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Национальное измерение Европейской Конвенции

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The National Dimension of the European Convention

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Constitutionalism and Judicial Review

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Judicial Standard of Fair Representation in a Proportional Electoral System: The Case of Russia

Abstract

The spread and entrenchment of the proportional electoral system is often viewed as one of the key features of establishment of the so-called "sovereign democracy" regime in Russia. The article attempts to track the issues of the system against the background of judicial decision-making, mainly focusing on jurisprudence of the Russian Constitutional Court, but also taking into the account the comparative European law. Our analysis focuses on three issues: general regulatory framework, mandate distribution between the party lists and within party lists.

Keywords: Russia, elections, parties, proportionality, standard, representation.

Правовой стандарт равного представительства в пропорциональной избирательной системе: пример России

Аннотация

Распространение и закрепление пропорциональной избирательной системы зачастую рассматривается в качестве одного из ключевых элементов создания режима так называемой «суверенной демократии» в России. Настоящая статья призвана связать системные проблемы и правовые решения, в основном на примере правовых позиций Конституционного Суда РФ, но также принимая во внимание тематические положения конституционного права европейских стран и заключения международных организаций. Предметом исследования являются три основных поля: общее правовое регулирование пропорциональной избирательной системы, распределение мандатов депутатов между партийными списками, а также их распределение внутри самих списков.

Ключевые слова: Россия, выборы, партии, пропорциональность, представительство.

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Judicial Standard of Fair Representation in a Proportional Electoral System: the Case of Russia

Introduction

Current types of electoral systems are usually divided in two large subgroups – plurality (also known as majoritarian or first-past-the-post) and proportional ones. The former ones enable a voter to pick clear "winners" and "losers", while the latter ones aim to eliminate the problem of "wasted votes", ensuring that every vote counts i.e. that the distribution of seats in the assembly would closely mirror the actual distribution of votes. Proportional systems can further be divided into those based on party lists in nationwide or large subnational electoral districts (a prevalent type) and those using a single transferable vote in relatively small electoral districts.[1]

However, despite the purported aims of the proportional electoral system, it does not exclude certain majoritarian elements. An extreme example can be found in the legislation of early Fascist Italy, where the top party list was assured of the two thirds of legislative seats, provided that it secured at least 25% of the vote, essentially establishing a majoritarian block system.[2] In-built devices, limiting the exact degree of proportionality (such as for example an electoral threshold), proliferated in the wake of the Second World War as the states sought to limit the possibility of small radical or extremist groups entering parliament. Similar concerns guided their introduction in the Post-Socialist states, including Russia.

Courts have generally taken a rather deferential approach to majoritarian devices within the ambit of the proportional system. The European Court of Human Rights (hereinafter – ECtHR),[3] and many national courts (with some notable exceptions) have concluded that "governmental stability",[4] or prevention of factionalism,[5] constitute permissible ground for deviations from the general proportionality principle. That would represent a sharp contrast with the position of the Canadian Supreme Court, which explicitly rejected such rationale in *Figueroa v. Canada.*[6] Perhaps the greatest contrast could be found between the positions of the Slovenian Constitutional Court and the US Supreme Court. On the one hand, the former rejected the case for greater proportionality of the electoral results by arguing that "it may occur to any voter, with an equal degree of probability that their vote would be worth more or less".[7] While, on the other hand the US Supreme Court proclaimed that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise".[8] Having this in mind, one can argue that while the majoritarian electoral system is systematically geared to produce less fair results, at the same time it may require a more stringent judicial scrutiny.[9]

Against this backdrop, the Russian case is especially interesting, as the judicial standard of proportional representation did not evolve gradually in a stable environment, but rather in a whirlwind of constant political change, which constantly affected the "rules of the game" (both in favor and against the proportional system). To discern the basic precepts of the judicial standard of fair representation in Russia, I would focus on three dimensions – the evolution of the general legislative framework (1) and judicial decisions, regarding the relationships both between the party lists (2) and within the party lists (3).

1. Basic legislative framework of proportional representation

First proposals for the introduction of a proportional component into the electoral system of the post-Soviet Russia were introduced in 1992, under the auspices of the Constitutional Commission, entrusted with, *inter alia*, drafting new electoral legislation.[10] The proposals faced stark criticism from both the supporters of President Yeltsin and of the Supreme Council[11]. This was hardly surprising. Unlike their Eastern European counterparts, the former Soviet republics and Russia in particular,

lacked any significant partisan infrastructure. If the former could either readily re-establish the pre-Socialist parties or grant official status to sufficiently representative dissident groups, for the latter such options were not available. The situation has been further exacerbated by President Yeltsin's refusal to build a party support base.

As a result of this political climate there is no specific proportionality requirement in the Constitution of the Russian Federation (unlike for instance in its Albanian, Czech, Finnish and Polish contemporaries). For the future, it meant that the judicial standard of fair representation had to be deduced from general electoral clauses of the Constitution (i.e. Articles 3 and 35). Nonetheless, the presidential decree on elections to the first State Duma, issued as a part of transition to the new constitutional regime, stipulated that half of the chamber was to be elected from party lists on a proportional basis in a single national district, with a 5 per cent threshold.[12] This was seen as largely a transitional provision as shown by subsequent attempts of presidential administration to modify the ratio between the proportional and first-past-the-post components, in favor of the latter.[13]

The formula has been replicated without any significant changes in the subsequent federal laws on the State Duma elections, adopted in 1995[14] and 1999[15] respectively. A 2002 law has slightly modified it by increasing the electoral threshold to 7 per cent (with delayed effect). Another presidential decree of October 1993, setting transitional guidelines on the formation of regional legislative assemblies,[16] made no provision for a mandatory proportional component. Neither could it be found in the subsequent federal framework electoral laws of 1994 and 1997 establishing basic guarantees of citizens' electoral rights, and a right to referenda (hereinafter – the framework electoral law). Reflecting low popularity of a proportional electoral system, in the period between 1993 and 2003, only 9 regions[17] had introduced some form of a proportional component for the elections of their legislative assemblies.[18] Of these, only three[19] have used it more than once.[20] Furthermore, only in Krasnoyarsk kray and Sverdlovsk oblast the proportional component has been used for electing more than a third of legislators.[21] However, in those two regions the proportional seats were contested almost exclusively by regional, rather than national political actors.

Overall, a dominant majority of regional legislators were notional "independents" with average share of party representatives in a regional legislature falling from 21.8 per cent during December 1995 – April 1999, to just 14.2 per cent in December 1999 – May 2003[22]. Such a situation has been generally interpreted as a sign of excessive fragmentation and excessive volatility[23] and hence institutional weakness of the Russian political system,[24] manifesting itself among other things in the establishment of regional authoritarian regimes and growth of centrifugal tendencies.

Early 2000s saw an establishment of consensus within both Kremlin administration and nationwide political parties that such an environment was no longer tenable. While the Kremlin wished to enhance their influence in regional politics, the parties hoped to entrench their position as only legitimate political actors. As a direct consequence of such a consensus, two key laws were adopted in 2001-2002. First one, regulating political parties, aimed to "streamline" the political process and exclude "frivolous" actors by establishing extensive requirements for party registration, banning regional and confessional parties. This law was complimented by subsequent amendments to the framework electoral law, which mandated the election of at least half of the legislators (or half of at least one chamber in a bicameral legislature) from the party lists, on the basis of a proportional system.[25]

The introduction of the amendment into regional legislation stretched for the period from December 2003 to October 2008. Its outcome can be divided into two major phases. For the duration of the initial one, the party-political system at both federal and regional levels maintained many features of the previous period: party registration was relatively easy, ballot access remained unobstructed, and *ad hoc* electoral blocs took the place of the erstwhile regional parties. A size of proportional quota would rarely exceed the mandatory 50 per cent. The second stage saw major steps towards the centralization and "cartelization" of the political process. A switch to a fully proportional system for the elections of the State Duma effectively denied ballot access to independent candidates and

restricted opportunities for minor parties. For the latter, participation in political process was further complicated by more stringent membership requirement in force from January 1, 2006. A party was required to have at least 50 000 members to obtain official status or to retain it. On top of that, effective ballot access was conditional on stringent requirements for presentation of citizen signatures, while alternative electoral deposit was abolished. Those requirements were waived for the parties, represented in the State Duma, thus contributing to the "cartelization".

This coincided with some regions, starting with St. Petersburg in 2005, emulating federal model by introducing a fully proportional electoral system. By 2010 such a mode of election had been introduced in eleven regions.[26] The proportional system also spread into the municipal elections with a 2011 law mandating a 50 per cent proportional quota for all municipal assemblies with over 20 members.

Another tendency was a "streamlining" of regional electoral legislation, which set the electoral threshold almost uniformly at 7 per cent of the vote. While some regions previously employed a higher threshold,[27] in most cases it was a raise. These measures had an effect of severely limiting ballot access to the political actors, who in practice had to satisfy three stringent criteria – mass membership, onerous registration procedure and eventually an electoral threshold within the electoral system itself. As a direct result of stringent membership requirements, by 2011 only seven nationwide political parties could contest elections, and of those, only one had been registered during the operation of the law (since January 2006). As a direct result of burdensome requirements for ballot access, in a majority of elections for regional legislatures between 2007 and 2011 only four "parliamentary" parties qualified for a place on a ballot. In two campaigns the number of participating parties shrunk to just three. Hence instead of allowing political evolution run its natural course, electoral politics was artificially turned into a game of "major league" parties.

However the thinking behind this process has received a degree of approval from the Russian Constitutional Court. In 2005, the latter emphasized the requirement that a party represents "the interests of a considerable number of citizens",[28] as "such support is required to fulfill the main mission of a political party in a democratic society, namely forming and articulating the political will of the people".[29] In 2007, the Constitutional Court further contended that the 50,000 membership requirement was vindicated by the State Duma being elected entirely on a proportional basis,[30] and thus the will of the nation ought to be represented "only by large, well-structured political parties".[31] The ECtHR in *Republican Party of Russia v. Russia* took the contrary view, arguing that "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",[32] and further underscoring that "small minority groups must also have an opportunity to establish political parties and participate in elections".[33]

In 2009-2010 the restrictive regime was slightly relaxed. Parties satisfying the 5 per cent threshold but not the 7 per cent one, at the State Duma,[34] and regional legislative elections,[35] were guaranteed "consolation mandates". Parties, already represented in the regional legislature, were no longer required to present voter signatures to gain ballot access in the elections for that particular legislature.[36] While these amendments did not change the restrictive registration regime and, thus, mostly concerned the interests of "major league" parties, the next changes, introduced in 2012, had a more wide-encompassing significance. Most prominent in this respect were the decrease of minimal membership requirement to 500 persons,[37] and the abolition of a requirement for party lists to present signatures in order to register to run in an election.[38]

However, after the two regional electoral campaigns pursuant to the new requirements, which saw increased competition, the "proportional" trend is being reversed. A federal law adopted in November 2013, cut the obligatory proportional quota in regional legislatures to 25 per cent, abolishing it altogether for the legislatures of Moscow, St. Petersburg and municipal assemblies.[39] At the same time, the mode of election to the State Duma election reverted to a mixed-member system. The Constitutional Court reacted to these developments by confirming that in choosing between the

FPTP and proportional system, the legislator had wide discretion.[40]

Given the persuasive influence of the general regulatory framework on the key features of the electoral process, such as ballot access, one may wonder whether the judicial standard of fair representation does matter at all. I would argue to the contrary. It is precisely the wider ballot access that makes the standard of representation all the more crucial. On the other hand, the existing safeguards may offer insights as to why the legislator seeks to curtail proportional representation in the context of wider ballot access.

2. Inter-party aspect of fair representation

By far the most popular of various devices, which limit the ideal-typical proportionality is the electoral threshold, which makes representation of a party list conditional on the attainment of a certain percentage of the vote. While, as noted above, for the purposes of the State Duma election such a threshold was initially fixed at 5 per cent, in the 1996 legislative election in Koryak autonomous okrug, it was as high as 25 per cent with only a single party being able to surpass it. In November 1998 the Constitutional Court of the Russian Federation found the threshold in State Duma election constitutional, as it fulfilled permissible policy goals such as prevention of "excessive fragmentation" of the legislative corps, "normal functioning of the parliament", "stability of the legislative power and the constitutional order in general".[41] The exact size of threshold was found to be in line with its average "in countries with an established multi-party system", where, reasoned the Court, it was fulfilling the above-mentioned policy goals without violating the proportionality principle.[42] However, when analyzed against the backdrop of the nascent and yet unstable multi-party system in Russia, in Court's opinion, the threshold could have been excessive, unless surpassed by the party lists, which in total command the support of the majority of voters. Otherwise, suggested the Court's reasoning, the State Duma would lack popular legitimacy. Next, the Court dealt with a hypothetical case where only one party satisfies the electoral threshold and thus is entitled to the totality of seats contested through the proportional system. Judges found such a scenario to be incompatible both with the principle of proportionality and the very idea of pluralist democracy.[43] As a remedy against both prospects the Court suggested either to provide an option for a merger of unsuccessful party lists or to establish a flexible threshold, which was to be lowered until the two conditions (representation of at least two party lists and the majority of the voters) were met. The legislature chose the latter option, which has been subsequently introduced in the law on the State Duma elections,[44] and various regional electoral laws.

Nonetheless, some experts remained unconvinced, deeming the very existence of an electoral threshold a violation the proportionality principle.[45] The Constitutional Court's rationale for the existence of the electoral threshold essentially followed a well-established line of thought, which defined it as a tool of "militant democracy", designed to keep the "fringe" parties out of the parliament, and thus prevent them from gaining the so-called oxygen of publicity. For instance, the Czech Constitutional Court explicitly referred to the ill-fated experiences of both the Weimar Republic and the French Fourth Republic as examples of how an "excessive diversification in the Assembly's composition and unrestricted proportional representation may become a tool of political destabilization and an element destructive of a constitutional state".[46] The Court conceded that "certain distortion of proportionality in political representation" due to operation of limitation clauses was constitutional, as long as the degree of disproportion did not cast into doubt the democratic nature of the political representation.[47] Czech judges based their reasoning, *inter alia*, on the foreseeability of electoral legislation for the voter and the transitionary nature of the political regime.[48]

However, some recent developments in European "soft law" run contrary to that wisdom. The 2007 resolution of the Parliamentary Assembly of the Council of Europe called on the member states to balance considerations of effectiveness of a legislature and fair representation of views in the community.[49] With this in mind, it stated that "in well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections".[50] On the other hand, the adoption

of such a position did little change to the established line of precedent of the European Court of Human Rights in deciding cases on Article 3 of the Protocol No. 1 to the Convention. In this regard the ECtHR tends to grant member states "wide margin of appreciation"[51] in deciding whether "currents of thought which were sufficiently representative"[52] to guarantee representation in parliament, conceding no electoral system can eliminate "wasted votes".[53] Particularly notable is the Strasbourg court's reasoning in *Yumak and Sadak v. Turkey*, which, along the emphasizing the previous line of jurisprudence, based itself on the premise that the applicants could circumvent the high threshold by joining other party lists or standing as individual candidates.[54] At the same time, we should also note the 2011 decision of the German Constitutional Court, which deemed the 5 per cent threshold in the European election to be unconstitutional.[55] The Court's reasoning was based on assessment of the potential impact broader representation would have on the functioning on the European parliament, as well as of the latter's powers vis-a-vis the executive organs of the European Union.[56]

This line of thought is essentially replicated by some experts when assessing the regional electoral legislation of the Russian Federation. They argue that the distribution of powers between regional legislative and executive powers warrants sufficiently wide representation as a paramount concern, rather than prevention of political fragmentation.[57] In hindsight such rationale could have been rebutted by referring to special roles of legislature and plurality party list in "vesting powers of a chief regional executive"[58] upon presidential nomination,[59] under previous system of regulation. However, under the current system such reasoning probably may apply only to those regions, whose chief executives are elected by legislature. On the other hand, we shall note the approach of the ECtHR, which viewed the threshold in conjunction with other barriers to ballot access – minimum membership requirement for a political party, and a requirement to collect signatures in order to run in elections.[60] In absence of the two other restrictive provisions, in our opinion, the case for a threshold becomes only stronger. Legal challenges to a 7 per cent threshold have seen courts so far take the position that the technical conformity to the 1998 Judgment of the Constitutional Court warrants the legality of a particular threshold in place.[61]

Ideal-typical proportionality can be further distorted by using a specific formula for converting votes into actual legislative seats. Some of the formulas used in proportional systems were found to constitute an implicit bonus for a party list, winning a plurality of votes, at the expense of less successful ones.[62] For the State Duma election, the preferred method since 1993 has been the Hare quota, often described as favorable for smaller parties and ensuring wider representation.[63] However the Russian framework electoral law establishes no particular formula as binding for the regions. As a result, since 2006 a majority of regional electoral laws have introduced a so-called Imperiali divisors formula, previously employed only in Belgian municipal elections, where it acted as an implicit electoral threshold.[64]

Two variations of the formula have been in use. The early one provided only for the representation of more than one party, thereby satisfying one the requirements, established by the 1998 Judgment of the Constitutional Court, but simultaneously establishing a potential extra implicit threshold beyond the one explicitly provided by the law.[65] The latter variation, also dubbed the Tyumen method,[66] avoided this conundrum, by assigning at least one seat to each party list having surpassed the threshold.[67] The first variation has been shown to dilute proportionality in favor of the plurality party, beyond the bias displayed by other established electoral formulae.[68] The second variation, on the other hand, in its practical operation mimicked the established D'Hondt formula, which generally favors a majority party.[69] The danger of the first variation of Imperiali divisors formula acting as an implicit threshold, has been largely precluded by the aforementioned 2010 amendment to the framework electoral law, which entitled to representation every party list satisfying a 5 per cent threshold.[70]

In the wake of the 2007 regional legislative elections, which saw the first use of Imperiali divisors, corresponding provisions of electoral laws have been challenged by voters in a number of regions. The lawsuits have been uniformly rejected by the courts of general jurisdiction.[71] The position of

lower courts has been subsequently endorsed by the Supreme Court of the Russian Federation.[72] A possible constitutional challenge could possibly be made by applying "arithmetic" scrutiny; thereby an electoral formula must be as close as possible to the ideal-typical model of proportional representation. This is an approach favored by some Russian commentators, who contend that in order to satisfy the proportionality requirement as set in the framework electoral law (i.e. that the seats are to be proportionally divided between party lists, depending on the number of votes), an electoral formula has to satisfy a two-prong mathematical test: a) deviation from "pure" proportionality, defined as sum of modules of difference between vote and seat percentage; b) equal "price of mandate", i.e. number of votes per mandate.[73]

In comparative perspective, such an approach establishes itself with the German constitutional jurisprudence. Perhaps the most vigilant protection of the principle of proportionality can be found in the 1952 decision of the Bavarian Constitutional Court, which established the general rule that the principle of equal suffrage requires first and foremost equal measure of success for the vote of equal value.[74] A similar position has recently been taken by the Federal Constitutional Court of Germany, which ruled a long-established practice of so-called overhang seats, as unconstitutional. In its 2009 decision, the Court found this practice in violation of the principles of the equality and directness of elections as far as rounding losses bring about "negative voting", where the party list could benefit from voters actually casting their vote for another party.[75] The 2012 decision further clarified the Court's position by explicitly limiting the number of such seats to satisfy the fundamental nature of proportional representation elections.[76]

However, such a position is far from representing a European consensus. The aforementioned integrationist reasoning, in our opinion, can be applied not only to the electoral threshold, but also to the very electoral formula. Evidently an *implicit* bonus constitutes a lesser violation of proportionality principle than an *explicit* bonus, which can be found in the electoral legislation of several European countries (e.g. Italy, Greece and France).

Another challenge to the proportionality principle lies in the very magnitude of an electoral district. If such a district is too small, a party list can be denied representation, despite satisfying an electoral threshold. This is precisely what happened in 1996 legislative elections in Kaliningrad oblast and Ust-Orda Buryat autonomous okrug, which were contested in excessively small districts (5 and 4 seats respectively). In the 2000 Kaliningrad oblast legislative election all the party lists satisfying the threshold, received one seat each, despite wide disparities in actual percentage of the vote. Hence the very purpose of proportional representation has hardly been achieved. Subsequent amendments to the framework electoral law helped exclude such a scenario for the time being, however the proliferation of the proportional system to the municipal level helped it resurface itself. While the law prescribed mandatory proportional quotas in municipal assemblies with 20 or more members, it did not preclude them in smaller ones. Electoral officials have early on warned about legal issues posed by proportional districts of small magnitude effectively creating an additional implicit threshold.[77]

Eventually in 2011 the issue went before Constitutional Court, which found unconstitutional an electoral system in a village council, which elected all of its 10 members on the basis of proportional representation. The Court ruled that the application of such a system effectively resulted in party lists winning the same number of seats, despite large-scale variations in the number of votes cast, thus making impossible to establish clear winners and losers of the election.[78] Such an outcome, according to the Court's reasoning, resulted in obscuring the electorate's will and hence undermining the legitimacy of an elected body.[79] As a direct result of the Judgment an amendment to the framework electoral law stipulated that in municipal elections, the size of an electoral district in a proportional system should be no less than 10 members.[80]

However with the adoption of the aforementioned amendments, cutting mandatory proportional quota to a quarter of seats, the permissible magnitude of a single district may shrink to just four seats. In case of such a scenario, the issues of fair representation can arise again. Furthermore, the case for an electoral formula with an implicit majority, in our opinion, may become weaker. In com-

parative perspective, we need to recall the 1992 judgment of the Bavarian Constitutional Court[81] and the 2001 judgment of the Constitutional Court of the Czech Republic,[82] which explicitly forbade the use of the electoral system with an implicit majority bonus in electoral districts of small magnitude, as inimical to the very principle of proportional representation.

The judicial standard of fair representation in application to inter-party relationships in a particular proportional system presupposes three major goals:

1) to maintain legitimacy of the legislature,
2) assure its multi-party nature, and
3) broadly retain its proportional nature.

The third component of the standard, in our opinion, shall preclude not only the systems where a party list with less votes may win more seats (for example, as the 1960s electoral systems of Italian regions of Sicily and Trentino-Alto Adige),[83] but also the ones which allow for non-representation of party lists, satisfying the electoral threshold. The case for unconstitutionality of such systems is further strengthened by the position of the Constitutional Court on the prohibition to obstruct the will of the electorate.[84] Thus at the very least, the current prohibition of excessively small proportional districts shall be expanded from the municipal to the regional level. However if the will shall not be obstructed, does it mean that it cannot be distorted as well? In this respect, we can identify two opposite positions – one that beyond electoral threshold no dilution is possible and a particular electoral formula must be as close as possible to the ideal-typical model of proportionality, and the other, that implicit in-built majority bonuses are permissible. If current jurisprudence is to be the guide, the latter position is more likely to gain traction, unless a clearer standard of proportionality is introduced in the framework electoral law.

3. Intra-party aspect of fair representation

Another aspect of the operation of any proportional election system is the distribution of mandates within the successful party list, which is intimately intertwined with the conflict between individual candidates and party as a whole for the primacy in a proportional system. Starting with the 1993 State Duma election, the electoral legislation envisaged a closed-list system, whereby positions of individual candidates and hence their chances of winning a mandate are predetermined, before the election, by party leaders rather than by voters. In contrast, an open list system, where voters can pick a certain candidate within the list, whereby directly influencing his or her chances of being elected, has been implemented only in a negligible number of regional electoral system (4 out of then 89, all having subsequently abolished them).[85]

From the onset, the Constitutional Court of the Russian Federation took the view that in a proportional system voters choose a party list as a whole, rather than the individual candidates of whom it is made up. Thus, in the November 1998 judgment on constitutionality of the State Duma election law, this feature was attributed to the very nature of a proportional electoral system.[86] One and a half years later, the Court deemed the "special role" of leading candidates of a particular party list as insufficient to warrant forfeiture of participation in an election, if a particular list was to lose at least one of its three leading candidates.[87] Such an intervention was judged to constitute a violation of both electoral rights and freedom of association.[88] The notional entrenchment of political parties as leading political actors in early 2000s legislation was endorsed by the Constitutional Court, which in its 2004 Judgment stated that "by consolidating political will of citizens, they help formulate the political will of the people".[89]

Subsequent relaxation of requirements concerning leading candidates on a party list coincided with the entrenchment of the practice of "poster candidates", who join the party list (usually occupying its top positions) solely for promotion purposes, only to surrender their mandate immediately upon election. In this regard, the 1999 federal law on the State Duma envisaged that a mandate forfeited by one of three leaders of a party list, without a reasonable explanation, was to be transferred to another party list. No similar provisions were included in subsequent legislation. As a result, in the 2003 State Duma election a total of 37 candidates on the United Russia party list forfeited their mandates,[90] while at the 2007 election this number rose to 118.[91] Presidential plenipotentiary at the Constitu-

tional Court conceded that in practice such candidates have decisive influence on the vote.[92]

Some scholars take the view that the practice ought to be penalized by forfeiture of seats, surrendered by "poster candidates",[93] or at least those of them, who are state or municipal office-holders.[94] In 2006, the chairman of the Central Electoral Commission at the time, Mr. Aleksandr Veshnyakov stated that the use of "poster candidates" as a widespread practice may be unconstitutional.[95] In 2012 the ECtHR expressed concern over use of such a coordinated practice by United Russia Party in 2003 State Duma elections, but refused to analyze it in abstract. At the same time the ECtHR confirmed the primacy of a political party over an individual candidate for voter's deliberation in a proportional system, and deemed the voluntary forfeiture of mandates as foreseeable for a voter.[96] However, even if a provision against "poster candidates" were to be envisaged in legislation, its effectiveness would by and large depend on the correctness of implementation. For instance, although such a provision was included in regulations on elections of inaugural legislative assembly of Perm kray, it was not enforced in cases of forfeiture of mandates by leading candidates, as the electoral commission construed the provision to apply only to candidates who have actually taken up their mandates.[97]

The vision adopted by the Constitutional Court, allowed for further extension of the rights of the parties at the expense of the candidates, who make up party lists, presumably aiming at ensuring their loyalty. For example, starting from 1999 federal law on the State Duma elections, the parties were allowed discretion to expel candidates from their lists. As the use of similar practices expanded to embrace regional elections, it was challenged before the Constitutional Court, which upheld it in November 2009.[98] In its reasoning, the Court again underscored the primacy of a party list as a whole over individual candidates in proportional elections,[99] the only added caveat being a prohibition on abuse of such a power in an arbitrary or discriminatory manner.[100] In 2007, similar discretionary powers were given to parties in cases of early termination of legislator's mandate, meaning that it could be substituted by any candidate from the same (or in some cases, another) regional group, regardless of their initial order. Again, as in previous judgments, the provision was ruled constitutional. According to the Court's reasoning, with a certain amount of time having elapsed since the election, the party could take into account circumstances, which came to light during this period (for example, changes in candidate's relationship with the party).[101] However, justice Sergey Knyazev in his dissenting opinion challenged this reasoning, arguing that a party's discretionary power over its candidates' list lapses after its formation, while an election gives a particular order of candidates in a list a degree of popular legitimacy, whereby it can no longer be altered by a party.[102] He referred, *inter alia*, to the Venice Commission guidelines on Political Party Regulation, which suggested that political parties should be prohibited from altering electoral lists after the voting has commenced.[103] On the other hand, Justice Aleksandr Kokotov's opinion argued for even wider grant of discretionary powers for parties in picking a substitute candidate, based *inter alia* on the party's need to adequately evaluate the personality of a prospective substitute, especially in a context of a fledgling democracy.[104]

The current legislative regulation maintains the powers of a party over a legislator, elected on a party list, after he or she has taken office. The law forbids such a legislator from switching parties or joining another parliamentary faction, as both would lead to automatic forfeiture of his or her mandate. The 2012 judgment of the Russian Constitutional Court confirmed the constitutionality of the current prohibition on switching party allegiance for legislators, elected on party lists, deeming it necessary for the preservation of electorate's will (again understood as expression of support for a party as a whole) under the current political climate.[105] Such a regulatory regime, in our opinion, borders on "imperative mandate", which was dubbed as "generally awkward to Western democracies"[106] by a 2009 report of the Venice Commission. However, in a fledgling democracy these measures can prove indispensable in guarding legislators from the influence of vested interests.[107] Indeed, some experts go as far as to rule any change of party allegiance during the term of legislature, a direct assault on popular sovereignty.[108]

Given the fact that current regulation of a pro-

portional system both on federal and regional level presumes a single constituency, the majority of regional laws envisage division of a party list into territorial subgroups. This mirrors the State Duma election, which has provided for the mandatory creation of such subgroups since 1995. The tendency in recent years has been for territorial subgroups to mirror the FPTP constituencies.[109] In St. Petersburg, where all members of a legislature are elected on a party list, territorial subgroups essentially recreate the erstwhile constituency scheme (especially if taking into account the fact that the groups in question consist of a single person). On the one hand, such a system creates a certain relationship between the electorate and a person on a party system (typically absent in a closed-list system). On the other hand, such a system may be a tool to pressure political parties by forcing the withdrawal of such a number of subgroups, which would make the whole list ineligible to stand in the election. The Russian Constitutional Court in its 2008 judgment sought to prevent precisely such a danger by deeming unconstitutional a provision in the Vologda oblast electoral law, which allowed for the exclusion of a party list on the basis of a withdrawal of a single subgroup.[110] Underscoring yet again the primacy of the party's interests, the Court judged that such a measure constituted an impermissible interference into its operation.[111]

The final issue is the eventual distribution of mandates between the regional subgroups. While the State Duma election law and the majority of regional laws envisage the percentage of a vote achieved by a party list in a particular region as the benchmark for the purposes of such distribution, this approach is not universal. Constitutional permissibility of alternative approaches was at the center of a case before the Constitutional Court, where a former candidate challenged party discretion in distributing mandates between subgroups. The Court ruled in his favor, arguing that such discretion amounted to dilution of the voters' will.[112] In similar fashion a year later the Constitutional Court ruled against the practice of "substitute mandates", namely a case of resuming a previously terminated mandate in State Duma, when a new vacancy arises. Such practice has also been found unconstitutional due to, *inter alia*, dilution of voters' will and consequent inequality of candidates.[113]

At first glance, the judicial standard on intra-party relationships within the proportional system seems contradictory, favoring parties in some instances and candidates in others. However things may become clearer if we discern an implied standard, differentiating between purely discretional decisions of a party, and those motivated by real or potential disloyalty of a candidate or a deputy. The former are unconstitutional due to the dilution of voters' will, while the latter are tolerated to an extent due to the conditions in which parties operate in a fledgling democracy, where they lack deep roots and ought to be protected from competing political actors and vested outside interests.

Conclusion

The evolution of the system of proportional representation in Russia was marked by several key turns, which left a deep impact. Initially it began as a half-hearted effort to help nurture "genuine" political parties, lacking strong support either from the center or the regions. In early years of Putin's presidency, however, the proliferation of the proportional system became a useful tool for centralizing the political class and cementing the ascendant power of the Kremlin. In conjunction with burdensome requirements for ballot access, this had an effect of severely limiting political competition. In the wake of the protests of 2011-2012, however, an opposite tendency gained traction. Proportional components of the electoral systems were either curtailed or completely discarded as Kremlin sought a more flexible *modus operandi*, allowing for taming the opposition and disguising pro-government candidates as notional independents. This volatility of legislation had a negative effect on the development of clear judicial standards for the fair representation.

Regarding the inter-party competition, the judicial standard spells out only the basic requirements such as in particular, democratic legitimacy, multiparty character of an assembly, and basic proportionality of its composition in relation to the vote. However, the standard is not nuanced enough to either prescribe a particular method of counting votes or to explain the existence of an implicit or explicit majority bonus. Some doubts may be cast

over the relationship between the electoral threshold and the effective functioning of an assembly, in the absence of a clear relationship with the executive power. In case of intra-party relationships, the judicial standard has a realist gist and takes into account the realities of party functioning, and while it generally protects the finality of vote, exceptions exist to tackle the purported disloyalty of party members.

Notes

1 These systems are found in the Republic of Ireland, Northern Ireland, Malta and with certain variations in India and Australia.

2 A. De Gasperi *La "legge Acerbo" e le elezioni politiche del 1924*, URL: http://www.degasperi.net/navipage_percorsi.php?id_cat=p1&id_bio=b3&id_bio_sub=4.

3 *Yumak and Sadak v. Turkey*, application no. 10226/03, judgment of 8 July 2008.

4 Judgment of the Constitutional Court of the Turkish Republic of 18 November 18th 1995, E. 1995/54, K. 1995/59.

5 Judgment of the Constitutional Court of the Republic of Latvia of 23 September 2002 № 2002-08-01.

6 *Figueroa v. Canada (AG)*, [2003] 1 S.C.R. 912, 2003 SCC 37, §39.

7 Decision of the Constitutional Court of the Republic of Slovenia of 9 March 2000, no. U-I-354/96.

8 *Reynolds v. Sims* 377 U. S. 556 (1964).

9 Although such an argument could be challenged by referring to the explicit refusal on the part of the US Supreme Court to deal with political gerrymandering.

10 *Sheynis, Vzlet i Padeniye Parlamenta: Perelomnye Gody v Rossiyskoy Politike*, pp.580-581.

11 *Ibid*, pp.590-596.

12 Decree of the President of the Russian Federation of 1 October 1993 No 1557.

13 Lyubarev A., A.Ivanchenko A. *Rossiyskie vybory: ot perestroyki do suverennoy demokratii*, pp.88-90.

14 Federal Law of 21 June 1995 No. 90-FZ.

15 Federal Law of 24 June 1999 No.121-FZ.

16 Basic Guidelines on Organization and Operation of the bodies of state power of krays, oblasts, federal cities, autonomous oblast and autonomous okrugs of the Russian Federation during the phased constitutional reform, established by the Decree of the President of the Russian Federation of 22 October 1993 No.1723.

17 Mari El and Tyva republics, Krasnoyarsk kray, Kaliningrad, Pskov, Saratov and Sverdlovsk oblasts, Koryak and Ust-Orda Buryat autonomous okrugs.

18 S. Avtonomov, A. Zakharov, E. Orlova *Regional'nye parlamenty v sovremmenoy Rossii*. pp.15-22.

19 Krasnoyarsk kray, Kaliningrad and Sverdlovsk oblasts.

20 A. Lyubarev "Novye regional'nye zakony o vyborah: problemy vvedeniya smeshannoy izbiratel'noy sistemy", *Pravo i zhizn*, 2003, No.61 (9) p.166.

21 *Ibid*.

22 G.Golosov "The Vicious Circle of Party Underdevelopment in Russia: The Regional Connection", *International Political Science Review*, 24, 4, October (2003); "Electoral Systems and Party Formation in Russia: A Cross-Regional Analysis", *Comparative Political Studies*, 36, 8, October (2003); G.Hale *Why Not Parties in Russia? Democracy, Federalism, and the State* (Cambridge, Cambridge University Press, 2006).

23 Cameron Ross *The Rise and Fall of Political Parties in Russia's Regional Assemblies'*, Europe-Asia Studies, (2011) '63: 3, 431.

24 Michael McFaul (2000) "*Party Formation and Non-Formation in Russia"*, Carnegie Endowment for International Peace, Working Paper, 12, May.

25 Federal Law of 24 July 2002 No.107-FZ.

26 St. Petersburg, Moscow oblast, Dagestan, Ingushetia, Kalmykia, Amur oblast, Chechen Republic, Kabardino-Balkar Republic, Nenets autonomous okrug, Tula oblast, Kaluga oblast. See A.Lyubarev "Electoral Legislation in Russian Regions", *Europe-Asia Studies*, 63: 3 (2011), p.419.

27 Moscow City and Kalmykia Republic had it set at 10 per cent.

28 Judgment of the Constitutional Court of the Russian Federation of 1 February 2005 No.1-П.

29 *Ibid*.

30 Judgment of the Constitutional Court of the Russian Federation of 16 July 2007 No.11-П.

31 *Ibid*.

32 *Republican Party of Russia v. Russia*, application no. 12976/07, judgment of 12 April 2011, §119.

33 *Ibid*, §114.

34 Federal Law of 12 May 2009 No.94-FZ.

35 Federal Law of 22 April 2010 No.63-FZ.

36 *Ibid*.

37 Federal Law of 2 April 2012 No.28-FZ.

38 Federal Law of 2 May 2012 No.41-FZ.

39 URL: http://ntc.duma.gov.ru/duma_na/asozd/asozd_text.php?nm=303-%D4%C7&dt=2013.

40 Decision of the Constitutional Court of the Russian Federation of 9 June 2014 215-О.

41 Judgment of the Russian Constitutional Court of 17 November 1998, No. 26-П.

42 *Ibid*.

[43] *Ibid*.

[44] Lyubarev A., A.Ivanchenko A. *Rossiyskie vybory: ot perestroyki do suverennoy demokratii*, p.123.

[45] Nudnenko L. "Novelly Federalnogo zakona 'O vyborakh deputatov Gosudarstvennoy Dumy Federalnogo Sobraniya Rossiyskoy Federatsii'", *Gosudarstvennaya i munitsipalnaya vlast*. 2006, No.6, p.17.

[46] Decision 1997/04/02, Pl. ÚS 25/96, URL: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=598&cHash=ea38443d890976ec5207e9f634e0817f.

[47] The Court further suggested that such distortion could happen, if the electoral threshold is raised from 5% to 10%

[48] *Ibid*.

[49] Resolution 1547 (2007), URL: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/ERES1547.htm.

[50] *Ibid*.

[51] *Ibid*, §113.

[52] *Partyja «Jaunie Demokrati» and Partyja «Musu Zeme» v. Latvia*, applications nos. 10547/07 and 34049/07, decision of 29 November 2007.

[53] *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, §54.

[54] *Yumak and Sadak v. Turkey*, application no. 10226/03, judgment of 8 July 2008.

[55] Order of 9 November 2011 2 BvC 4/10, 2 BvC 6/10, 2 BvC 8/10, URL: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-070en.html.

[56] *Ibid*.

[57] See e.g. L.G.Kuzmina *Ekspertnoye zaklyuchenie na zakon o vyborakh deputatov Samarskoy gubernskoy dumy*, URL: http://www.vibory.ru.

[58] Procedure used in 2005-2012 instead of direct elections.

[59] See e.g. Judgment of the Constitutional Court of the Russian Federation of 21 December 2005 No. 13-П.

[60] *Republican Party of Russia v. Russia*, application no. 12976/07, judgment of 12 April 2011, § 113.

[61] See e.g. Ruling of the Supreme Court of the Russian Federation of 29 November 2006, No.46-Г06-26.

[62] See e.g. Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945-1990*. Oxford: Oxford University Press, 1995.

[63] *Ibid*.

[64] Nezavisimaya gazeta, 28.06.2007.

[65] N.Shalaev, "Opyt Ispol'zovaniya Sistemy Deliteley Imperiali v Regionakh Rossii", *Rossiyskoe Electoral'noe Obozrenie*, 2009, No.1, pp.4-11.

[66] A.Lyubarev "Ispol'zovanie Metodov Deliteley na Rossiyskih Vyborah", *Rossiyskoe Electoral'noe Obozrenie*, 2009, No.2, pp.4-22.

[67] Shalaev *Op.cit.*; A.Lyubarev, N.Shalaev "O Kriteriyakh Proportsional'notsi pri Raspredelenii Mandatov mezhdu Partiynymi Spiskami", *Konstitutsionnoe i Munitsipalnoye Pravo*, 2009, No.23, pp.23-27

[68] Ibid; *Metod Imperiali, kak i ozhidalos, srabotal v polzu Yedinoi Rossii*, URL: http://www.votas.ru/imperial-2.html.

[69] Lyubarev 2009, A.Lyubarev *Electoral Legislation in Russian Regions*, Europe-Asia Studies, 63: 3 (2011), pp.415-427.

[70] Federal Law of 22 April 2010 No.63-FZ.

[71] For example, the St. Petersburg City Court in its decision no. 3-75/07 of 5 March 2007 ruled that an individual position on admissibility of a particular mathematical rule does not warrant it contrary to the federal legislation.

[72] See Decision No. 78-Г07-30 of 1 August 2007, Decision N 46-ГО7-21 of 1 August 2007.

[73] A.Ivanchenko, A.Kynev, A.Lyubarev *Proportional'naya Izbiratel'naya Sistema v Rossii: Istoriya, Sovremennoye Sostoyanie, Perspektivy*, 2005, pp.178-182.

[74] BVerfGE 1 (1952) 208–263 [246], zitiert in Pukelsheim F. *Mandatszuteilungen bei Verhältniswahlen:Idealansprüche der Parteien,* Zeitschrift für Politik 47 (2000) 239-273.

[75] Judgment of 3 July 2008 – 2 BvC 1/07, 2 BvC 7/07, URL: http://www.bverfg.de/en/press/bvg08-068en.html.

[76] Judgment of 25 July 2012 - BvF 3/11, 2 BvR 2670/11, 2 BvE 9/11.
URL: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/ger/ger-2012-2-019.

[77] See e.g. Kryukov V. "Optimalnaya proportsionalnost", *Zhurnal o vyborakh*, 2009, No.4-5, s.111-112.

[78] Judgment of the Constitutional Court of the Russian Federation of 7 July 2011 No 15-П.

[79] *Ibid*.

[80] Federal Law of 16 October 2012 No.173-FZ.

[81] VerfGH 45 (1992) 54–67, zitiert in Pukelsheim F. *Mandatszuteilungen bei Verhältniswahlen:Idealansprüche der Parteien* // Zeitschrift für Politik 47 (2000) 239-273.

[82] Decision 2001/01/24 - Pl. ÚS 42/00, URL: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=591&cHash=9be5ff03277670d41bfa0582e75e6861.

[83] D.McKean (ed.) *The Government of Republican Italy*, 1966, p.174.

[84] See e.g. Judgment of the Constitutional Court of the Russian Federation of 10 June 1998, No.17-П.

[85] Lyubarev 2011, p.422.

[86] Judgment of the Constitutional Court of the Russian Federation of 17 November 1998, No.26-П.
[87] Judgment of the Constitutional Court of the Russian Federation of 25 April 2000 No.7-П.
[88] *Ibid*.
[89] Judgment of the Constitutional Court of the Russian Federation of 15 December 2004 No.18-П.
[90] *Communist Party of Russia and Others v. Russia,* application no. 294000/05, judgment of 19 September 2012 §8.
[91] Vedomosti, 05.12.2007.
[92] Krotov M. *Vystypleniya Polnomochnogo Predstavitelya Prezidenta RF v Konstitutsionnom Sude RF*, 2009, s.556.
[93] Avakyan S. "Probely i defekty v konstitutsionnom prave". *Kostitutsionnoe i munitsipalnoe pravo*, 2007, No.8.
[94] Kolyushin E. *Vybory i izbiraltelnoe pravo v zerkale sudebnykh reshenii*, Chapter 8, Paragraph 1.
[95] Veshnyakov opasaetsya organizovannoy diskreditatsii vyborov, URL:http://www.ng.ru/politics/2006-11-30/1_veshniakov.html.
[96] *Communist Party of Russia and Others v. Russia*, §136.
[97] A.Kynev *Vybory parlamentov rossiyskih regionov*, p.215.
[98] Judgment of the Constitutional Court of the Russian Federation of 9 November 2009 No.16-П.
[99] *Ibid*.
[100] *Ibid*.
[101] Decision of the Constitutional Court of the Russian Federation of 6 March 2013 No.324-О.
[102] *Ibid*.
[103] Guidelines on Political Party Regulation, available at URL: http://www.osce.org/odihr/77812.
[104] *Ibid*.
[105] Judgment of the Constitutional Court of the Russian Federation of 28 February 2012 №4-П.
[106] Report on the Imperative Mandate and Similar Practices, CDL-AD(2009)027, URL: http://www.venice.coe.int/webforms/documents/CDL-AD(2009)027.aspx.
[107] The effects of this phenomenon, explicitly referred to in the Judgment of the Constitutional Court, can be vividly seen e.g. during the Ukrainian parliamentary crises of 2006-10.
[108] V.Lapayeva *Formirovaniye konstitucionnogo bol'shinstva v Gosudarstvennoy Dume: volya naroda ili parlametskiye protsedury*, URL: http://www.vibory.ru/analyt/lapaeva2.htm.
[109] E.g. in Moscow City, Kostroma and Novosibirsk region, Republic of Bashkortostan.
[110] Judgment of the Russian Constitutional Court of 11 March 2008 No.4-П.
[111] *Ibid*.
[112] Judgment of the Russian Constitutional Court of 19 December 2013 №28-П.
[113] Judgment of the Russian Constitutional Court of 16 December 2014 №33-П.

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