully in criminal proceedings in which a client was interrogated as a witness but not yet named as an accused).

51. See the remarks of Judge Kononov in *Prava cheloveka v Rossii: deklaratsii, normy i zhizn'* (*materialy mezhdunarodnoi konferentsii, posviashchennoi 50-letiiu vseobshchei deklaratsii prav cheloveka*), 3 GOSUDARSTVO I PRAVO [GOS. I PRAVO] 37, 44-45 (2000).

52. *Decree 9-P*, *Sobr. Zakonod. RF*, 1996, No. 16, Item 1909, at 4201.

53. In particular, the Court has reiterated this point in regard to the property rights in Article 35 of the constitution. See, e.g., *Decree 20-P*, *Sobr. Zakonod. RF*, 1997, No. 1, Item 197. Another right that the Court has not found to be absolute is the Article 27.1 right of freedom of movement. See *Decree 4-P*, *Sobr. Zakonod. RF*, 1998, No. 6, Item 783 (citing as an example prohibitions on access to military zones).

54. *Decree 10-P*, *Sobr. Zakonod. RF*, 2001, No. 29, Item 3058, at 5985; *Decree 4-P*, *Sobr. Zakonod. RF*, 2001, No. 12, Item 1138, at 2837.

55. Article 56.3 states in full: "The rights and freedoms specified in Articles 20, 21, 23 (Part 1), 24, 28, 34 (Part 1), 40 (Part 1), and 46-54 of the Constitution of the Russian Federation shall not be subject to restriction." KONST. RF art. 56.3 (1993), translated in CONSTITUTION OF THE RUSSIAN FEDERATION, *supra* note 1, app. at 34. These Articles guarantee: the right to life (Article 20); right of individual dignity and freedom from torture, violence, or other cruel or degrading treatment or punishment (Article 21); rights of privacy and protection of honor and reputation (Article 23.1); rights as to personal data collection and use (Article 24); freedom of conscience and religion (Article 28); right of abilities and property for business activity (Article 34.1); right to housing (Art. 40.1); rights of judicial protection (Articles 46 and 47.1); right to

Article 55.3 incorporates Articles 56.3's prohibitions, thereby shielding the enumerated constitutional rights from state interference.<sup>56</sup> The Court might have employed a different textual construction: that Article 56.3 should be read in conjunction with the first two paragraphs of that Article, which expressly relate only to "states of emergency."<sup>57</sup> Under Article 88 of the constitution, states of emergency can be declared only by the President of the Federation, acting in accordance with a federal constitutional law.<sup>58</sup> Thus, it is possible that Article 56.3 might have been construed narrowly to apply only in such circumstances.

### II.D.

The Court's treatment of the fourth question — the meaning of "necessary" in Article 55.3 — has emerged as the most dynamic aspect of the Court's jurisprudence under Article 55.3 and the one that perhaps has the most significant long-term implications. In some of its early decisions, the Court suggested that "necessary" has an independent significance that requires the Court, even in cases where the legislative goal is deemed legitimate, to proceed further to determine whether the means employed are consistent with that purpose.<sup>59</sup> Since that time, the Court's case law in this area has reflected an effort to develop an appropriate and consistently applicable formulation of a strict proportionality test.<sup>60</sup>

Before examining this development, I should make several preliminary observations. First, the emergence and evolution of the Court's strict proportionality test is linked to the Court's articulation of a set of "general

a jury in criminal proceedings (Article 47.2); rights of detainees and criminal defendants (Articles 48.2 and 49-50); right against self-incrimination (Article 51); rights of crime victims (Article 52); right to compensation by the state for harm inflicted by illegal acts of state authority (Article 53); and prohibition of application of ex post facto laws (Article 54).

56. See, e.g., Determination 261-O, *Sobr. Zakonod. RF*, 2002, No. 7, Item 742, at 2267; Decree 11-P, *Sobr. Zakonod. RF*, 2000, No. 27, Item 2882, at 5500-01; Decree 13-P, *Sobr. Zakonod. RF*, 1998, No. 19, Item 2142, at 4078; Decree 4-P, *Sobr. Zakonod. RF*, 1995, No. 19, Item 1764, at 3406. *Contra* Decree 20-P, *Sobr. Zakonod. RF*, 1997, No. 1, Item 197, at 283 (rights of private ownership in Article 35 are not among those enumerated in Article 56.3, and therefore are not absolute).

57. KONST. RF art. 56.1-2 (1993), *translated in* CONSTITUTION OF THE RUSSIAN FEDERATION, *supra* note 1, app. at 33-34.

58. Article 88 states in relevant part: "The President of the Russian Federation shall, under the circumstances and in accordance with the procedures stipulated by federal constitutional law, announce a state of emergency within the territory of the Russian Federation . . ." *Id.* art. 88, app. at 51.

59. See, e.g., Decree 1-P, *Sobr. Zakonod. RF*, 1996, No. 4, Item 408, at 1087.

60. See discussion *infra* notes 67-74 and accompanying text.

principles of law” (also referred to as “constitutional principles”) that are said to be inherent in Article 55.3.<sup>61</sup> These principles, or implied constitutional protections, include “proportionality” (usually *sorazmernost'*, at times *proporsional'nost'*)<sup>62</sup> and “fairness” (*spravedlivost'*),<sup>63</sup> as well as two other general principles that are linked to the proportionality analysis: “legal security” (*pravovaia bezopasnost'*) and “legal certainty” (*pravovaia stabil'nost'*).<sup>64</sup> The inclusion of general principles in the Court’s jurisprudence is noteworthy for two reasons. First, it is a departure from strictly literal interpretive methodology. Second, it appears to borrow from the well-established use of “general principles of law” by courts such as the European Court of Justice and German Federal Constitutional Court, both of which apply fundamental texts that do not refer to the concept and which have entrenched proportionality among the implied protections of individual rights.<sup>65</sup>

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61. The First Constitutional Court also spoke of general principles of law, most often citing the principle of separation of powers in cases related to allocation of governmental authority under the pre-1993 constitution. See, e.g., Decree 6-P, VEDOMOSTI S’EZDA NARODNYKH DEPUTATOV ROSSIISKOI FEDERATSII I VERKHOVNOGO SOVETA ROSSIISKOI FEDERATSII, 1993, No. 17, Item 621, at 1037; Decree 9-P, VEDOMOSTI S’EZDA NARODNYKH DEPUTATOV ROSSIISKOI FEDERATSII I VERKHOVNOGO SOVETA ROSSIISKOI FEDERATSII, 1993, No. 11, Item 400, at 659. Several decrees, dealing with other constitutional issues, also identified other general principles, including “equality,” Decree 8-P, VEDOMOSTI S’EZDA NARODNYKH DEPUTATOV ROSSIISKOI FEDERATSII I VERKHOVNOGO SOVETA ROSSIISKOI FEDERATSII, 1992, No. 30, Item 1809, at 2271, a rule against retroactive application of legal acts, Decree 9-P, VEDOMOSTI S’EZDA NARODNYKH DEPUTATOV ROSSIISKOI FEDERATSII I VERKHOVNOGO SOVETA ROSSIISKOI FEDERATSII, 1993, No. 11, Item 400, at 660, and “fairness,” Decree 1-P, VEDOMOSTI S’EZDA NARODNYKH DEPUTATOV ROSSIISKOI FEDERATSII I VERKHOVNOGO SOVETA ROSSIISKOI FEDERATSII, 1993, No. 14, Item 508, at 825. See also a brief discussion of “general principles,” stating that the constitutional text did not refer to the concept, in Decree 6-P, VEDOMOSTI S’EZDA NARODNYKH DEPUTATOV ROSSIISKOI FEDERATSII I VERKHOVNOGO SOVETA ROSSIISKOI FEDERATSII, 1993, No. 17, Item 621, at 1042. I have found no citation of a principle of “proportionality” in any of the First Constitutional Court’s Decrees — a circumstance that might be explained in part by the absence of a textual proportionality principle in the pre-1993 constitution.

62. Ger van den Berg prefers the English translation, to be “commensurate with.” See Ger P. van den Berg, *supra* note 17, at 181. However, in light of the Court’s analysis in recent cases and the similarity of the Court’s approach to what is uniformly called the “proportionality” test of the European Court of Justice and other courts, I have decided to use the term “proportionality.”

63. Examples are Decree 13-P, *Sobr. Zakonod. RF*, 2002, No. 31, Item 3160, and Decree 10-P, *Sobr. Zakonod. RF*, 2001, No. 29, Item 3058. See also Decree 10-P, *Sobr. Zakonod. RF*, 2002, No. 25, Item 2515 (citing only “proportionality,” and not “fairness”).

64. Decree 13-P, *Sobr. Zakonod. RF*, 2002, No. 31, Item 3160, at 8095, 8097.

65. KOMMERS, *supra* note 10, at 46; George A. Bermann, *Taking Subsidiarity Seriously*, 94 COLUM. L. REV. 331, 386 (1994); Kirk, *supra* note 9, at 8 (including also European Court of Human Rights and French Conseil d’Etat); de Burca, *supra* note 10, at 114-15.

As to the Court's case law, it is evident that most members of the Court have embraced, or at least accepted, the strict proportionality methodology, with all of its implications for exacting judicial review of legislative action.<sup>66</sup> Among the judges who, either by their role as reporters (*dokladchiki*) or in separate opinions, have evidenced particular interest in on-going refinement of this methodology are Judges Gadzhiev, Kononov, and Zor'kin.<sup>67</sup> The only judge who expressly has voiced rejection of this approach is Judge Vitruk, who in a number of separate opinions has counseled greater judicial restraint and deference to the legislative branch.<sup>68</sup>

Two decisions involving the law on bankruptcy illustrate the Court's application of proportionality analysis. In the first, the Court found that a provision permitting the transfer of property from the bankruptcy estate to a municipality was a disproportionate interference with the property rights of the debtor because it failed to provide compensation.<sup>69</sup> In the second, the Court examined a legislative grant of power to a bankruptcy trustee to cancel a long-term contract with a creditor.<sup>70</sup> The Court ruled that this constituted an interference with freedom of contract grounded in arbitrary criteria that were not "necessary" to meet the legitimate goal of protecting the rights of others.<sup>71</sup>

In both cases, the Court emphasized that the proportionality test requires that legislation strike a fair balance between competing interests.<sup>72</sup> Thus, in

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66. Regarding "strict proportionality" and "broad proportionality," see discussion *supra* note 10 and accompanying text. The first decision in which the Court expressly identified necessity as a discrete requirement in proportionality analysis and fully articulated its components, was *Decree 14-P*, *Sobr. Zakonod. RF*, 1996, No. 26, Item 3185, at 6554-55. Other cases in which the Court has applied proportionality include: *Decree 13-P*, *Sobr. Zakonod. RF*, 2002, No. 31, Item 3160 (aspects of judicial supervisory review under the RSFSR Code of Criminal Procedure); *Decree 10-P*, *Sobr. Zakonod. RF*, 2002, No. 25, Item 2515 (provisions of election law); *Decree 13-P*, *Sobr. Zakonod. RF*, 2001, No. 32, Item 3412; *Decree 7-P*, *Sobr. Zakonod. RF*, 2001, No. 23, Item 2409; *Decree 14-P*, *Sobr. Zakonod. RF*, 2000, No. 49, Item 4861 (media subsidy case); *Decree 11-P*, *Sobr. Zakonod. RF*, 1999, No. 30, Item 3988; *Decree 14-P*, *Sobr. Zakonod. RF*, 1998, No. 20, Item 2173; *Decree 8-P*, *Sobr. Zakonod. RF*, 1998, No. 12, Item 1458; and *Decree 14-P*, *Sobr. Zakonod. RF*, 1996, No. 26, Item 3185.

67. For example, Judge Gadzhiev was the Reporter in *Decree 8-P*, *Sobr. Zakonod. RF*, 2000, No. 21, Item 2258. Regarding Judge Kononov, see *supra* note 37 and accompanying text, and *Decree 11-P*, *Sobr. Zakonod. RF*, 2000, No. 27, Item 2882, at 5502. Judge Zor'kin has been particularly active in this regard. See, e.g., *Decree 9-P*, *Sobr. Zakonod. RF*, 2000, No. 24, Item 2658, at 5103; *Decree 8-P*, *Sobr. Zakonod. RF*, 1999, No. 21, Item 2669, at 4921-22; *Decree 14-P*, *Sobr. Zakonod. RF*, 1998, No. 20, Item 2173, at 4219.

68. See, e.g., *Decree 9-P*, *Sobr. Zakonod. RF*, 1999, No. 23, Item 2890, at 5275; *Decree 12-P*, *Sobr. Zakonod. RF*, 1998, No. 18, Item 2063, at 3950-51.

69. *Decree 8-P*, *Sobr. Zakonod. RF*, 2000, No. 21, Item 2258, at 4523-25.

70. *Decree 9-P*, *Sobr. Zakonod. RF*, 2000, No. 24, Item 2658.

71. *Id.* at 5103.

72. *Id.*; *Decree 8-P*, *Sobr. Zakonod. RF*, 2000, No. 21, Item 2258, at 4523-25.

contrast to the categorical approach used in the Court's assessment of the legitimacy of legislative goals, in proportionality analysis the Court has introduced a balancing test that requires an assessment of the relative values of the legitimate interest and the implicated constitutional right.

Identification of the elements of the Court's strict proportionality test must acknowledge the fact that application of the test in the practice of other courts follows two lines of inquiry. They are to a considerable extent separable, so that a court may pursue one without necessarily employing the other. One of these requires that the interference not be overly intrusive. In other words, it seeks to determine whether the legislature has imposed an excessive burden on the exercise of a constitutional right.<sup>73</sup> This approach — the "excessive burden" test — is directed primarily toward protection of individual rights.

The other approach requires that the interference be the least intrusive measure capable of advancing the legitimate goal. This "least intrusive alternative" test can be a formidable tool for broad evaluation of the legislature's policy choices.<sup>74</sup> The European Court of Justice and German Federal Constitutional Court have long employed it to reject legislative choices by finding that other, less intrusive policies were available to advance constitutionally legitimate goals.<sup>75</sup>

The Russian Federation Constitutional Court has not embarked on this latter path in any concerted fashion. In general, its strict proportionality analysis has focused on the protection of individual rights by an application of the "excessive burden" test.<sup>76</sup> However, several of the Court's decrees have contained hints of a more broad-scale policy evaluation,<sup>77</sup> and it is evident that

73. Thus, in *Decree 14-P*, *Sobr. Zakonod. RF*, 1996, No. 26, Item 3185, the Court stated that the principle of proportionality expressed in Article 55.3 requires that "[t]he state can not employ excessive means, but only those that are necessary and narrowly tailored to achieve its goals." *Id.* at 6554.

74. de Burca, *supra* note 10, at 106-07; Engel, *supra* note 10, at 3, 10.

75. See, for example, the judgments of the European Court of Justice in Case 178/84, *Federal Republic of Germany*, 1987 ECR 1227, ¶ 28, 51 C.M.L.R. 780, 806 (1988), and Case C-241/89, *Societe d'application et de recherches en pharmacologie et phytotherapie SARL v. Chambre syndicale des raffineurs et conditionneurs de sucre de France*, 1990 ECR I-4695, ¶ 31 (both reciting that "[i]f a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts" the free movement of goods). For a summary of the case law and commentary with regard to Germany, see Kommers, *supra* note 10, at 46, Kirk, *supra* note 9, at 7, and Engel, *supra* note 10, at 2-3.

76. A number of the decrees have involved the Court's invalidation of legislative provisions establishing criminal or administrative sanctions that the Court found excessive. *E.g.*, Decree 7-P, *Sobr. Zakonod. RF*, 2001, No. 23, Item 2409; Decree 11-P, *Sobr. Zakonod. RF*, 1999, No. 30, Item 3988; Decree 14-P, *Sobr. Zakonod. RF*, 1998, No. 20, Item 2173; Decree 8-P, *Sobr. Zakonod. RF*, 1998, No. 12, Item 1458.

77. See, *e.g.*, Decree 13-P, *Sobr. Zakonod. RF*, 2001, No. 32, Item 3412; Decree 9-P, *Sobr.*



the Court has developed a basis for engaging more fully in this exercise if it wishes to do so.<sup>78</sup>

### *III. Possible Implications: Constitutional Methodology and the "Broader Questions"*

These considerations lead to the second goal of my Essay: speculation as to the implications of these developments for the evolution of Russia's constitutional order. In this regard, it should be noted that the Russian Federation Constitutional Court's active application of proportionality methodologies serves as an example of the Court's participation in the perceived trend toward globalization in judicial systems.<sup>79</sup> It perhaps was to be expected that members of the Court would examine various judicial methodologies following the intense interest in foreign constitutional models in the early 1990s.<sup>80</sup> Nevertheless, it is noteworthy that in a relatively short time period most members of the Court have agreed to the Court's consistent application of these models. There was little, if anything, in the Russian constitutional or administrative law traditions to draw upon in approaching the questions associated with broad proportionality methodologies. As such, the Court's rapid development of its methodology must be attributed in part to the proclivity of its members to borrow from the influential European courts, while at the same time giving them meaning in the Russian constitutional context.

The implications of the Court's relatively quiet but growing assertiveness in this area, particularly as reflected in its adoption and application of the proportionality principle, could be significant. First, it has established the framework for the Court's scrutiny of legislation in highly visible cases. For example, in the aftermath of the theater hostage crisis in Moscow, the Federal Assembly in November 2002 adopted amendments to the 1991 Law on the Mass Media. The amendments, which were intensely criticized as excessively broad in scope and subsequently were vetoed by President Putin, prohibited the mass media from reporting any information seen as obstructing anti-

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Zakonod. RF, 2000, No. 21, Item 2258.

78. Judge Kononov, for example, has signaled that he is prepared to embark on such an approach. In his separate opinion in *Decree 7-P*, *Sobr. Zakonod. RF*, 2001, No. 23, Item 2409, he argued that a lack of normative precision is absolutely impermissible under Article 55.3.

79. See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

80. As Robert Sharlet has noted, "Chapter 2 of the 1993 Constitution was written to reflect European and international human rights standards . . ." Robert Sharlet, *Putin and the Politics of Law in Russia*, 17 POST-SOVIET AFFAIRS 195, 196 (2001) [hereinafter Sharlet, *Putin*].

terrorist operations.<sup>81</sup> Had President Putin not vetoed the amendments, they could have been fertile ground for application of strict proportionality. They undoubtedly advanced legitimate Article 55.3 interests, but were they sufficiently tailored to satisfy an “excessive burden” test, or even perhaps a “least intrusive alternative” standard? If the amendments had been subject to challenge before the Court, would the judges have had the political confidence to apply the same standards that they have applied in the recent past in less visible cases?<sup>82</sup>

Second, the Court’s trend suggests that its role might someday expand beyond focusing on individual rights protection alone and move into policy evaluation. It is interesting that the strict proportionality analysis, particularly policy evaluation via the least intrusive alternative test, does not appear to have elicited concern from the executive or legislative branches.<sup>83</sup> This suggests that the implications of the Court’s evolving proportionality analysis have not yet been grasped, or else that the Court is not taken seriously enough to be considered a significant threat to lawmaking.

It is doubtful that these implications will suddenly become dramatically visible. Instead, the following considerations mitigate against any dramatic developments in this direction.

First, there are the limits on the Court’s competence. Unlike the broad competence of its continental models such as the European Court of Justice, European Court of Human Rights, and the German Constitutional Court, the Court’s competence precludes review of non-normative governmental acts.<sup>84</sup> In addition, the Court’s competence does not include examination of individual complaints against normative acts, such as Presidential Edicts, that are not *zakony*.<sup>85</sup> One of the consequences of the Court’s limited competence might be an unfortunate perception that the Court’s docket is limited to

81. Eric Engleman, *Putin Vetoes Media Reporting Legislation*, Associated Press, Nov. 25, 2002.

82. Meanwhile, review of this question could extend to the European Court of Human Rights, which has developed extensive jurisprudence on national security concerns and the exercise of free expression rights under Article 10 of the ECHR. *See, e.g.*, *Ceylan v. Turkey*, 1999-IV Eur. Ct. H.R. 27; *Vereniging Weekblad Bluf! v. the Netherlands*, 306 Eur. Ct. H.R. (ser. A) (1995); *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v. Austria*, 302 Eur. Ct. H.R. (ser. A) (1994); *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) (1991); *Sunday Times v. United Kingdom*, 217 Eur. Ct. H.R. (ser. A) (1991). The judgements of the European Court of Human Rights are available at the court’s website, <http://www.echr.coe.int>.

83. For President Putin’s views on the Court, see Sharlet, *Putin*, *supra* note 80.

84. *See* discussion *supra* notes 15, 34 and accompanying text.

85. *See* discussion *supra* note 15 and accompanying text.

matters of little significance. This impression is undoubtedly incorrect, however, especially from a long-term perspective.<sup>86</sup>

Second, in regard to the “excessive burden” approach and protection of individual rights, the Court has been reluctant to delve into one of the most challenging applications of the proportionality principle — its application in cases that involve the direct clash of countervailing constitutional rights. In a case involving state subsidies to the mass media, for example, the Court largely ignored the problem, analyzing the challenged legislation almost entirely from the perspective of its impact on the exercise of property rights.<sup>87</sup> Though the Court found the legislation invalid, it failed to balance the free expression rights that also were at issue.<sup>88</sup>

Finally, as to both the “excessive burden” and “least intrusive alternative” tests, the Court is undoubtedly aware of its uncertain legitimacy and authority in the Russian polity.<sup>89</sup> With the exception of the 1995 *Chechnia* decision, which was not really an individual rights case, the Court has not yet applied Article 55.3 in a high-profile, politically charged setting. We can expect the Court to maintain its relatively low profile while continuing to build patiently a methodological and doctrinal foundation for the future.

These considerations lead to the question of the Court’s long-term status in Russia’s constitutional order. Although the subtleties of the Court’s Article 55.3 jurisprudence can hardly be considered directly relevant to problems such as immediate enforcement by Russian officials, the Court’s respect for and reasoned approach to accommodation methodologies (those that seek to reconcile the exercise of constitutional rights and conflicting governmental interests) might have a significant impact in the long term. The identification of criteria and methodologies for practical application of the accommodation problem is essential for the development and maintenance of a constitutional consciousness — what Robert Sharlet has identified as a recognition of the “intrinsic value” of law.<sup>90</sup> The reason for this is that by affording a means of

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86. See Peter B. Maggs, *Constitutional Commercial Law in the Courts*, Paper Presented at Annual Convention of the American Association for the Advancement of Slavic Studies (Nov. 24, 2002) (on file with author).

87. Decree 14-P, *Sobr. Zakonod. RF*, 2000, No. 49, Item 4861.

88. *Id.* For commentary, see Peter Krug, *Glasnost’ as a Constitutional Norm: The Article 29 Jurisprudence of the Constitutional Court and Other Courts in the Russian Federation*, Paper Presented at Annual Convention of the American Association for the Advancement of Slavic Studies (Nov. 16, 2001) (on file with author).

89. For a comprehensive examination of this question, see Alexei Trochev, *The Constitutional Court Has Ruled . . . What’s Next?*, Paper Presented at Annual Convention of the American Association for the Advancement of Slavic Studies (Nov. 24, 2002) (on file with author).

90. Sharlet, *Putin*, *supra* note 80, at 196; see also Engel, *supra* note 10, at 2 (noting the

recognition for both legitimate governmental action and the exercise of fundamental rights, the accommodation problem addresses the concerns of both political elites in the executive and legislative branches and the public, creating a means of “reciprocity” between the state and its citizenry.<sup>91</sup> It is through the careful, ongoing development of a reasoned methodology for resolving the tensions inherent in the exercise of governmental action within a structure of individual constitutional rights that a judicial body, such as the Court, can gradually enhance its legitimacy.

In this regard, the acquisition of greater legitimacy among political elites and the general public could have its most important impact within the judiciary — specifically impacting the Court’s challenging and often stormy relationship with the courts of general jurisdiction,<sup>92</sup> perhaps influencing their substantive decisionmaking. This matter is of particular importance because of the allocation of competencies assigning constitutional application to the courts of general jurisdiction in cases involving the vast range of non-normative governmental acts. While my research on this question definitely requires updating, earlier decisions of bodies such as the Russian Federation Supreme Court have demonstrated either an apparent lack of familiarity with proportionality methodologies or a disinclination to apply them.<sup>93</sup> There is nothing in the allocation of competencies that should preclude the courts of general jurisdiction from applying Article 55.3 and its principles to non-normative acts. If these courts were to begin adopting the Constitutional Court’s methodology — particularly the balancing associated with proportionality analysis — it would mark a significant step in the creation of a more common constitutional “space” among the various sectors of the judiciary.

#### IV. Conclusion

In a relatively short period of time, the Russian Federation Constitutional Court has developed a methodology for effectuating the accommodation principle. Certainly, this is a work in progress for the Court, and it faces the

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post-World War II German public’s “almost naïve belief in the beneficial abilities of law”).

91. See KATHRYN HENDLEY, TRYING TO MAKE LAW MATTER 3 (1996) (law valued by both political elites and citizenry).

92. For a recent study, see Trochev, *supra* note 89. See also PETER H. SOLOMON, JR. & TODD S. FOGLESONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM 76-78 (2000); Peter Krug, *The Russian Federation Supreme Court and Constitutional Practice in the Courts of General Jurisdiction: Recent Developments*, 26 REV. CENT. & E. EUROPEAN L. 129, 133-34 (2000) [hereinafter Krug, *Recent Developments*]; Krug, *Centralized Model*, *supra* note 15, at 747-50.

93. Krug, *Recent Developments*, *supra* note 92, at 141-42.

challenges I have identified. However, in the end, patient development of methodologies and judicial style such as those associated with Article 55.3 can be of significant help in making constitutional law “matter” in Russia.<sup>94</sup>

Therefore, this aspect of the Court’s practice bears watching. Quietly, the Court is developing the tools for a more pronounced role in Russia’s constitutional order. Whether it will choose at some point to activate these tools in an aggressive fashion, and how Russia’s executive and legislative branches will respond, should furnish an informative perspective from which to view Russia’s constitutional development.

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94. See HENDLEY, *supra* note 91.