The Concept of the ‘Living Constitution’ in Russian Constitutional Theory and Practice

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Abstract

In discussing the concept of the ‘living constitution’ in Russian constitutional theory and practice, this paper shows that the Russian concept of the living constitution differs from U.S. or European approaches to evolutive interpretation. The Russian concept has its roots in Soviet and pre-revolutionary Russian constitutional thinking. It reduces the normative power of the Constitution but allows an interpretation according to changing social conditions and gives the legislator a broad margin of appreciation. Whereas the 1993 Russian constitutional reform had been regarded as a paradigm shift with the intention to break with the past by declaring that the Constitution shall have supreme judicial force and direct effect, the paper also gives answers to the complexity of constitutional change and legal transplants and the role of constitutional theory and practice for the functioning of the current authoritarian regime in Russia.

Keywords

Russia – constitutional theory – living constitution – Constitutional Court of the Russian Federation – comparative constitutional law – authoritarianism

1 Introduction

In the run-up to the controversial 2020 Russian constitutional reform¹ Russian President Vladimir Putin and the Speaker of the State Duma, Viacheslav

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¹ Закон РФ о поправке к Конституции РФ от 14.03.2020 N 1-ФКЗ “О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти” (Law of the Russian
Volodin, both referred to the concept of the ‘living constitution’ (zhivaia konstituciia) to argue that amendments to the Constitution were necessary. At the occasion of his annual news conference in December 2019, Putin responded to the question of possible constitutional amendments by stating that the Constitution was “a living document” that should “reflect the level of development of society”.2 In summer 2019, Volodin called for constitutional changes in an article titled “The Living Constitution of Development”.3 Here, Putin and Volodin were reflecting a concept that had been prominently advocated by the Chairman of the Russian Constitutional Court, Valery Zor’kin, who has held a prominent place in Russian intellectual debate in recent years.4 Zor’kin views the Constitution as a “living instrument”, one which requires a “dynamic interpretation” whereby the Constitution is only applied as far as “present conditions” so permit.5

The concept of the living constitution is well known in U.S. constitutional theory6 and in European constitutional law, also. The European Court of Human Rights regularly states that the European Convention of Human Rights is a “living instrument”.7 In both jurisdictions, the doctrine stands for the right of the courts to interpret the text in a broad and progressive manner so as to adapt it to the changing time. These doctrines are highly controversial as they limit legislative competences and therefore pose a threat to the principle of democracy and separation of powers.8 The concepts also challenge the

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general idea of the constitution and human rights as unchangeable, timeless or time-transcendent fundamental principles that are guaranteed regardless of alternating governing political parties and social conditions.

The paper discusses not only the concept of the ‘living constitution’ in Russian political and legal discourse but also explores the differences and similarities between the traditional Soviet and Russian vis-à-vis the U.S. and the European approaches. Although the term ‘living constitution’ was not known in Soviet constitutional theory, it is to be discussed whether the Russian concept of the living constitution might have roots in Russian constitutional legal history. While Soviet leadership principally adhered to the concept of constitutionalism, the content and functions of constitutions differed from western constitutionalism. Soviet constitutional doctrine explicitly deviated from “bourgeois” constitutionalism. The theoretical underpinning of Soviet constitutional theory derived from the concept of Marx, Engels and Lenin on dictatorship of the proletariat, a society under transition to communism. The content of the constitution depended on social conditions and the political goal to create communism as defined by the party. The constitution was rather seen as a program developed and concretized by the party according to social conditions. The idea of social change organized by the party was broadly incompatible with the concept of a rule of law and separation of powers by limiting and binding the power of the ruler. Against this backdrop, the declaration of supreme juridical force, normativity and direct applicability of the Constitution of 1993 was meant as a paradigm shift compared to the nature of former Soviet Constitutions.

In addition to questioning the successful transformation with respect to the declaration of supreme juridical force, normativity and direct applicability, this paper analyses the significance of Russian historical constitutional ideas with regard to the concept of the ‘living constitution’, discusses the role of ideas during institutional transformation and elaborates on the complexity of legal transfer in the field of constitutional law. Furthermore, it explores the extent to which both the separation of powers has been weakened and the current authoritarian regime in Russia has been legitimized by traditional

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legal concepts and legacies which, at first glance, bear similarities with liberal western concepts.

2 The Constitution of 1993 as a “Legal Document in the Strict Sense”

The entry into force of the Russian Constitution in 1993 was widely perceived as a new beginning in Russian constitutional development. The drafters of the Constitution explicitly expressed their intention to break with the past and to overcome the antagonism of “bourgeois” and “socialist” constitutionalism by codifying key elements of western constitutionalism. According to Article 1 of the Constitution of 1993, the Russian Federation is a “democratic, federal rule of law-based state with a republican form of government”. In contrast to Soviet constitutionalism, separation of powers is now enshrined in the Constitution, the judiciary forms an independent branch of state power (vlast’). The new Constitution also steps away with the paramount power of the Communist party in the past by acknowledging “political diversity and a multi-party system” (Article 13(3)).

The Constitution of 1993 differs significantly from its predecessors with respect to human rights:12 It declines the contrasting juxtaposition of bourgeois and socialist human rights by recognizing the common principles and norms of international law to be an integral part of the Constitution. W.E. Butler characterized this step as “most momentous change” of the 20th century development of Russian law.13 Richard Sakwa wrote that by the establishment of these norms the “liberal idea of individualism” had “triumphed” and more “organic notions of community” had been marginalized.14 According to the Russian Constitution, individual rights were regarded as inherent. Article 2 declares the rights and freedoms of the individual as “highest values” and their recognition the obligation of the state.15

The creation of a Constitutional Court was a further notable change. The introduction of judicial review over the legislature was intended to give new

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13 Butler, op. cit. note 10, 18.68.
15 Rainer Arnold and Helena Sieben, “Art. 2,” in Bernd Wieser (ed.), *Handbuch der russischen Verfassung* (Verlag Österreich, Vienna, 2014), 40. Arnold and Sieben show that Article 2 was seen as starting point of a “new era” as human rights were regarded as pre-state natural rights, which the state only acknowledged, but did not create.
significance to Russian constitutionalism. Apart from the USSR Supreme Court during the 1920s courts in the USSR could not question the constitutionality of legislation.\textsuperscript{16} The difficult process to change the 1993 Constitution laid down in its Articles 134–137 increased the imperative power of the Constitutional Court.\textsuperscript{17}

The creation of the Constitutional Court was accompanied by the new fundamental concept of the Constitution laid down in Article 15: “The Constitution of the Russian Federation shall have supreme juridical force, direct effect and shall be used on the entire territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation.”\textsuperscript{18} This Article guides into a new direction. Following Hans Kelsen’s “Pure Theory of Law”,\textsuperscript{19} the constitution becomes a paramount law, criterion or objective benchmark for political action and its content fully enforceable. Unlike in Soviet constitutional theory, the constitutional “ought” now takes precedence over the political “is”.

The drafters intended here to enshrine the very idea of constitutionalism, developed in Western Europe and the United States as a reaction against the unlimited power of the monarch. The approach chosen in 1993 had been characterized before as essence of the “western idea” of constitutionalism.\textsuperscript{20} The classical idea of constitutionalism is understood as idea of individual freedom through limitation and control over political power through law laid down in Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789 that states “toute société dans laquelle la garantie des droits n’est pas assurée ni la séparation des pouvoirs déterminée, n’as pas de Constitution”.\textsuperscript{21}

While early constitutionalism in France and Germany was reluctant to limit the power of the parliament, U.S. constitutionalism from the beginning understood the constitution as a law that was paramount to other legal acts and could not be overridden by the legislative power. Justice John Marshall

\textsuperscript{17} Henderson, \textit{op cit}., note 12, 200.
\textsuperscript{19} Hans Kelsen, \textit{Reine Rechtslehre} (Mohr Siebeck, Tübingen, 1934, 1st edition).
declared: “a legislative act contrary to the constitution is not law”. Already in 1803, the decision *Marbury v. Madison* established the authority of the judiciary to review acts of all other branches of power: “It is emphatically the prominence and the duty of the judicial department to say what the law is”. This idea returned to Western Europe much later. It took over a century until Germany introduced the idea of human rights as directly applicable law in the constitution and the constitution as paramount law that was difficult to change. Here, the notion of a constitution as legal norm not containing programs, mere goals or promises was only established after World War II. At the same time the German Federal Constitutional Court became the authority to decide on the constitutionality of legal norms.

It is clear that the framers of the Russian Constitution in 1993 tend to join this universal process towards constitutionalism as the idea of the protection of the individual against the arbitrariness of the state. The constitutional design sees the constitution as a fully applicable and enforceable legal document. Article 15 expresses, that the Constitution will become an obstacle to political decisions of the legislation, an instrument “to protect long term values from short term passions”. This includes the concept that the Constitution is unchangeable, timeless or time-transcendent.

While much time was reserved during the drafting process to the question of the division of power among the different branches, the highest legal force and direct applicability of the Constitution were almost undisputed. Most drafts contained both elements—direct applicability and the notion of the Constitution as highest legal force. Oleg Rumiantsev, head of the Constitutional Commission established by the Congress of People’s Deputies, stated in 1991:

23 Ibid., 177.
26 See the different drafts of the Constitution in: Johannes Ch. Traut, *Verfassungsentwürfe der Russischen Föderation* (Nomos, Baden-Baden, 1994): draft of the working group of Sergej M. Shachrai (Article 56), 80; draft of the working group of Anatolji A. Sobchak (Article 38), 116–154; draft of the Russian Christian Democratic Union and the party of the constitutional democrats (Article 26), 155–183; draft of the Constitutional Commission of the Russian Federation of (Article 3), 239–306; draft of the President of the Russian Federation (Article 65), 307–340; draft of the Constitutional Assembly (Article 15), 341–383.
“Will the new constitution differ substantively from its predecessors? Absolutely [...] First the Constitution will become a legal document in the strict sense, providing the legal basis for all the laws of the land. It contains the founding principles of the life of society and the functioning of the State. The text consists of precisely formulated principles and norms that will enable the Courts to decide the constitutionality of any action. Hence the constitution will be of immediate relevance to the Courts and other State organs.”

Other drafters such as Sobchak and Alekseev rejected Soviet Constitutions as largely ideological party documents and agreed that the coming into force of the Russian Constitution of 1993 marked a new beginning. Khasbulatov wrote:

“We are confronted with an extraordinary important task: We not only have to approve the Constitution of the Russian Federation but also to leverage the idea of constitutionalism. [...] One of the main principles of this draft is the enforcement of the rule of law. Within a constitutional state the political power is subordinated to the law and not the law to the power.”

Accordingly, the declaration of supreme juridical force and direct applicability of the Constitution of 1993 together with the creation of a Constitutional Court was a paradigm shift compared to the nature of Soviet Constitutions. The creation of the Constitution of 1993 was seen as “radical change” with the intention “to break with the past.”

3 The Concept of the ‘Living Constitution’

A closer look on the concept of the ‘living constitution’ in Russian constitutional theory will show the extent it challenges the successful implementation

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29 Ibid., 382.
31 See Henderson, op cit. note 12, 80.
of the newly enshrined fundamental constitutional principles, the supreme judicial force of the Constitution and its direct applicability, in practice.

The concept of the ‘living constitution’ was developed and established in numerous essays and speeches of the Chairman of the Russian Constitutional Court, Valery Zor’kin, and was first used as a justification for two highly controversial decisions of the Russian Constitutional Court in 2005. Both decisions were made during the process of centralization and the establishment of the power vertical in the early years of the presidency of Vladimir Putin. This was clearly a very difficult situation for the Constitutional Court as Putin's political agenda challenged the federal structure of the country according to the Constitution. In this regard, it appears that the Court attempted to nebulize its retreat from its obligation to interpret the norm by the diffuse and very general concept of the relevance of present conditions over legal norms. Both decisions refer to politically difficult times and attach great significance to the political “is” at the expense of the constitutional “ought”.

3.1 Decisions of the Constitutional Court

3.1.1 Decision of 21 December 2005

The first decision concerns an amendment of the Federal Law “On general principles governing the organization of legislative (representative) and executive state authorities of constituent entities of the Russian Federation” in 2004. By this amendment the election of the head of government in the Russian regions (the subjects) was de facto abolished. Heads of government of the subjects were no longer elected by popular vote, but by the regional parliament upon appointment by the President of the Russian Federation. At the same time the President of the Russian Federation was granted the right to dissolve a regional legislative body if that body rejected the President’s candidate twice. This amendment was understood as attempt to strengthen the “vertical of power”. Shortly after the school siege in Beslan (North Ossetia) in September 2004, President Putin announced the abolition of direct election of the head of the executive power in the subjects as necessity “to strengthen state power in the fight against terror”.

The Constitution of the Russian Federation does not contain a procedure on the composition of the regional government. However, Article 11 states

33 sz rf 2004, No. 50 st. 4950.
that “State power in the subjects of the Russian Federation shall be exercised by the bodies of State authority created by them”. In an earlier decision the Constitutional Court had ruled that from the principle of the sovereignty of the people (Article 3(2)) in conjunction with Article 32, the citizens right to vote it follows that the head of government in a subject had to be elected by the people of the subject.35 Nonetheless, the Constitutional Court did not object to the amendment of 2004 but rather paved the way for Putin’s recentralization and the political marginalization of the subjects.

The Constitutional Court was heavily criticized for this decision.36 Unlike for the Court, a violation of the principle of federalism was readily apparent to many observers. Yet, the decision completely ignores the principle of federalism and thus criticism was directed towards the lack of a judicial opinion with regard to the content of the principle of federalism and democracy as stipulated by the Constitution.37 An opinion by the European Commission for Democracy Through Law (Venice Commission) pointed out that the law violated the separation of powers as the heads of the regional executive bodies represent the subjects in the Federation Council, one of the chambers of the federal legislative. If the President of the Federation appointed the regional heads, he would de facto be part of the legislative power on the federal level.38

The Constitutional Court did not discuss these issues and did not find a violation of the principle of federalism and separation of powers. Instead, it left the interpretation to the legislature, arguing that the interpretation of federalism was within its competence. To justify its deviation from the earlier decision and to overrule the precedent, the Court came to the conclusion that

35 Sz RF 1996, No. 4 st. 409.
38 European Commission for Democracy through law (Venice Commission) opinion on the draft federal law amending the federal law “on general principles governing the organization of legislative (representative) and executive state authorities of constituent entities of the Russian Federation” and the federal law “on fundamental guarantees of Russian Federation citizens’ electoral rights and right to participate in a referendum” (Opinion No. 321/2004), Adopted by the Commission at its 61st Plenary session (Venice, 3–4 December 2004), CDL-AD(2004)042.
it was bound by the “concrete social and legal conditions” in their “evolving social and historical context”:\textsuperscript{39}

“As the provisions of the Constitution of the Russian Federation are influencing the legal system and the historical context directly and indirectly through concretizing legislature, legal opinions can [...] be clarified or modified in order to reflect the sense of the letter and the spirit of the constitutional provisions taking into account the specific social and legal conditions of their implementation, including the changes in the system of legal regulations.”\textsuperscript{40}

It was argued that this decision hit rock bottom as the Constitutional Court did not decide on the constitutionality of the law but used the law to interpret the Constitution.\textsuperscript{41} In his very harsh dissenting opinion, Constitutional Judge Kononov rejects the idea that the legislature may change the spirit of the Constitution and argues:

“The argumentation of the Constitutional Court, if it can be called this way, changes the generally established concepts of the priority of the Constitution, its relations to the legislative, the boundaries of interpretation and the legal positions of the Constitutional Court, that can be changed according to a ‘zeitgeist’.”

According to his view, everything that was useful could of course be justified; the boundaries of the law would however be exceeded.\textsuperscript{42}

3.1.2 Decision of 1 December 2005, No. 1-p (Baltic Republican Party)
The other decision concerns an amendment to the Political Parties Act of 2001,\textsuperscript{43} according to which a party could only be registered if it had more than 10,000 members and regional branches in more than half of the almost 80 subjects with more than 100 members each. This amendment brought an end to regional parties.

\textsuperscript{39} sz rf 2006, No. 3 st. 336.
\textsuperscript{40} Ibid.
\textsuperscript{42} Dissenting opinion of Constitutional Judge A.L. Kononov, sz rf 2006, No. 3 st. 336.
The Constitutional Court held that this amendment was constitutional, arguing that Article 13 of the Russian Constitution not only explicitly recognized ideological diversity but also political diversity and the multi-party system and the right to association in Article 30. Summarizing these provisions, the Constitutional Court recognizes a right to establish political parties, which includes the creation of regional parties. Nevertheless, the Constitutional Court held that the restrictions were justified.

In its decision the Court did not invoke Article 55(3) of the Constitution which allows limiting the rights and freedoms of man and citizen by a federal law for the protection of the fundamental principles of the constitutional system, namely morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State. The Court neither discusses Article 13(5)—the regulations of party ban. Instead, the Court refers to Russia’s political situation in rather general terms:

“Taking into account the present conditions, under which the Russian society has not yet acquired enduring experiences with the democratic system and in a situation in which there is serious threat of separatist, national and terror organizations, the creation of regional parties—which tend to defend regional and municipal interests—can lead to the destruction of the integrity of the State and the unity of the system of State organs as foundation of the federal structure of the Russian federation.”

Unlike in the decision on the heads of regional government, where the Constitutional Court left the definition of the constitutional concept of federalism to the legislature, the Constitutional Court here admits that there was a constitutional right to create regional parties, but then sees the violation justified by referring to the current political conditions. The Constitutional Court therefore reduces the normative force of the right to create a political party because of the current political conditions.

The Constitutional Court repeated this approach in another decision on 16 July 2007. In this decision the Court explained that the Political Parties Act could be altered by the legislature in line with the development of a

44 "The creation and activities of public associations whose aims and actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited."

45 Decision of the Constitutional Court No. 1-P of 1 February 2005, Sz RF 2005, No. 6 st. 491.

46 Decision of the Constitutional Court No. 11-P of 16 July 2007, Sz RF 2007, No. 30 st. 3989.
stable multi-party system considering the “stages of evolution” of the Russian Federation. Constitutional doctrine here explicitly declares a primacy of social conditions over constitutional content. Consequently, social conditions become a corrective to constitutional norms.

The Constitutional Court was again criticized for these decisions as they reduced the normative force of basic constitutional ideas and at the same time strengthened the political power of the Russian federal center.

3.2 The Concept of the ‘Living Constitution’ in Russian Constitutional Discourse

In the aftermath of these decisions the concept of the ‘living constitution’ and its evolutive interpretation gained momentum. The Chairman of the Constitutional Court, Valery Zor’kin, opposes on multiple occasions the wording of the Constitution to “present conditions” and declares that the political situation is not stable enough to unveil the Constitution’s full content. He paints a gloomy picture of the Russian political situation using rather “apocalyptic terms” stressing the need “to save Russia” from chaos and disorder. Disintegration and instability of the state are his biggest fears for the rule of law. The collapse of the USSR through the break up into micro states is a scenario that he warns to happen with respect to the Russian Federation. Moreover, he warns of the threats from global terrorism and the financial crisis. In an essay published in Rossiiskaia gazeta on 26 January 2012, Zor’kin condemns the protest against forgeries of Russian Duma elections on 4 December

47 Ibid.
52 Zor’kin, “Rossiia: dvizhenie k pravu ili khaosu?”, ibid.
2011 as “illegitimate”.53 Zor’kin’s main complaint refers to the fact that the protesters threatened the Russian state and thus the very basis of their right of free assembly. As the protest is attacking the state as such, it had to be considered as an “unlawful position” (nepravovaiia poziciia). The state order being contested by the opposition has been juxtaposed with chaos as the only viable alternative. Zor’kin puts protest on the same level with “Antistatism” (antigosudarstvennost’).

Asking about the benefits of the rule of law under a scenario of social, economic and political threat, in his essay “Crisis of Confidence and the State”54 he warns against “judicial romantics” and refers to the chaos of a non-existing state. He sees antimony between constitutional content and reality. In his view, the biggest threat is the conflict between constitutional duties and the duty to protect national security. The solution is seen in a strict balance between the duties deriving from the Constitution and the protection of the country—between judicial maximum and conformism. According to Zor’kin, it is important to find the optimum balance between the Constitution and reality according to the present stage of historical evolution.55

In the subtext, Zor’kin argues for postponing the full enforcement of the Russian Constitution to a later period of time. On the one hand, the “optimum balance” favors the implementation of constitutional rights in general but on the other hand views Russia as not yet ready for full enforcement. In so doing, Zor’kin modifies the normative force of the Constitution, relativizing its content and postpones the constitutional “ought”. The Constitution is regarded as a political program and its implementation resting with those in power.

In later years Zor’kin explicitly coined the term ‘living constitution’ in Russian theory, describing the practice of the Constitutional Court “to adapt the text of the Constitution to changing social and legal realities”.56

Zor’kin's ideas share similarities with views expressed by constitutional Judge Bondar in the book “Judicial Constitutionalism in Russia in the Light of Constitutional Justice”.57 Bondar's starting point is the challenge of

53 Ibid.
55 Zor’kin, “Rossiia: dvizhenie k pravu ili khaosu?”, op cit. note 51.
globalization. In particular, Bondar stresses the dynamic function of the Constitutional Court in times of social transformation.\footnote{Ibid., 219–225.} According to Bondar, the Constitutional Court secures a coherent harmonization of wording and the spirit of the Constitution combining the formal judicial interpretation with the realities of political governance and the social and economic organization of society. By doing so, the Court—according to Bondar—stabilizes the role of the Constitution. Once more, stabilizing social reality is seen as precondition for constitutional enforcement.

Bondar writes that constitutional control shall not be based solely on formal literal judicial interpretation of the Constitution but also includes general principles such as justice, equality, human dignity, proportionality, the balance between power and liberty; these not only have a legal meaning but also a social, economic, political and socio-cultural content.\footnote{Ibid., 219–220} Bondar thus views the function of the Constitutional Court in combining the Constitution with the “objective processes of evolution of society and state”\footnote{Ibid., 219–225.}

However, Smirnova and Thornhill have shown that the doctrine of the living constitution does not enjoy a full consensus among Russian constitutional scholars.\footnote{Maria Smirnova and Chris Thornhill, “Living Constitutionalism in Russia”, in P. Sean Morris (ed.), Russian Discourses on International Law, Sociological and Philosophical Phenomenon (Routledge, New York, 2019), 69–99.} Former Russian Constitutional Court judge Vitruk, for example, warned that the doctrine can be misused “to transform the state into a ‘managed democracy’ with strong authoritarian tendencies.”\footnote{Nikolai V. Vitruk, “K voprosu o ‘zhivom konstitucionalizme’ v kontekste sootnosheniia konstitucii i politiki” Konstitucionnoe pravo i politika: sbornik materialov mezhdunarodnoi nauchnoi konferencii (“On the question of ‘living constitutionalism’ in the context of the correlation between the constitution and politics” in Constitutional law and politics: a collection of materials of the international research conference), (Law Faculty of the Moscow State University, Jurist 2012) 72–80, 76.}

The term ‘living constitution’ was later picked up by the head of state and other influential officials, including Viacheslav Volodin. In 2014, Putin praised the Constitutional Court for developing the concept of the living constitution\footnote{Vladimir Putin: “Konstitucia Rossii dolzhna bit ‘zhivoi,’” Tass (8 December 2014), available at https://tass.ru/politika/1691567.} and to mark the 25th anniversary of the Russian Constitution in

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December 2018, Vladimir Putin again reflected this approach and praised the Constitutional Court for adapting the Constitution according to social needs. However, the analysis shows that in the forefront of the controversial Russian constitutional reform in 2020 that allowed President Putin to stay in office for two more terms and further strengthened the powers of the President with respect to other state organs, Putin and Volodin expressed a slightly different understanding of the concept of the ‘living constitution’ compared to that of Valery Zor’kin. In October 2018, Zor’kin explicitly referred to the concept of the living constitution to dismiss calls for constitutional changes. For Zor’kin the concept of the living constitution leaves a wide margin to the legislature but also allows to adapt the Constitution through interpretation according to the current political situation. Constitutional changes are therefore not necessary. Zor’kin admitted the Constitution had shortcomings with regard to the “proper balance in the system of checks and balances, a bias in favor of the executive branch of government, insufficient clarity in the distribution of powers between the President and the government, in determining the status of the presidential administration and the powers of the prosecutor’s office”, local self-government and federalism. However, this was unproblematic as the fundamental ideas in the text allowed “to adapt the text to changing social and legal realities” within the framework of the doctrine of the ‘living constitution’. As Zor’kin argues, the doctrine allows, “without distorting the essence of the legal meaning laid down in the text of the Constitution of the Russian Federation, to identify its actual meaning in the context of modern social and legal realities”.

As speculation grew that the Kremlin was considering ways to allow Vladimir Putin to remain in power after his second term in 2024 and to evade the presidential term limit according to Article 81(3) of the Constitution, the Speaker of the State Duma, Viacheslav Volodin, began to contemplate necessary changes to the Constitution. In late 2018 Volodin’s comments were still vague, but he already made clear that according to his view even the basic law “was not dogma”. Volodin’s statements later became more specific, proposing amendments in April 2019, explaining that his ambitions lay in the need to strengthen the parliament and to improve effective cooperation between state

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65 Zor’kin, op cit. note 56.
Volodin intensified his call in July 2019 in a paper entitled “The Living Constitution of Development,” referring to Zor’kin and the concept of the living constitution. According to his view, basic constitutional norms and values should remain unchanged, but other provisions of the Constitution should “evolve and adapt to modern times”. However, this should be done through the mechanisms and institutions of democracy. Volodin here implicitly questions the role of the Constitutional Court to control constitutional development but rather sees parliament in the position to decide on the content of the Constitution.

Putin himself had long since dismissed claims to change the Constitution but only in December 2019 hinted possible changes by referring to the Constitution as “a living document” that should “reflect the level of development of society”. While Putin did not further develop the concept, it is clear that his and Volodin’s understanding differ to Zor’kin’s. While for Zor’kin the interpretation of the Constitution may vary according to social changes without formally amending the text, for Putin and Volodin the concept includes amendments to the text. The different approaches agree that the text of the Constitution “is not dogma”, but depends on social development that gives a certain flexibility to those in power. If the Constitutional Court leaves the legislature a broad margin to concretize the constitutional norm by laws or other legislative acts, the legislator may a fortiori change the constitutional norm. On this basis, amendments could be imposed that inter alia strengthened Putin’s personal power by resetting his term limits and giving the President more power with regard to the federal government. This further strengthened the current Russian authoritarian regime. The amendments reflect a distinct violation of the principle of separation of powers. Yet, the Constitutional Court did not find any violation of the Constitution by the amendments as it had always stated that the fundamental principles of the Constitution had to be...
interpreted according to present conditions with a broad margin of the legislature to decide on what present conditions require. With the concept of the living constitution, Zor’kin and the Constitutional Court had insofar paved the way for the constitutional changes.

3.3 **Theories in Evolutionary or Dynamic Interpretation in Other Legal Systems**

The notion that the Constitution is a living instrument that is open to evolutionary interpretation according to present day conditions is also familiar to other legal systems. According to the concept of the living constitution, the constitution evolves, changes over time, and adapts to new circumstances, without being formally amended. The problem of dynamic or evolutionary interpretation has particular significance as the U.S. Constitution was already adopted 230 years ago and is comparatively difficult to amend. It is difficult to govern present day conditions by documents enacted centuries ago. Therefore, it is argued, the original intent leads to unacceptable results because of the changing morals of society with an effect on human rights especially with regard to family values, discrimination or the definition of inhuman treatment. Human rights especially should always reflect contemporary values. The concept of the living constitution thereby reflects evolving needs of the society that treats people differently than 230 years ago.

The concept of the living constitution in U.S. constitutional theory is not uncontested. In his famous dissenting opinion to the U.S. Supreme Court’s decision on the recognition of a (new) right to same sex marriage by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Judge Antonin Scalia strongly criticized that when the Fourteenth Amendment was ratified in 1868, marriage was limited to two people of the same sex. He harshly condemns that the judicial decision overrides the democratic process using the judiciary and "robs" the people of the freedom to govern themselves. He excoriates the majorities “hubris reflected” in this “judicial Putsch”. There is a constant tension between a constitutional interpretation in search for the “original intent” of the “framers” of the Constitution and a “dynamic” interpretation of the

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76 Ibid., at 6.
Constitution as a “living document”. One the one hand, constitutions are meant to signal pre-commitment to fundamental principles that should be immune from political changes, on the other life changes and many developments could not be foreseen by the drafters. There exist different explanations for the concept. Some argue, the understanding of what is “original” is itself a changing phenomenon.

In a similar approach the European Court of Human Rights (ECtHR) developed the concept of the European Convention of Human Rights (ECHR) as a living instrument. In order to provide effective protection for human rights, the Court demands a dynamic or evolutionary interpretation. Thus, the ECtHR explicitly breaks away from the original intent of the parties and sees the ECHR as a “living instrument, which must be interpreted in the light of present-day condition”. This approach was first acknowledged in 1978 in *Tyrer v. United Kingdom*, arguing that corporal punishment of juveniles amounts to degrading punishment within the meaning of Article 3 ECHR. The Court uses present day standards as a counterweight factor to the moral climate within the respondent states. In 1981, in *Dudgeon v. United Kingdom* the Court elaborates:

“As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied”.

In general, the doctrine is applied in cases about changing moral attitudes. The Court justifies its dynamic interpretation with the necessary effectiveness of international human rights protection (*effet utile*). In *Mamatkulov and Askarov v. Turkey* the Court stated in 2005 that it “upholds individual rights as practical and effective, rather than theoretical and illusory protections”.

78 Brest, *op cit.* note 74.
By applying the doctrine, the Court is continuously raising the protected minimum standard by defining an emerging consensus among member states. The Court therefore asks for a certain consensus among member states in question. If the court does not find consensus, it leaves the question to a margin of appreciation of the member states.83

This counter majoritarian reading of the ECHR is not uncontroversial. George Letsas has prominently defended the Court’s approach by referring to the moral foundations of human rights and their distinctively counter-majoritarian nature. Human rights shall protect minorities against the majority and should not be dependent on what the majority believes. Therefore, majoritarian preferences in the respondent state should not be decisive.84

A comparison of the U.S., the European and the Russian approaches shows that the Russian approach to evolutionary constitutional interpretation differs significantly from the concepts of constitutional evolution in the U.S., and international law. The examples of dynamic or evolutionary theories in U.S. and international law share the common element that they discuss the role of the courts and the scope of interpreting a legal norm. They justify the judiciary’s legitimation to develop the scope of human rights further according to the changing morals within society. The U.S. and international concepts broaden the constitution’s imperative compared to the original intent and reduce the margin of the legislature. By contrast, the approach taken by Zor’kin and the Russian Constitutional Court reduces the normative power of the Constitution and gives the legislature a broader margin to determine the content according to political needs. The U.S. and European concept aim to secure more freedoms and rights for the individual than the framers of the constitutions foresaw; the Russian version strengthens the central power.

3.4 Philosophy of History as Continuous Pattern in Russian Constitutional Theory

By referring to the concept of historical evolution of the state the Constitutional Court as well as both judges and politicians draw instead on well-known patterns of argumentation in Russian constitutional theory. The term “stage of evolution” in particular is part of marxist terminology.85 According to

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84 Ibid., 122–123.
85 See Henderson, op. cit. note 12, 53; Butler, op. cit. note 11, 27.
historical materialism, society depends on the material conditions according to the different stages of evolution. This includes state and law. The substructure is formed by the material base according to each stage. There is a predetermination of the legal “ought” by the material “is.”

The idea of the temporary character of the state is emphasized in all Soviet Constitutions. Each Constitution marked a new step. The first Soviet Constitution (of the Russian Soviet Federative Socialist Republic; ‘RSFSR’) of 1918 still aimed to abolish the state:

“The fundamental problem of the constitution of the Russian Socialist federated Soviet Republic involves, in view of the present transition period, the establishment of a dictatorship of the urban and rural proletariat and the poorest peasantry in the form of a powerful All-Russian soviet authority, for the purpose of abolishing the exploitation of men by men and introduction of socialism, in which there will be neither a division into classes nor a state of autocracy.” (Article 9).

The Constitution of 1936 acknowledged a modified notion of the state and declared that the country had reached a new step and that the country now had to be regarded as “socialist state of workers and peasants” (Article 1). In the last Soviet Constitution of 1977, the developing character of state and the law is laid down in the preamble. Through the preamble the Constitution subordinates to a concept of history divided into different historical stages. It refers to previous socialist achievements such as the October revolution and socialist transformation, and the creation of a “developed socialist society” as a new stage of evolution. However, it also looks forward and declares future political goals together with a detailed program to achieve them. The stage of a “developed socialist society” declared by the Constitution of 1977 was therefore only

“a stage on the road to communism. The highest goal of the Soviet state is the building of a classless communist society in which social communist self-government will be developed. The main tasks of the socialist all people’s state are: to create the material and technical base of communism; to perfect socialist social relationships and their transformation into communist relationships.”

86 See Butler, *ibid*.; Westen, *op cit.* note 11, 60.
Under the umbrella of the preamble, the notion “social development” became a relevant term within the Constitution. Especially the first part of chapter 3 (Articles 19–27) on “social development and culture” further elaborates the preamble on the political aims. Based on the program of the Communist party, the provisions programmatically define aims and goals of the Soviet state as social homogeneousness of society, free development of each, improvement of working conditions, education, science and culture. Article 9 on socialist democracy declares that the direction of “the development of the political system of Soviet society” was the unfolding of democracy. By “preserving the continuity of the ideas and principles of the first Soviet Constitution (of the RSFSR) of 1918, the Constitution of the USSR of 1924, and the Constitution of 1936” the Constitution of 1977 does not claim for eternal validity. It can rather only be regarded as valid legal foundation for the current stage of development.89 Judge Bondar claimed the roots of the doctrine of the “living constitution” lie in in the Saratov school of legal thought – the most important school of Soviet constitutional theory in the 1960s.90

But historical or evolutionary theories of state are not only popular in Soviet historical materialism. The historicity of state and law is also a widespread element of prerevolutionary legal theory.91 In his textbook on constitutional law, former Constitutional Judge Baglaj sees the belief in the evolution of state according as one of the most important features of pre-revolutionary Russian constitutional theory.92 The starting point is the debate between “Slavophiles” and “Westernizers” on Russia and the West, the cultural differences between both and the question whether Russia would develop along Western European countries. While Slavophiles considered Russia’s nature as unique and different from the West, Westernizers argued that Russia should adopt European culture.93 In this context, the faith in progress of German philosophy that sees history as determined process of the development of reason, conscious and

89 Martin Fincke, “Präambel” in Fincke, op cit. note 11, 113.
91 See Klaus Detlev Grothusen, Die Historische Rechtsschule Russlands (Schmitz, Darmstadt, 1962).
92 Marat Baglaj, Konstitucionnoe pravo Rossisskoi Federacii (Norma, Moscow, 2009), 58.
spirit seemed very meaningful. In particular, pre-revolutionary liberal legal scholars as Boris Chicherin held that the current socio-political situation in Russia was not ready for free institutions, but the idea of history gave room for liberal optimism. Chicherin believed in progressive logic of historical development. As Hamburg elaborated, Chicherin saw history as a “logical, law-governed, providentially ordained process” during which the self-consciousness of human beings gradually increases. Chicherin found that with Hegel’s evolution of the spirit philosophical thought reached its culmination; for him Hegel’s dialectic was “the mainspring of the entire development of human thought.” The view that the character of things is revealed at the end is used by Chicherin “to refute those who look too closely or exclusively at current constitutions.”

While Chicherin saw Russian citizens as not yet prepared for political liberty, liberty was a goal: “For liberty is one of the most important blessings a man can enjoy, one of the fundamental principles of society is also one of the goals of the state.” For Chicherin, political liberty was the culmination of individual liberty: “Political freedom in Russia must be preceded by the introduction and full utilization of civil freedom, under which the Russian people could develop the spirit of economic self-help and the ability of self-government at the local level.”

Boris Chicherin believed that Russia belonged into the European family. He saw differences in the legal development so far, but argued that Russia would develop according to western legal development. He criticized Hegel for elaborating on different national characters attached to a special stage of development of the spirit, instead viewing the development of the spirit as universal phenomenon common to all people.

98 Ibid.
99 Morson, op cit. note 95, xxiv.
101 Andrzej Walicki, Legal Philosophies of Russian Liberalism (University of Notre Dame Press, Notre Dame, 1992), 122.
102 “There is absolutely no reason that a given historical epoch should be associated with a single dominant nationality which, having carried out assigned mission, should then recede from the historical stage (…) Therefore, one cannot agree with Hegel when he interprets all modern history as a product of the Germanic Spirit. In modern history not one nation is the dominant nation in a given epoch; all are members of a common system.
Although Chicherin agreed with the principles of democracy and political participation in general, he argued that in Russia the time had not yet come and Russia needed a strong monarchy until this stage would be reached. For Zor’kin, authoritarianism is a “good travel friend”. Within this historical development for Chicherin the state played a significant role. As Chicherin was aware that “freedom could not be achieved quickly” he declined revolutionary ideas as wrong. Instead, he defended a gradual introduction as a direct application of political freedom would not be desirable. Therefore, he defended the idea of a strong state with liberal measures. It was his conviction that under constitutional order without representative government people would get used to defending their civil liberties, local self-government would flourish and the rule of law would have a chance to become entrenched in the traditions and mental habits of the nation. Political freedom remained a remote ideal.

While today Valery Zor’kin does not often refer to Chicherin, it is interesting to observe that, whilst still under Soviet rule in 1984, he wrote a monograph on this liberal legal thinker. Here Zor’kin underlines the future-oriented perspective and the developing character of the state as common feature between Chicherin’s and official Soviet legal doctrine, though he cannot agree with Chicherin that the bourgeois-liberal state was the final stage of evolution. Another common feature elaborated by Zor’kin is the united supreme power of the state (edinaia verkhovnaia vlast’) as a precondition for further development towards freedom.

3.5 Restricted Normativity as Pattern of Soviet Constitutional Theory

The role of social conditions for the normativity of the Constitution is a further pattern used by the actors. Soviet Constitutions were governed by the

On the other hand, one and the same people pass through different stages of development, participating in the general movement as far as its nature permits.” Chicherin, op cit. note 95, 316–318.

103 Boris N. Chicherin, Rossiia nakanune dvacatogo stoletiiia (Russia on the eve of the twentieth century) (Hugo Steinitz, Berlin 1901), 152–153.


105 Andrzej Walicki, Legal Philosophies of Russian Liberalism (University of Notre Dame Press, Notre Dame, 1992), 122.

106 Hamburg, op cit. note 95, 3.

107 Boris N. Chicherin, Obshee gosudarstvennoe parvo (Law of the State) (I.N. Kushnerev, Moscow, 1894), 214.

108 Valery Zor’kin, B.N. Chicherin (Iuridicheskaia literatura, Moscow, 1984), 41.

109 Ibid., 43.
spirit of Marxism or Marxism-Leninism. According to Marxism-Leninism, law and state were seen as products of class society and would wither away after classes were abolished under communism, though not as the victory of socialist law but rather the victory of socialism over any law, since with the abolition of class, with their antagonist interests, law and state will wither away altogether. According to historic materialism, state and law are seen as substructure that depends on the social and economic basis. Changes of the basis thus lead to changes in the substructure accordingly. Hence, the origin of all institutions—including the law—were present socio-economic conditions. From the western perspective, this was criticized as primacy of politics over the law, as per the German “Ostrecht” scholar, Georg Brunner.

While in later years Soviet constitutional theory acknowledged that state organs were bound by the Constitution and the laws, the principle of socialist legality maintains that legality only existed within the limits of the idea of the revolution. Lenin was quoted saying: “We have to know and always remember that the whole legal and political constitution of the soviet Republic is based on the fact, that the party corrects, determines and establishes everything.” This was recognized in the first Soviet Russian Constitution of 1918 adapted eight months after the revolution, which does not declare judicial guarantees or enforceable individual rights against the party but political goals of the revolution. It was designed for the transitional period and only declared the dictatorship of the urban and rural proletariat and the poorest peasantry (Article 9). Socialist legality was understood as application of the laws in accordance with the political aim. The state in the hands of the working class served as an instrument of suppressing antagonistic class elements and realizing the ultimate transition to communism. Until then, the state served as an instrument for this goal. Legality was seen as an instrument to reach the revolutionary goals. Piotr Stuchka defined law “as system (or procedure) of social relations corresponding to the interest of the ruling class and protected by the organized power thereof.” Later, Vyshinsky explained socialist legality as follows: “As law does not rule above the State, but rather derives from the

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111 Piotr I. Stuchka, cited by Unger, op cit. note 87, 278.
114 Butler, op cit. note 10, 143.
State, the principle of socialist legality cannot be understood as a limit or even obstacle for the State to fulfil its duties.\textsuperscript{116} Therefore, legality is bound by social conditions.

In the Soviet Union, the approach towards law changed over time. The creation of the “state of the whole people” by the Constitution of 1977 laid the conceptual foundation of the rule of law state.\textsuperscript{117} Under Article 4, State organizations, public organizations and officials shall observe the Constitution and Article 155 declares that judges and people’s assessors are subject only to the law. But the leading role of the party, however, continued to predominate. The Constitution declared the leading and guiding force of the Communist party (Article 6), which included the right of the party to interpret the Constitution. Even though the last clause of Article 6 requires that all party organizations work “[w]ithin the framework of the Constitution” the provision read as a whole does not subject the party to the Constitution but declares its hegemony over society. It can be derived from the principles of the leading role of the party, the instrumental character of the law and the principle of socialist legality, that the primacy of politics above law limits the normative power of the Constitution. The Constitution was not unchangeable but only of transitional nature. An independent court to declare any political acts unconstitutional did not exist for most of the time; application of the Constitution in court required further legislation.\textsuperscript{118} Such approach assured that ultimately the rule of man prevailed over the rule of the Constitution.

It can be seen therefore that the Russian concept of the ‘living constitution’ is labelled by the same or a similar term as in U.S. and international law (here ‘living instrument’); at first glance it also looks very similar as it also allows to interpret the text according to present day conditions. Nonetheless, a deeper analysis shows that is has much more in common with traditional Russian and Soviet concepts.\textsuperscript{119} It very much echoes the traditional understanding of the Constitution as a document that reflects “the level of development of society”

\begin{footnotes}
\item[118] Henderson, \textit{op cit.} note 12, 91.
\item[119] For a different application of Western legal institutions in Russian legal theory see also Antonov, \textit{op cit.} note 4, 150–187 and in an updated version: Mikhail Antonov, \textit{Formalism, Decisionism and Conservatism in Russian Law} (Brill, Leiden, 2020), 52.
\end{footnotes}
as defined by the regime. This understanding comes in conflict with Article 15 of the Constitution. According to Article 15(1) the Russian Constitution of 1993 is a paramount law. Its content is not regarded as goal or program for the future but as applicable norms. It means that the current state of affairs may only be considered insofar as it is foreseen in the text of the Constitution itself. However, the Constitutional Court does not interpret the Constitution with regard to this crucial issue, but leaves the specification entirely in the hands of the legislature. Instead, it refers to the fact that the legislature is bound to the respective development stage, the “specific social and legal conditions”, the “evolving social and historical context.”

4 Successful Legal Transplants and Soviet Legacies

While during 1992–93 the Constitutional Court had shown strong judicial activism in order to strengthen and expound the Constitution, in later years the Court hardly opposed the federal center in questions of separation of powers state and federalism. In examining the socio-political context Trochev has argued that the Constitutional Court’s judicial restraint was a strategy chosen by the Court to recover after the severe struggle of power in 1993 that heavily damaged the Court’s image. Admittedly, the reluctance of the political organs to enforce the Constitutional Court’s decisions in the following years was a massive challenge for the Court. Trochev explains that the growing judicial power of the Constitutional Court went hand in hand with the concentration of the power of the President. As a matter of fact, it has to be recognized that, following the severe power crisis in 1993, the Constitutional Court not only survived but again achieved a strong position among Russian constitutional intuitions.

Both of the constitutional complaints discussed here brought the Court in a very difficult situation as it had to decide against the backdrop of Putin’s laws challenging main constitutional principles as well as the Court’s earlier rulings. It is interesting to see that the Court now, under pressure, reactivates traditional concepts, again. By referring to “present conditions” and a special “stage
of evolution" the Court clearly asks for understanding for its controversial decisions. In this state of emergency, the recourse to historical concepts seems plausible. Even though the decisions were criticized by Russian and foreign legal scholars, in political reality they helped to justify and legitimize Putin’s centralization. Later, it apparently seemed helpful for Putin and Volodin to refer to the concept of the ‘living constitution’ to justify constitutional changes.

It is important to recall Pierre Legrand’s analysis that a legal transplant does not end with the adoption of a norm.124 The process of constitutional borrowing is not completed after the norm enters into force. In response to Alan Watson’s theory on the possibility of a “legal transplant”, the possibility of “moving a rule [...] from one country to another”,125 Legrand argues that “rules cannot travel”:126 legal borrowing is not possible. Moreover, he criticizes that in the legal transplant discussion too much attention is paid to the written texts while application and interpretation are overlooked. According to Legrand, rules cannot exist without meaning, as meaning is an essential part of the rule. But the meaning is not attached by the rule, but is rather created by the interpretation of the person applying the rule. Meaning is not acontextual and can only be discovered through content. The interpreters’ understanding is bound by culture and history—the "Vorverständnis", according to Gadamer.127 The application of a written rule transferred from one country to another may considerably differ from the original meaning. What is transferred or transplanted is, according to Legrand, only the “form of words”,128 but not the rule.

In reality there have always been successful cases of legal borrowing or legal transplanting, and this cannot remain unnoticed.129 With his apodictic conclusion that “rules do not travel” Legrand has however rightly pointed out that this is a process going beyond the adoption of a borrowed rule and does not take place automatically. This must apply especially with regard to public law and constitutional law, both often described as less technical than civil law.130 The norms of the Constitution generally do not contain any clear legal position;

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126 Legrand, op cit. note 124, 114.
128 Legrand, op cit. note 124, 120.
130 Ibid.
these are only to be determined by means of a process of interpretation. This applies to principles such as “rule of law”, “democracy” or “federalism”.

Epstein and Knight argued that scholarly literature on constitutional borrowing still focuses on situations in which borrowing occurs, i.e., the transplant of provisions or court decisions from one county to another or the case of international judicial dialogue between courts. But in addition, it must also be examined that a provision inspired by a western model was borrowed and put into a legal rule, but was then applied in a different way as originally intended. In order to analyze why the underlying idea has not become prevalent, the discourse with regard to the norm has to be scrutinized and reconstructed. Furthermore, the intellectual context is to be examined in which the norm has to gain acceptance, and which ideas were eventually blocking its path.

Against this backdrop, it does not suffice to emphasize the importance of the interpretation of a legal provision. Instead, the general handling of the norm in extra-legal context has to be considered, too. In the present example the Constitutional Court has not interpreted the principle of federalism according to the Constitution in a different way than, for example, the German or U.S. principle of federalism is understood. It has instead limited the legal force of the principle according to extra-legal criterions. In the present example, the transplant therefore does not lose its identity through the re-interpretation of the historically conditioned interpreter, but rather by the overall handling of the norm with regard to non-legal phenomena such as government, politics and time. The Constitutional Court does not question the content of the freedoms and principles of the Constitution in general or oppose it to a western understanding of these rights in general. It instead limits the legal force of the constitution according to social conditions as defined by the legislature or the Constitutional Court. An analysis of the effectiveness of a borrowed rule must therefore always provide an answer to the question of what sources of law are acknowledged. Not only the norms but also non-legal aspects competing with the written law can be of relevance. According to Konrad Zweigert, it has to be considered that “a legal source is everything that shapes or help to shape the law”. This means that it is necessary to examine which concept of norms

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exists and to what extent it is being applied at all. Accordingly, the prevailing rules of interpretation, the factors employed and their rank are to be taken into consideration.\textsuperscript{134} In this regard, the possibility has to be considered that the interpretation does not follow certain theories and methods at all.\textsuperscript{135}

5 Conclusion

While the reference to the theory of the ‘living constitution’ gives the initial impression that the Russian Constitutional Court uses a similar approach as western courts, it is apparent upon closer examination that this impression is deceptive. A comparative analysis shows that the same term is applied to theories serving very different functions. The concept of the ‘living constitution’ in current Russian legal theory and practice differs significantly from the liberal and progressive U.S. approach to the ‘living constitution’ and the ‘living instrument doctrine’ followed by the European Court of Human Rights. The latter give the courts the right to develop human rights further according to changing social morals and thereby limit the scope of the legislature. In contrast, the Russian concept reduces the normative power of the Constitution and gives a broader margin to the political decision-maker to centralize state power and thereby weaken the separation of powers. It shows how traditional ideas and Soviet legacies were used in Russian constitutional theory with the effect to legitimate the current authoritarian regime. At first, the theory of the ‘living constitution’ helped to save the liberal and democratic text of the Russian Constitution from changes according to the realities in which the President gained ever more powers by interpreting it in a broad manner. However, as a result this modified the normative force of the Constitution and paved the way for constitutional changes bolster authoritarian powers. While the Constitutional Court left the legislature a broad margin to concretize the constitutional norm by laws or other legislative acts, the legislature could \textit{a fortiori} amend the Constitution.

The example shows that the transformation of Russian constitutional law following the entry into force of the liberal and democratic 1993 Russian Constitution was not a self-executing process. While the text of the Russian Constitution was quick to change, the underlying ideas are still challenged and in conflict with traditional patterns of argumentation. In the present example, the drafters of the Constitution have adopted the western idea of

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\item \textsuperscript{134} Vogenauer, \textit{op cit.} note 132, 886.
\item \textsuperscript{135} \textit{Ibid.}
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\end{footnotesize}
the supremacy of the constitution and its direct applicability, expressing these notions in Article 15. In the illustrated case study, a legal norm inspired by western ideas was once adopted, but its notions later challenged in interpretation.

By their concept of a ‘living constitution’ and a “dynamic interpretation of the constitution” Zor’kin and Bondar create a state of exception because of separatist or terrorist threat. Their theory implies that social conditions were not sufficiently stable to be ruled by norms and not by man. Stabilizing social reality is seen as precondition for constitutional enforcement. By creating a state of emergency, Bondar and Zor’kin (as well as the cited decisions) undermine the viability of the intended constitutional changes. Instead, traditional patterns of explication make their return. It shows that ideas and path dependence of institutional engineers, here the Constitutional Court as well as the Judges Bondar and Zor’kin, are noteworthy for constructing legal institutions in crucial situations.

The notion that constitutional law is to be delayed in time leads to a substantial violation of the principle that the interpreter is bound to the Constitution. It relativizes set normative expectations laid down by the law, according to which sanctions may be required. As a result, the Constitutional Court moves away from the basis of the Constitution by framing constitutional values as a modern threat without the Constitution itself leaving room for such an interpretation.

With its concept of evolution, the Russian Constitutional Court takes up the Russian tradition of constitutional law promises, particularly in the ruling concerning political parties. From a legal policy point of view, the argument that Russia is not yet ready for values such as federalism, democracy and pluralism of political parties proves to be ambivalent: It includes the expectation of a self-running process ultimately leading to reason and human freedom. At the same time, however, it threatens the idea of full and unrestrained normativity of the Constitution and was finally misused to further strengthen authoritarianism as the example of the 2020 Russian constitutional reform shows.