Can the Russian Constitution Still Strike Back?

Accountability and Justice in Russia After Putin

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Three decades after the adoption of the Russian Constitution, we must admit that it has not become an effective safeguard against the usurpation of power and state terror. Since 2002, Russia has adopted dozens of repressive laws that arbitrarily and disproportionately restrict freedom of speech, conscience, assembly, and association, and punish the peaceful exercise of these freedoms. Despite some half-hearted decisions in defense of human rights, such as in the case of Ildar Dadin,[1] the Constitutional Court was unable to stop the growing tide of terror. And with the beginning of Russia's open aggression against Ukraine, its judges willingly rode this wave themselves, offering the Kremlin their services in justifying measures to eliminate opponents of Putin and his policies. In its ruling on the complaint of opposition politician Ilya Yashin, who was sentenced to 8.5 years in prison under a new article of the criminal code on disseminating "fake news about the army" in a comment about the massacre in Bucha, the Constitutional Court went so far as to implicitly accuse the applicant of aiding and abetting the enemies of Russia.[2] Lower courts also disregarded alleged breaches of the Constitution pleaded by defendants under this and other "terrorizing" articles of the Criminal Code.

The conditions under which the Russian Constitution could have served as a secure barrier to the revival of authoritarianism and state terror is a profound question warranting a separate discussion. I suggest that we should look a few steps ahead and imagine an optimistic scenario of a new attempt to establish democracy and rule of law in Russia – regardless of how improbable such a scenario may seem at present. One of the priorities of such an attempt will be to overcome impunity for the perpetrators of crimes of the Putin regime. The search for solutions to this problem through criminal justice will inevitably encounter several problems that many post-authoritarian countries have already faced: prohibition of retroactivity, protection of legitimate expectations, and legal certainty. The judges and prosecutors who sent Ilya Yashin to prison, if they themselves are ever indicted for obstruction of justice, will certainly justify their past activity by saying that they were only applying the existing law. Could the 1993 Constitution serve as a source of arguments to counter such a defense?

As a starting point to discuss this problem, I will refer to the experience of prosecuting crimes committed under the regime of the German Democratic Republic (the GDR) in unified Germany. In total, over 52,000 investigations were opened into suspected obstruction of justice by the members of the East German judiciary. However, of this substantial number, charges were only brought in 0.7% of cases (397 individuals), resulting in a mere 181 convictions.[3] One of the reasons for the low level of convictions is the restrictive interpretation by the German Federal Court of Justice of obstruction of justice (*Rechtsbeugung*) committed by the judiciary of the GDR. In its decisions, the court referred to the socialist constitutional order established in the GDR as the reason for the inability to assess the actions of judges and prosecutors by rule of law standards. Such an interpretation of the law would contradict the constitutional prohibition of retroactivity (Article 103, paragraph 2 of the Basic Law of the Federal Republic of Germany)[4]

The Federal Court of Justice identified "democratic centralism", the lack of separation of powers,

[1] Constitutional Court of the Russian Federation dated 02.10.2017 N 2-P "In the case of verifying the constitutionality of the provisions of Article 212.1 of the Criminal Code of the Russian Federation in connection with the complaint of citizen I.I. Dadin."

and the theory and practice of "socialist legality" as distinctive features of East Germany's legal system. According to its conclusion, when evaluating the lawfulness of decisions of judiciary officials, it is necessary to take into account that the concept of "socialist legality" resulted in constitutionally inherent restrictions on fundamental rights. In particular, the freedom of speech guaranteed in the GDR Constitution was limited to statements desired by the state. A citizen had no guarantees of freedom of speech in relation to the state. In addition, the main constitutional objective of the judiciary was the protection and development of the GDR and its state and public order (and not the protection of a person).[5] As a consequence of these restrictions, the vast majority of cases of persecution under East German political criminal law remained unpunished. As noted by the Berlin prosecutor C. Schaefgen, the tolerant attitude of German courts to the acts of state terror in the GDR turned out to be proportional to the intensity of resistance that their victims offered to the dictatorship: "The more resistant the citizens of the GDR behaved in the lawless state of the GDR, the harsher the punishment could be".[6]

Many politicized offences recently criminalized in Russia, such as public actions aimed at discrediting the armed forces (Article 280.3), or public calls for activities directed against the security of the state (Article 280.4), are very similar to the crimes of political criminal law in East Germany. Does this mean that in post-Putin Russia the court will be forced to acquit prosecutors and judges who repressed dissidents on the basis of these and other similar provisions?[7]

I believe that the 1993 Constitution will provide the public prosecution and the court with several arguments to refute the defence of the accused pleading prohibition of retroactivity, protection of legitimate expectations, and legal certainty. The Constitution retains unchanged Chapters 1 and 2 – "Fundamentals of the Constitutional System" and "Rights and Freedoms of Man and Citizen". Unlike the East German Constitution (1968), which proclaimed the GDR as a socialist state under the leadership of the Marxist-Leninist party (Article 1, paragraph 1), the Russian Federation, according to its Constitution, is based on ideological and political diversity (Article 13, Parts 1 and 3), recognizes a person, their rights and freedoms as the highest value (Article 2), and is a rule-of-law state (Article 1). Article 18 of the Constitution stipulates that the rights and freedoms of man and citizen are directly implemented, that those rights determine the meaning, content, and application of laws, the activities of the legislative and executive powers and municipal self-government, and that those rights are guaranteed by the judiciary. Article 120 still enshrines the independence of judges and their subordination only to the Constitution and the law. In development of the constitutional principle of the priority of international law, which has remained unchanged since 1993 (Article 15, Part 4), the Criminal Code states that criminal laws are based on generally recognized principles and norms of international law (Article 1, Part 2), and in the Code on Administrative Offenses, it is even prescribed to apply the provisions of an international treaty if the Code contradicts it.

Therefore, the Russian Constitution contains provisions sufficient to recognize persecution for the peaceful exercise of freedom of speech or of assembly as an unlawful violation of human rights, even if such persecution was carried out "under legal imprimatur".[8] The fact that the Constitutional Court has so far taken the opposite view and, with rare exceptions, refused to

[2] Decision of the Constitutional Court of the Russian Federation of 30 May 2023 N 1398-O "On the refusal to accept for consideration the complaint of citizen Ilya Valerievich Yashin about the violation of his constitutional rights by part 1 of Article 20.3.3 of the Code of the Russian Federation on Administrative Offenses": "Public actions, including remarks and statements that intentionally carry a negative assessment of activities aimed at protecting the interests of the Russian Federation and its citizens, maintaining international peace and security, may, especially taking into account their cumulative effect, have a negative impact on the implementation of relevant measures and decisions, reduce decisiveness and effectiveness of accomplishment of assigned missions by the Russian Armed Forces and other state bodies, the motivation of military personnel and other persons directly involved in this, *and thereby in fact – even without directly pursuing precisely this goal – support forces opposing the interests of the Russian Federation and its citizens, impeding the maintenance of international peace and security.*"

[3] Keller, Iris. Die strafrechtliche Aufarbeitung von DDR-Justizunrecht. Peter Lang GmbH, 2013. P. 639-640.

[4] BGH, 06.10.1994 – 4 StR 23/94.

[5] BGH, 15.09.1995 – 5 StR 713/94.

accept complaints about the unconstitutionality of Putin's "political criminal law" does not close off such a possibility in the future. Such recognition would make it possible to retroactively evaluate the judgments rendered in the application of such provisions of criminal law as wrongful. This is one of the elements of a crime of obstruction of justice under Article 305 of the Russian Criminal Code.

The second element of the crime is the knowledge of its wrongfulness: a judge must already be aware that the judgment they are making is unlawful. Proving this element of a crime will be quite difficult, since, as a general rule, the judge resolves the case, guided by their inner conviction (Article 17(1) of the Russian Code of Criminal Procedure). However, the intent to render a wrongful judgment may manifest itself in ignoring the defendant's pleadings on the conflict between the applicable criminal law and the Constitution or international law (the court is obliged to explain the rejection of these arguments, but usually does not do this), or by refusing to satisfy the defendant's request to apply to the Constitutional Court for a check of the constitutionality of the norm applicable in their case. Even in cases where the Constitutional Court has recognized a norm of political criminal law as conforming with the Constitution, the court of trial retains the obligation to apply international law if domestic legislation contradicts it.[9] Other indicators of intent to obstruct justice through the application of "terror criminal law" may include the context in which such judgments were delivered – whether it was against the backdrop of a campaign to suppress political opposition or a war of aggression.

These brief reflections are only an invitation to discuss the future of Russia's constitutional development and ways to overcome the crimes of the Putin dictatorship.

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[6] Wie viel DDR-Regierungskriminalität kam vor Gericht? Deutschland Archiv, 23.02.2022. https://www.bpb.de/themen/deutschlandarchiv/505484/wie-viel-ddr-regierungskriminalitaet-kam-vor-gericht/

[7] Data on politically motivated criminal prosecutions in Russia. OVD-Info, 16.11.2023. https://en.ovdinfo.org/data-politically-motivated-criminal-prosecutions-russia.

[8] Teitel, Ruti. Transitional Justice. OUP, 2002. P. 220.

[9] See Resolution of the Plenum of the Supreme Court of the Russian Federation No. 5 of October 10, 2003, paragraph 9.