What Went Wrong and What Could be Done?

30 Years of the Russian Constitution

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The question should perhaps be "what went right?". I argue that for more than 30 years, as a result of a key provision in the Constitution, and the work of the Constitutional Court of the Russian Federation (CCRF) there were many positive changes to Russian law and practice. In 2018, I published specifically on this topic.

These advances were only possible as a result of Russia's membership of the Council of Europe (CoE, accession on 28 February 1996, following application to join on 7 May 1992 and Parliamentary Assembly recommendation on 25 January 1996, despite the First Chechen War) and ratification on 5 May 1998, of the European Convention on Human Rights (ECHR).

The 1993 Constitution was adopted in inauspicious circumstances, after President Yeltsin tore up the existing constitution and stormed the White House, where the Supreme Soviet was in session. I return to this below.

Of course, on 16 March 2022, Russia was excluded from the CoE, following its all-out invasion of Ukraine on 24 February 2022, and ceased to be bound by the ECHR. On 23 March 2022, the Committee of Ministers (CoM) and the Plenary of the Strasbourg Court decided, separately but almost simultaneously, that Russia would cease to be a Contracting Party to the ECHR on 16 September 2022.

I have argued over the years, and most recently in a chapter in 2018, that Russian ratification of the ECHR was in no sense a "legal transplant", but was correctly understood in Russia as a restoration of the Great Legal Reforms of Tsar Alexander II of 1864, including jury trial, an independent Bar, a reduced role for Prosecutors, and procedural rights, following Russian defeat in the Crimean War (1854-1856), and his abolition of serfdom in 1861, several years before the USA abolished slavery.

The Constitutional Court and the new Constitution

The Law on the Constitutional Court of the RSFSR (within the USSR) was signed by President Yeltsin, who had been elected President of the RSFSR, on 12 June 1991. The USSR collapsed in December 1991.

The Court started work in January 1992, almost immediately after the collapse of the USSR. From 6 July 1992 to 30 November 1992 the Court was occupied by the *Case of the Communist Party*, which did not produce the hoped-for (by the applicants) definitive condemnation of the Communist Party, a Russian Nuremberg, but instead in a compromise decision ruled that President Yeltsin rightly dissolved the highest bodies of the Party, but also ruled that the Party could continue to exist at the local level. There was no "drawing of a line" under Russia's Soviet past.

The CCRF sat all night following Mr Yeltsin's decree of 21 September 1993 declaring the Congress of People's Deputies and the Supreme Soviet dissolved and held that his actions violated the Constitution. The Court was suspended by Yeltsin on 7 October 1993, after he tore up the 1978 Constitution, disbanded parliament, and finally shelled the White House, the seat of the parliament. As Alexei Trochev put it in *Judging Russia The Role of the Constitutional Court in Russian Politics 1990–2006,* "[i]n response to the Court's finding that Yeltsin had violated the constitution, Yeltsin shelled the parliament's building and suspended the [CCRF] by Decree 1612 of 7 October 1993."

The new Constitution was adopted by a referendum of 12 December 1993. The official result of the referendum was that 54.8% of the electorate had voted, and of those, 58.4% had approved the new

Constitution, which came into force on 24 December 1993. Not a resounding success.

In July 1994 a new Law on the Constitutional Court was adopted. However, the new Constitutional Court started working only in February 1995.

The status of international law including the ECHR

The provision of Article 15(4) turned out to be of special importance:

> *4. Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.*

The whole case law of the ECtHR became, in 1998, part of Russian law (Russia being a "monist" state), and was frequently cited in the CCRF.

The apotheosis of this new relationship seemed to have truly arrived with the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003, binding on all lower courts. The Resolution was entitled 'On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation'.

This Resolution was followed ten years later on 27 June 2013 by the Resolution 'On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by Courts of General Jurisdiction'. Paragraph 2 of the Resolution stated:

> *2. As follows from Article 46 of the [ECHR], Article 1 of Federal Law of 30 March 1998 no. 54-FZ On Ratification of [the ECHR] the legal positions of [the ECtHR] contained in the final judgments of the Court (ECtHR) delivered in respect of the Russian Federation are obligatory for the courts.In order to effectively protect human rights the courts take into consideration the legal positions of [the ECtHR] expressed in its final judgments taken in respect of other States which are parties to the [ECHR].However, this legal position is to be taken into consideration by court if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by [the ECtHR].*

This clear statement of the relationship between Russian law and the ECHR continued until Russia's illegal annexation of Crimea in 2014. In 2014 the great Judge Anatoly Kovler published an article, written the previous year, on the forthcoming 17 years anniversary of ratification. He concluded "One is reluctant to scrape the bottom to come up with an upbeat conclusion but there is no cause for an apocalyptic vision either. The Russian-European dialogue on human rights is well underway; it is not unlike a tug of war, but its results (albeit modest) are evident."

But from then on the process of Russian departure from the CoE and ECHR was inexorable.

The impact of the ECHR in Russia

Nevertheless, on 11 January 2016 the PACE, assisted by the Human Rights Centre at the University of Essex, published a report on the impact of the ECHR in various countries.

The report identified a number of instances of positive impact in Russia.[1]

- As a result of a pilot judgment (*Burdov v. Russia*) in 2009 over non-enforcement of a domestic court judgment in favour of the applicant, Russia enacted a Federal Compensation Act, as well as a Federal Law to guarantee the effectiveness of the new remedy.
- In 2005 the RF Supreme Court followed up the 2004 Declaration of the Committee of Ministers and extended journalists' freedom of expression to criticism of public officials: public officials must accept that they will be subject to public

[1] See my 2018 chapter on Russian implementation of EctHR judgments in the 2018 collection *Russia and the European Court of Human Rights: The Strasbourg Effect*.

scrutiny and criticism. In 2008 the ECtHR closed a number of applications in view of this change.

- Following *Mikheyev v. Russia* (2006) and other similar judgments, on account of torture or inhuman and degrading treatment inflicted on persons held in police custody and a lack of effective investigations into such acts, special investigation units were created within the Investigative Committee and tasked with investigating particularly complex crimes by police and other law enforcement bodies.
- There had been progress in the implementation of the ECtHR 's 2012 pilot judgment in *Ananyev and Others v. Russia* concerning inhuman and degrading conditions in Russian remand prisons (SIZOs) and the lack of an effective remedy. Russia presented and implemented an action plan as a result, monitored by the Committee of Ministers.
- A number of measures had been taken to remedy numerous violations of the right to liberty, guaranteed by Article 5 of the Convention, owing to unlawful and lengthy unreasoned (or poorly reasoned) detention on remand. Legislative changes were made between 2008 and 2011. Both the CCRF and the RF Supreme Court had emphasized that a suspect or accused may be detained only on the basis of a valid judicial decision. This had been most recently monitored by the Committee of Ministers in 2015.

Pragmatism from the CCRF and resolution of the Russian Hirst

In my 2020 article "Russia and the European Convention (or Court) of Human Rights: The End?" I highlighted what was perhaps the last example of a pragmatic conversation between the CCRF and the ECtHR.

On 19 April 2016, the CCRF rendered a judgment in which it examined the question of the possibility of executing the judgment of the ECtHR of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* (on prisoners voting rights, the Russian *Hirst v UK*) in accordance with the RF Constitution. There were amicus curiae briefs before the CCRF arguing that the problem could be resolved by interpreting the RF Constitution, rather than seeking to amend it, which the CCRF could not do.

The CCRF, with three powerful dissents, disagreed and held that in 1998, when Russia ratified the ECHR, there was no case law under Article 3 of Protocol 1 (right to democratic elections) prohibiting a "blanket ban" on prisoners' voting. Otherwise, ratification would have contradicted the RF Constitution.

However, the CCRF suggested that, by an amendment to the criminal law, persons detained in Russian "open prison" correctional colonies could be reclassified so that they do not fall within Article 32(2) of the RF Constitution. If this was done, Russia would in effect implement the ECtHR's judgment. The CCRF emphasized the priority of international law, especially the ECHR, over Russian domestic law, while insisting that it is the final judge on issues concerning the RF Constitution.

Indeed, the pragmatism of the CCRF prevailed and, on 25 September 2019, the Committee of Ministers (CM) of the CoE adopted a final resolution, CM/ResDH(2019)240, which closed the supervision of *Anchugov*. The closure of the case meant that Russia, taking the advice of the CCRF, had complied with the ECtHR's judgment, according to the CM's assessment. The judgment was executed through the introduction to the Russian Criminal Code of a new category of criminal punishment "placement in correctional centers for community work". Persons detained in this way would have the right to vote and Russia was able to comply with the ECtHR's judgment. Gleb Bogush and Ausra Padskocimaite wrote a strong criticism of this resolution, claiming that the CM should not have accepted Russia's compromise.

But that chapter in Russia's constitutional history has been closed.

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