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Constitutional Legitimacy of Political Parties: Experience of the Russian Federation

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Abstract

The paper discusses a perception of the militant democracy concept in Russia after the collapse of the Soviet Union within the context of constitutionality of political parties. The first part considers the early case of the Constitutional Court of the Russian Federation on constitutionality of the Communist Party. The second part regards the restraint approach chosen by the Constitutional Court after the adoption of the 1993 RF Constitution and legislation based thereon. It considers current regulation providing for limitation of political parties' activities and for the grounds of constitutional review in this regard. The third part of the paper considers the ECtHR case law in respect of Russian law-enforcement decisions regarding political parties.

Key words: Constitutional Court of the Russian Federation, the Communist Party, militant democracy, constitutionality of political parties, ECtHR

Introduction

The issue of militant democracy in respect of political parties is a controversial topic in Russia taking into account its history of parliamentarism born only at the very beginning of the XXth century and abandoned after the October Revolution of 1917 until the Perestroika times, when the representative democracy started its transformation from the Soviet model to the liberal one. In the last years of the Soviet Union the society discovered the atrocities and violations of human rights and constitutional principles which were taking place during the Communists' reign. Thus, similarly to the post-Nazi Germany the question whether the country had to start a process of "decommunisation" came to the forefront.

The paper discusses some aspects of decommunisation process, including the establishment of multiparty regime and the role of the Constitutional Court in political life in nowadays Russia. Not going into the socio-economic and cultural details the paper describes legal consequences of the 1992 Constitutional Court Judgement on the Communist Party. The Judgement was much criticised from both the liberal part and the conservative part of the society. However, what is more important, it has shown how dangerous the judicial power can be for the government, resulting in reduction of the Court's competence after the 1993 constitutional crisis.

1. The first period of the Constitutional Court: a real militancy

Before proceeding with the situation of 1992 the status of the first Constitutional Court of Russia (the Russian Soviet Federal Socialist Republic – the RSFSR then) has to be briefly described. By that time the RSFSR Constitution of 1978 was tremendously amended by the Congress of

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People's Deputies.[2] One of these crucial amendments was establishment of the Constitutional Court of the RSFSR (the CC) in 1990.[3] The Law of the RSFSR on the Constitutional Court of the RSFSR was adopted on 6 May 1991.

Under Article 165.1 of the Constitution the CC had very wide competence and significant powers among which was the power "to review constitutionality of… political parties and public associations".[4] The latter power was included in the text of the Constitution on 21 April 1992 and was promulgated on 16 May 1992 just several months before the *Constitutional Party* case.

The decommunisation process was dealt with by the first president of the Russian Federation, the successor of the Soviet Union. In this respect the three Presidential Decrees of President Yeltsin in respect of legal personality and property of the Communist Parties of the USSR and the RSFSR were challenged before the Constitutional Court.[5]

The Presidential Decree of 23 August 1991, suspended the activities of the Communist Party of the RSFSR after failed *coup d'état* and the Decree of 6 November 1991 stopped the activities of the Communist Party of the Soviet Union (the CP SU) and the Communist Party of the RSFSR (the CP RSFSR); the Decree of 23 August 1991 instructed the Ministry of Interior of the RSFSR to ensure the safety of property of the CP RSFSR, and the Central Bank of the RSFSR - to suspend operations on the accounts of bodies and organisations of the latter. The Decrees of 25 August and 6 November 1991 provided a number of security measures in relation to the CP's property on the territory of the Russian Federation, which was declared to be publicly owned, and, therefore, the right to use this property was transferred to the state authorities. The measures provided for in respect of the CP SU and the CP RSFSR in the Decrees of 23 and 25 August 1991, were developed in the Decree of 6 November 1991, which, according to its legal consequences, absorbed the previous two.

The circumstances and facts, surrounding the decrees, were established and investigated by the Constitutional Court to the extent that they can serve as a basis for legal decisions, characterising the constitutionality of these decisions and, thus, under the Law on the Constitutional Court they fall under the scope of the latter's jurisdiction.[6]

In fact this case is significant from two perspectives: firstly, it was one of the first (and definitely the most important) case of the Court dealing with the separation of powers – a *terra incognita* for the Russian judiciary in 1992, and secondly, it was the first and the last case where the Constitutional Court discussed the issue of militant democracy, even not applying this exact term.

The applicant to the Court was a group of People's Deputies of the Russian Federation who belonged to the communists' opposition then. They challenged the Presidential decrees on the ground that while issuing them President Yeltsin acted *ultra vires* and overstepped the sphere of the legislative and judicial authorities since the suspension of a public association was possible only in a state of emergency, which was not the case at that time.

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[2] The Russian version of the Constitution's text can be found at: http://constitution.garant.ru/history/ussr-rsfsr/1978/red_1978/183126/ [the last access: 9 September 2016].

[3] The Law of the RSFSR from 15 December 1990 No. 423-I "On Amendments and Additions to the Constitution (Basic Law) of the RSFSR".

[4] The RSFSR Constitution, Article 165.1, para.1.

[5] Judgment of 30 November 1992 No. 9-P in the case concerning the review of constitutionality of the Decrees of the President of the Russian Federation of 23 August 1991 No. 79 "On Suspension of Activity of the RSFSR Communist Party", of 25 August 1991 No. 90 "On the Property of CPSU and RSFSR Communist Party" and of 6 November 1991 No. 169 "On the Activity of the CPSU and the RSFSR Communist Party", as well as the review of constitutionality of CPSU and CP of the RSFSR [*hereinafter* The Judgement No. 9-P].

[6] Unfortunately there is no official translation of the Judgment's text into English, thus all the translations are made by the author.

The reasoning of the President was as follows. The Decree *inter alia* noted that the CP RSFSR is not registered in the prescribed manner, that the CP bodies have supported the Emergency Committee, were directly involved in the establishment of emergency committees in a number of regions which grossly violated the Constitution and laws of the Russian Federation, including the USSR Law "On Public Associations" and prevented the execution of the Russian President's Decree of 20 July 1991 "on the termination of activity of organisational structures of political parties and mass public movements within the state bodies, institutions and organisations of the RSFSR".

Firstly, the Court faced the separation of powers issue. The Constitutional Court found that the possibility of suspension of a political party was established not only in paragraph "c" of Article 23 of the Law "On the State of Emergency" and a similar federal legislation in connection with the introduction of a state of emergency as it was argued by the Applicant, but also in the USSR Law of 2 April 1990 "On strengthening accountability for infringement of national equality of citizens and the forcible violation of unity of the territory of the USSR." At the meantime the Court said that the decision on suspension normally has to be taken by the judiciary and not by the means of executive decrees. However, this procedure was not yet settled in legislation. In this case where directly secured possibility of suspending the activities of public organisations did not exist, such an authorisation was granted by the head of the state - the President.

The suspension order in respect of the Communist Party of the RSFSR was carried out by the Decree in the August 1991 situation, which was consistent with the provisions of Article 4 of the Constitution as amended on 24 May 1991, obliging the State to ensure protection of the rule of law, public interest, and the rights and freedoms of citizens and to comply with the law in force, and corresponded to the constitutional status of the Russian Federation President, taking into account his authority to take measures to ensure public safety in the Russian Federation. The use of such measures is not bound by the mandatory declaration of emergency in the territory of the Russian Federation. This power includes the right of the President of Russia to recognise the state and public security threat to the country and, depending on the degree of the threat, to take decisions in accordance with his competence. Suspension of the CP RSFSR demanded measures for the preservation of its assets and property.

Secondly, the Court addressed the CP SU's property notion. The Court stressed that the exact attribution of property rights being in the management of the Communist Party institutions is difficult because of the nationalisation of the bulk of the national wealth.

The Party was out of the civil-law regulation of property. This conclusion is proved by the case materials, showing that the state did not exercise financial control in respect of the property of the CP SU. Overall supervision of the prosecutor's office also did not include the sphere of activity of the CP SU. Even accounting in the CP SU was not conducted in accordance with the established procedure.

The Constitutional Court recognised the impossibility to find in this trial a genuine will of the proprietor when the transfer of property from the state to the Communist Party took place. The Court considered the property, managed by the CP SU, being in the latter's possession without any legal basis. This statement does not rule out in principle the possibility that some parts of the property, which was under control of the CP SU, legally belonged to it under the property right.

In assessing the constitutionality of the Presidential Decree of 25 August 1991 "On the property of the CP SU and the CP RSFSR" the Constitutional Court assumed that the property, managed by the Party belonged to three categories of owners: a) the state b) the CP SU *per se*, and c) other owners.

The legislative authority, however, had neither the right to address specific issues nor the power to rule on the future of the property of the CP SU as a public association (this is the prerogative of the judiciary), nor has it the right to decide in respect of the state property, which was actually

in the possession, use, and disposal of the CP SU (these issues should be the domain of the executive).

Thirdly, the Constitutional Court addressed the alleged unconstitutional nature of the Communist Party in a way which resembles famous judgements of the Federal Constitutional Court of Germany in the *Socialist Reich Party* case (1952)[7] and the *Communist Party* case (1956).[8]

For a long time the country was under the regime of unlimited power, relying on violence, the power of a small group of communist functionaries, united in the Politburo led by the Secretary General of the CP SU Central Committee. This regime was still in force even after Article 6 of the Constitution establishing the monopoly of the Communist Party was abolished. The facts in disposal of the Court confirmed the latter.

The governing structures of the CP SU and the CP RSFSR corrupted the public-authority, as they actively implemented their own policy, preventing normal functioning of the constitutional authorities. This was the legal basis for the suspension of these structures by the Decrees of the supreme official of the Russian Federation. The President's actions were motivated by the objective need to rule out a possible moving back to the past, to eliminate the practice which was based on the fact that the Communist Party within its place at the state mechanism was inconsistent with the fundamentals of the constitutional system.

However, very broad wording of paragraph 1 of the Decree providing for the termination and dissolution of organisational structures of the CP SU and the CP RSFSR, did not take into account the above-mentioned difference between the governing bodies and the primary organisations of the CP SU and the CP RSFSR established on the territorial principle.

Hence, the Court found the challenged Presidential decrees partly constitutional and partly unconstitutional, providing a detailed analysis for each part thereof. The Court's Judgement shows two main conclusions. Firstly, the Communist Party as an organisation which used to govern the whole country without solid constitutional grounds was illegal. Secondly, even if such an organisation as the CP SU is unconstitutional the ideology or so-called first-layer party organisation at the level of municipalities were not condemned. Later the President of the Constitutional Court Mr Zorkin published an article explaining this decision which he considers a compromise between different social and political groups and the Constitutional Court was trying to get a position "over the battlefield".[9] Nevertheless, the Judgement was not unanimous and there were dissenting opinions both from liberal and left justices.

2. Constitutional Court and political parties after 1993: the judicial restraint approach

Constitutional Court powers after the 1993 Constitution

Even if the Constitutional Court was trying to make a compromise decision in the Communist Party case, the implications thereof were not that good either for the society (the decision made a lustration process similar to one which was taking place at the same time for example in the

[7] *Socialist Reich Party Case*, 2 BVerfGE 1 (1952), cited: Kommers D.P. The Constitutional Jurisprudence of the Federal Republic of Germany (3rd ed.) Durham: Duke University Press, 1997 P.286-289.

[8] See: *Communist Party case* 5 BVerfGE 85 (1956), cited: Kommers D.P. The Constitutional Jurisprudence of the Federal Republic of Germany (3rd ed.) Durham: Duke University Press, 1997 P.290.

[9] See: Zorkin V.D. Legal foundations of Russian multi-party system and case-law of the Russian Constitutional Court: the presentation during the International Conference "Political Parties in Democratic society: Legal Foundations of Organisation and Activities", St. Petersburg, 27 - 28 September 2012. Constitutional Justice Review 2012, N 6 (in Russian).

Czech Republic practically impossible) or for the Constitutional Court itself. The critics were blaming the Court for its involvement in the politics. The final point of the debate about the political role of the Court was the 1993 Constitutional crisis, where the majority of the Court opposed the President and argued for the protection of the 1978 Constitution then in force.

By the Presidential Decree of 7th October 1993 the activities of the Court were suspended.[10] Nevertheless, all the judges kept their positions and when the Court was restored in 1994 they continued their activities under the 1993 Constitution[11] and the 1994 Federal Constitutional Law "On the Constitutional Court of the Russian Federation".[12]

Another consequence of the Communist Party Judgement was exclusion of the power to review constitutionality of political parties from the list of the Court's powers.[13] Current legal regime of political parties does not give, unlike in several European countries, the Constitutional Court of the Russian Federation a power to dissolve political parties. This power belongs to the Supreme Court which is competent to consider such cases as the first instance court.[14] The Ministry of Justice can initiate the proceedings at the Supreme Court regarding banning of a political party.[15] Such an order provides the Ministry with quite a wide freedom of appreciation in respect of its checks of political parties and at the same time, as the Supreme Court cannot review constitutionality of parties, the latter's participation is reduced to a formal consideration of correctness of the application of the dissolution procedure by the Ministry of Justice.[16]

Nevertheless, the Constitutional Court, being deprived of the power to review constitutionality of political parties *per se*, can review constitutionality of a law (or a legal provision) applied in a particular case of dissolution of a political party which was done several times within the last 15 years. These cases were devoted to the check of constitutionality of legislative provisions establishing a minimum amount of members of a party, a number of territorial branches thereof etc. In the Judgement of 2004 No. 18-P, which is discussed below, the Court checked the provisions according to which formation of political parties on the basis of territory, ethnicity or religious beliefs was prohibited in Russia.[17]

The Judgement of 2004 No. 18-P

Pursuant to Subsection 3, Article 9 of the Federal Law "On Political Parties" of 11 July 2001, the establishment of political parties based on professional, racial, national or religious affiliation shall not be permitted. The Federal Law defines the basis of "professional, racial, national or religious affiliation" as proclamation in the charter and the programme of a political party of

[10] Decree of the President of the Russian Federation of 7th October 1993 No. 1612 "On the Constitutional Court of the Russian Federation".
[11] The judiciary in Russia is regulated by Chapter 7 of the Constitution. URL: http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Pages/Chapter7.aspx [the last access: 13 September 2016].
[12] Federal Constitutional Law of 21 July 1994 No. 1- FKZ "On the Constitutional Court of the Russian Federation". The updated text of the Law can be found on the official webpage of the Court: http://www.ksrf.ru/en/Info/LegalBases/FCL/Pages/default.aspx [the last access: 13 September 2016].
[13] *Ibid*, Article 3.
[14] Federal Constitutional Law of 5 February 2014 N 3-FKZ (as amended on 15 February 2016) "On the Supreme Court of the Russian Federation", Article 2 (5).
[15] See: The Decree of the President of the Russian Federation of 13 October 2004 N 1313 (as amended on 15 December 2016) "Regarding the Ministry of Justice of the Russian Federation".
[16] See, among others: Rulings of the Supreme Court of the Russian Federation of 4 June 2004 in the case N 33-Г04-2; of 12 September 2006 in the case N 70-Г06-6.
[17] Judgment of 15 December 2004 No. 18-P in the case concerning the review of the constitutionality of the provision of Subsection 3, Article 9 of the Federal Law "On Political Parties", upon a request of the Koptevsky District Court of Moscow and in connection with complaints of the Russian Social and Political Organization The Orthodox Party of Russia and the citizens I. V. Artyomov and D. A. Savin. The text of the Judgement in English is available at URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2004%20December%2015%2018-P.pdf [the last access: 13 December 2016].

such objectives as advocacy of professional, racial, national or religious interests and the reflection of these objectives in the name of the political party.

In their complaints to the Constitutional Court of the Russian Federation, the applicants asserted that the mentioned provisions did not conform to Articles 19 (Section 2) and 30 (Section 1) of the Constitution of the Russian Federation to the extent that they violate freedom of association and the principle of equality in the exercise of this freedom. Furthermore, the mentioned provisions did not conform to Article 13 (Section 5) of the Constitution of the Russian Federation stipulating the grounds for prohibition of public associations in the Russian Federation. Hence, the applicant challenged not a ban of a party but the special legislation in respect of possible bans.

The Constitutional Court confirmed constitutionality of the challenged provisions.

Firstly, the Court examined a fundamental constitutional nature of freedom of association. Everyone's right to association, it noted, as follows from Article 30 (Section 1) of the Constitution of the Russian Federation in conjunction with its Articles 1 (Section 1), 2, 13, 14, is among the fundamental values of society and the state based on the principles of the rule of law and democracy. It includes the right to freely establish associations to protect citizens' interests and the right to freedom of activity of public associations.

Article 30 of the Constitution of the Russian Federation does not explicitly provide for the citizens' right to freedom of association with respect to political parties, however, within its meaning in conjunction with Articles 1, 13, 15 (Section 4), 17 and 32 of the Constitution of the Russian Federation, the mentioned right, which includes the right to establish a political party and the right to participate in its activity, is an inalienable part of everyone's right to association and freedom of activity of political parties as public associations is guaranteed.

Secondly, the Court commented on the constitutional ground for prohibition of political parties. It stated that the Constitution of the Russian Federation prohibits the establishment and activity of political parties which aims or actions are directed to forcibly alter the fundamentals of the constitutional order, to violate the unity of the Russian Federation, to undermine security of the state, to create military units, to incite social, racial, ethnic and religious discord (Section 5, Article 13), and allows restriction of the rights and freedoms of man and citizen only by a federal law to the extent necessary to protect the fundamentals of the constitutional order, morals, health, the rights and lawful interests of others, and to ensure defence of the country and security of the state (Article 55, Section 3).

Being guided by the Constitution of the Russian Federation and provisions of international instruments ratified by Russia, the legislator may regulate the legal status of political parties, including the conditions and procedure for their establishment, principles of their activity, their rights and obligations. The legislator may also establish necessary restrictions on the right to establish political parties and grounds and procedures for state registration of a political party as a legal entity.

Thirdly, the Court shared its attitude which is still relevant even after 12 years, in respect of difference between political organisations including political parties and religious organisations. As opposed to political parties, religious associations, as follows from Articles 28 and 30 of the Constitution of the Russian Federation, are established to exercise freedom of religion, the right to join others in professing a certain religion, which implies a possibility to perform religious rites and ceremonies, proselytism, religious education and upbringing, charitable, missionary, philanthropic and other activities predetermined by the respective religious doctrine.

Pursuant to Article 14 of the Constitution of the Russian Federation taken in conjunction with Articles 11, 12 and 13 and pursuant to provisions of Article 4 of the Federal Law "On Freedom of Conscience and Religious Associations", the constitutional principle of the secular state and

separation of religious associations from the state implies that the state, its bodies and officials, bodies and officials of local self-government i.e. bodies of public (political) power, have no right to interfere in the lawful activity of religious associations and may not vest them with state or local self-government functions. Religious associations, on the other hand, have no right to interfere in the affairs of the state, participate in the formation and to perform the duties of state and local self-government bodies, participate in the activities of political parties and political movements, assist them financially or in any other way, participate in elections, *inter alia* by campaigning for or publicly supporting certain parties or candidates.

Therefore, in the Russian Federation as in a democratic and secular state a religious association may not substitute itself for a political party, it must be above partisanship and politics.

Finally, In respect of statutory regulation of the establishment and activity (including conditions of registration) of political parties, the Court noted that the principles of pluralistic democracy, plurality of political parties and secular state, which are the fundamentals of the constitutional order of the Russian Federation, may not be interpreted and implemented without taking into consideration peculiarities of the historical development of Russia, outside the context of national and confessional composition of Russian society, and peculiarities of interaction of the state, political power, ethnic groups, and religious confessions.

The establishment of parties on a religious basis could open the way for politisation of religion and religious associations, political fundamentalism and clericalisation of parties, causing in its turn rejection of religion as a form of social identity and its ousting from the system of factors which consolidate the society. The establishment of parties on a national basis could lead to dominance in elected state bodies of representatives of parties acting in the interests of larger ethnic groups to the detriment of smaller ethnic groups. The principle of legal equality regardless of the nationality guaranteed by the Constitution of the Russian Federation (Article 6, Section 2; Article 13, Section 4; Article 19, Section 2) would be violated.

Even though the Judgement No. 18-P does not directly deal with the issue of constitutionality of political parties, it describes existing approach of the judiciary towards political parties and approves quite wide margins of the legislature's manoeuvre.[18]

To sum up the existing approach of the Russian judiciary to political parties we can conclude that:

- The Constitutional Court does not have a power to review constitutionality of political parties. Its powers in this respect are limited with the constitutional review of the legislative provisions applied by ordinary courts in cases involving banning of political parties or constitutional review of legal provisions which could be applied by the executive when denying registration of political parties. Thus, this kind of review is only an abstract one.

[18] The Court later for several times upheld its legal positions from the 2004 Judgement. See for example, Judgment of 1 February 2005 No. 1-P in the case concerning the review of constitutionality of Indentions 2 and 3 of Paragraph 2 of Article 3 and Paragraph 6 of Article 47 of the Federal Law "On Political Parties" in connection with the complaint of socio-political organization "Baltic Republican Party"; Judgment of 9 November 2009 No. 16-P in the case concerning the review of constitutionality of Paragraph 32 of Article 38 of the Federal Law "On Fundamental Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation", Sub-Paragraph "к" of Paragraph 2 of Article 21 of the Federal Law "On Political Parties", Section 3 of Article 30 of the Law of the Krasnodar Territory "On Elections of Deputies of the Legislative Assembly of the Krasnodar Territory" and Section 1 of Article 259 of the Civil Procedure Code of the Russian Federation in connection with the complaint of V.Z.Izmailov; Judgment of 7 July 2011 No. 15-P in the case concerning the review of constitutionality of the provisions of Section 3 of Article 23 of the Federal Law "On General Principles of Organization of Local Self-Government in the Russian Federation" and Sections 2 and 3 of Article 9 of the Law of the Chelyabinsk Region "On Municipal Elections in the Chelyabinsk Region" in connection with complaints of the Commissioner for Human Rights in the Russian Federation and I.I.Boltushenko and Yu.A.Gurman.

- In Russian legal system it is up to the Supreme Court, the highest judicial authority eligible to check legality of a particular judicial decision to dissolve a political party in substance. In a number of its decisions the Supreme Court has already done this, while it usually tends to uphold the arguments of the executive.[19]
- The judiciary usually considers cases involving political parties, existence and legality thereof from a formal point of view, avoiding assessment of political motivation of the executive decisions. On the one hand this approach can be appreciated especially taking into account the traditional role of the judiciary as an arbiter, staying away from political branches and avoiding interventions in political matters.[20] However, from the other hand this approach restraints judicial review in this matters, giving political branches too wide competence. The latter is criticised by the European Court of Human Rights which is discussed below.

3. The ECtHR case-law against Russia

The ECtHR has several times considered complaints from Russian political parties or social organisations which were primarily connected to registration requirements established by the Federal Law "On Political Parties". However, there were several cases where applicants tried to contest national decisions banning activities of parties on the ground of content of the disseminated information or political programmes, while it has to be borne in mind that in Russian cases the concept of militant democracy has been never applied *per se*.[21] One of the most significant in a line of those cases is the *Vatan v. Russia* case.[22]

The Vatan Party case

The Vatan was registered as a political party by the Ministry of Justice of the Russian Federation. The aim of the party was to "to support the renascence of the Tartar nation, to enhance the latter's political activity and to protect Tartars' political, socio-economic and cultural rights".[23] Several regional branches were established in the regions of Russia, including the Ulyanovsk Regional Organisation of the People's Democratic Party Vatan (the Regional Organisation) which in 1997 addressed peoples of the Volga regions ("To peoples of the Volga region, to all oppressed peoples of the empire, to the Ulyanovsk Regional and City authorities, to historians, students of local lore, archaeologists and scientists") with the statement entitled "Prevention and cancellation of the forthcoming witches' Sabbath arranged by reactionary forces – 'the war party'- the so-called '350th anniversary of the founding of the town of Simbirsk' which is in fact an approximate date of the colonisation of Shekhry Sember".[24]

Later the branch made similar statements which were regarded by national courts. The Ulyanovsk regional court found:

> ...the Ulyanovsk Regional Organisation of the People's Democratic Party Vatan openly calls for violation of the integrity of Russia, for violent alteration of the foundations of constitutional governance and for the creation of an Islamic State in the Volga Region. The Regional Organisation proclaims the idea of a national liberation fight and calls for the formation of a brigade of trustworthy, courageous and resistant people. The activities and

[19] See *e.g.* Decisions of 13 December 2011 N ГКПИ11-2162, of 18 October 2013 N АКПИ13-674 etc.
[20] See *e.g. Baker v. Carr*, 369 U.S. 186 (1962).
[21] Unlike, for example, the case of *Refah Partisi (the Welfare Party) and Others v. Turkey* App. nos. 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR: 13 February 2003).
[22] *Vatan v. Russia* App. No. 47978/99 (ECtHR: 7 October 2004).
[23] *Ibid*, paras. 8-10.
[24] *Ibid*, paras. 11-12.

> opinions of the Regional Organisation's leaders and members are of an extreme nationalist nature, inciting people to national and religious discord and denigrating the Russian speaking population and non-adherents of Islam.[25]

The court concluded that the activities of the Regional Organisation did not correspond to the purposes declared in its Charter and violated Section 16 of the Federal Law "On Public Associations". Hence, the branch was prohibited from providing meetings or other public activities and after unsuccessful attempts to appeal the decision of the regional court, applied to the European Court.

The ECtHR found the application inadmissible and said the Government's arguments were well-founded. The main reasoning of the Court was based on the ground that the Party which lodged the application to Strasbourg was a legal person separate from the Ulyanovsk branch which under Russian legislation was an independent legal person. In paragraph 43 of the Judgement the Court stressed that "[a]ny claim that a political party embraces more than one legal person must be borne out by the statutes and structures of the organisation".[26] More important was the finding that the Party *per se* did not have standing before the regional court as a "party as whole" and that no limitations were imposed on the Vatan Party itself. [27]

Thus, the ECtHR judgement appears to be founded on the merely technical approach to analysis of the status of non-governmental legal persons under Russian legislation without going into substance of the ban occurred.

From this perspective the Concurring opinion of judges Ress and Cabal Barreto could be of interest. They believe that "in order to protect the existence of political parties and freedom of political expression under Articles 10 and 11 of the Convention, a broad approach is to be preferred". Within such a context they offered to give the Party itself the right to protect interests of its branches even in a case if they are separate legal persons. Otherwise freedom of association and the right to political expression could be diminished.

The European Court in *Vatan* decided not to study expression of the political party which in any case would not overcome the threshold of acceptability in a democratic society. On the opposite, the Court decided to minimise political impact of the decision and stuck to technical-legal reasoning which in this case could be reasonable.

The ECtHR case law regarding technical requirements to political parties

The second group, a more widespread one, is a line of cases where the ECtHR discusses national decisions applying technical regulation towards a number of members of a party, a required amount of regional branches in territorial Subjects of the Russian Federation.

The political parties' regulation in Russia in some aspects intentionally or unintentionally could lack necessary clarity which allows arbitrary influence their activities creating obstacles of even cancelling registration of political parties.[28]

One of the examples of such case-law is the case of *Republican Party of Russia v. Russia*.[29] According to the facts of the case on 17 December 2005 an extraordinary general conference of the Applicant elected its management bodies. The Applicant asked that its new address and the

[25] *Ibid*, para. 19.
[26] *Ibid*, para. 43.
[27] *Ibid*, paras. 45, 50.
[28] See among other sources: *Presidential Party of Mordovia v. Russia* App. No. 65659/01 (ECtHR: 5 October 2004); *Yabloko Russian United Democratic Party and Others v. Russia* App. No. 18860/07 (ECtHR: 8 November 2016).
[29] *Republican Party of Russia v. Russia* App. No. 12976/07 (ECtHR: 12 April 2011).

names of its *ex officio* representatives be entered in the Register by the Ministry of Justice. On 16 January 2006 the Ministry of Justice refused to make the amendments because the party had not submitted documents showing that the general conference had been held in accordance with the law and with its articles of association.[30] After subsequent failed attempts to introduce amendments to the Register the Applicant applied to domestic courts which left the Ministry's decision in force. Moreover, in 2006, in a separate set of proceedings, the Ministry of Justice conducted an inspection of the applicant's activities. In the result of the inspection the Ministry applied to the Supreme Court of the Russian Federation which is the competent judicial body in this case, asking to dissolve the Party. The Supreme Court agreed with the position of the Ministry. Later the activities of national authorities became a subject of the complaint to the ECtHR.

The first issue which the Applicant put before the Court was whether there was a violation in the case of the Ministry of Justice refusal to amend the Register on the ground of illegality of the Party's conference.

The position of the Government in respect of restrictions imposed on registration and functioning of political parties can be summarised as follows: the Federal Law "On Political Parties" established a special authorisation procedure for registration of political parties. The requirement to obtain a registration authorisation was justified by the special status and the role of political parties. Moreover, the same rules apply to the registration of a newly established political party and to the registration of any amendments to the information contained in the registrar thereof, thus, making the procedure indiscriminate.

The European Court in this respect stated that "it should be up to an association itself to determine the manner in which its conferences are organised. Likewise, it should be primarily up to the association itself and its members, and not the public authorities, to ensure that formalities of this type are observed in the manner specified in its articles of association",[31] finding, thus a violation of Article 11 of the Convention.

The second issue was whether the dissolution of the Applicant for failure to comply with the requirements of minimum membership and regional representation was in conformity with Article 11.

The reasoning of the Government in respect of this issue was pretty much similar to the one described above, with the reference to the position of the Constitutional Court of Russia which stated that:

> the requirements of minimum membership and regional representation promoted the process of consolidation of political parties, created prerequisites for the establishment of large, strong parties, prevented excessive parliamentary fragmentation and thereby ensured normal functioning of the parliament and furthered the stability of the political system. The above requirements were not discriminatory because they did not prevent the emergence of diverse political programmes and were applied in equal measure to all political parties, irrespective of their ideology, aims and purposes set out in their articles of association. Nor did they impair the very essence of the citizens' right to freedom of association, as political parties which did not meet that requirement had an opportunity to reorganise themselves into public associations.[32]

In the first stages of the proportionality analysis the Court found the standards to be met whereas while discussing the notions of necessity in a democratic society the ECtHR stressed that "the interference at the issue in the present case was too radical: the applicant party was dissolved

[30] *Ibid*, paras. 11-13.
[31] *Ibid*, para. 88.
[32] *Ibid*, para. 97.

with immediate effect. Such a drastic measure requires very serious reasons by way of justification before it can be considered proportionate to the legitimate aim pursued".[33]

In respect of the minimum membership requirement the Court was not convinced by the arguments of the Government and the Constitutional Court, and in particular, existence of a number of small parties which did not overcome a 3% threshold for getting state financing could not be a burden to the budget. Moreover, the argument regarding prevention of parliamentary fragmentation also was irrelevant since at that moment the electoral threshold to be elected to the State Duma was 7%.[34]

Regarding the same notion the Court stressed that even small social groups have to be eligible to get their representation by the means of creation of their political associations. In the Court's opinion, "a minimum membership requirement would be justified only if it allowed the unhindered establishment and functioning of a plurality of political parties representing the interests of various population groups".[35]

In respect of insufficient number of regional branches the ECtHR, unlike the Constitutional Court, uphold the importance of participation of regional political associations in public life and importance of their parliamentary representation.[36] More than that, "with the passage of time, general restrictions on political parties become more difficult to justify",[37] hence, the imposed restrictions and subsequent dissolution of the Applicant were not proportionate to the legitimate aim pursued.

Conclusion

In the paper we briefly discussed the approach of the Russian Federation towards constitutionality of political parties and the evaluation of the European Court of Human Rights thereof, however, not yet complete. Several conclusions could be made.

Firstly, as the early case law of the Constitutional Court demonstrates, during the first years of the new Russian state there was a trend towards a deeper involvement of the judiciary in evaluation of constitutionality of political parties mostly from the perspective of ideology which after 1993 events was abandoned to a more pragmatic and legalistic approach.

Secondly, nowadays this is the Ministry of Justice which is the key-actor within the process of dissolution of a political parties, whereas the Supreme Court, which currently has the power to check decisions of the Ministry in this field, tends to be more lenient towards the executive's position.

Thirdly, current regulation of political parties, even being significantly softened after the 2011-2012 protests, stays quite repressive and favouring the ruling party, "the United Russia". The technical requirements of the legislation still serve as grounds for banning political parties of restricting their activities without proper evaluation of the ideology thereof. Thus, the review of constitutionality of political parties rests at the "first technical level" leaving practically no room for development of the concept of militant democracy in Russia.

Fourthly, it appears the European Court of Human Rights was not very critical towards Russian party legislation, however, it managed to address the issue of the review of political parties which was not going into the details of their ideology or platforms in cases like *Republican Party of Russia v. Russia*.

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[33] *Ibid*, para. 102.
[34] Currently under the Federal Law "On Political Parties" the threshold is lowered again to 5%.
[35] *Republican Party of Russia v. Russia*, para. 119.
[36] *Ibid*, para. 124.
[37] *Ibid*, para. 125.

Finally, from the provided material one can reasonably conclude that the concept of militant democracy is not well-implemented in Russian party legislation. The primary idea of constitutional review of political parties, appeared on the edge of the strike with communism legacy, was not uphold either by the constitutional legislator or by the Constitutional Court itself which from the beginning of XXI century tends to deal with less politics as possible.