Conference: "INTEGRATION AND DISINTEGRATION MODELS OF POLITICAL, ECONOMIC AND SOCIAL ORDER IN EUROPE 20 YEARS AFTER THE DISSOLUTION OF THE SOVIET UNION"

Panel VI: "COMMON EUROPEAN PROTECTION OF BASIC LAW VERSUS NATIONAL CONSTITUTIONAL TRADITION"

Title of the intervention at the panel: "RUSSIAN CONSTITUTIONAL COURT'S APPROACH TO INTERNATIONAL LAW: 1992 – TODAY"

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1. INTRODUCTION: SPASIBO GORBACHEVU!

The turning point in the area of the balance of national and international law occurred during the time of Perestroika. In his concept of a state based on rule of law (pravovoe gosudarstvo), M. S. Gorbachev, Secretary General of the Central Committee of the USSR Communist Party at the time, devoted particular attention to the relationship between national and international law where priority was given to international law. This idea was expressed through the notion of the primacy of international law in politics.[2]

Later the Gorbachev's government expressed determination to bring national law to the level of international law:

"it is necessary that national legislation and administrative rules in the humanitarian sphere be brought

[1] This article is based on research conducted for Ph.D. thesis at the University of Cambridge. For more detail on the research results (in Russian), please refer to Burkov, A. L., *Konventsia o Zaschite Prav Cheloveka v Sudakh Rossii* (Moscow: Wolters Kluwer, 2010). See also Anton Burkov, The Impact of the European Convention on Human Rights on Russian Law (Stuttgart: ibidem-Verlag, 2007, ISBN 978-3-89821-639-5) 162 pp.

[2] George Ginsburgs, "Sootnoshenie Mezhdunarodnogo i Vnutrennego Prava v SSSR i v Rossii," *Gosudastvo i Pravo* 3 (1994). P. 109.

into accordance with international obligations and standards everywhere".[3]

2. RUSSIAN CONSTITUTION'S APPROACH TO INTERNATIONAL LAW (TO CASE LAW OF INTERNATIONAL TRIBUANAL IN PARTICULAR)

Under Article 15 of the Russian Constitution Russia is a monistic country: "The international treaties ratified by the Russian Federation shall be a component part of its legal system" Russian legal order is more favourable towards the Convention - "[i]f an international treaty of the Russian Federation stipulates other rules than those stipulated by the statute, the rules of the international treaty shall apply" (the Constitution).

There is no difference between the Convention and the Russian Civil Procedure Code.

Under the Russian legislation contains no bar to the domestic use of ECHR case-law in interpreting the Convention (Russia recognises compulsory jurisdiction of the ECHR by ratifying the Convention)

It was the Constitutional Court that further interpreted Article 15 of the Constitution in terms of legal bindingness of the case-law of an international tribunal and stated that the case-law of the ECHR (in regard to the interpretation and application of the Convention) is part of the Russian legal system (like the Convention).

3. LEGAL POSITION OF THE CONSTITUTIONAL COURT REGARDING DIRECT APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN GENERAL AND THE ECHR IN PARTICULAR

The Russian Constitutional Court has been contributing a great deal to the development of the principle of direct applicability of norms of international law. The Constitutional Court is the only judicial organ that gives official interpretations of the Constitution. Its judgments are obligatory across the entire territory of the Russian Federation for all legislative, executive and judicial organs. The majority of Russian legal scholars classify its judgments as a source of Russian law which can amend a statute and which is of equal status to the Constitution itself.

The first judgement delivered by the Constitutional Court of the Russian Federation in regard to the domestic application of international law was judgment No. 2-P of 4 February 1992 "On the Constitutionality of Law Enforcement Practice Concerning the Termination of Employment Contracts Under Clause 1 of Article 33 of the Labour Code of the RSFSR." It stated inter alia that "[c]ourts are also obliged to evaluate a statute subject to application from the standpoint of its conformity to the principles and norms of international law."[4]

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[3] See M. Gorbachev, *Real'nosti i Garantii Bezopasnosti Mira*, 1987. P. 13. Cited from Ginsburgs, "Sootnoshenie Mezhdunarodnogo i Vnutrennego Prava v SSSR i v Rossii." P. 109.

[4] More detailed analyses of this judgment is in Chapter 2.

It might not be a coincidence that this judgment was delivered three months before the Government of the Russian Federation, in its letter of 6 May 1992 to the Secretary General of the Council of Europe, expressed the wish to be invited to become a member of the Council of Europe.

After the promulgation of the 1993 Constitution, the post-1993 Constitutional Court delivered a number of significant judgments giving an innovative interpretation to the new Constitution, particularly to its Article 46(3) on the right to appeal to international tribunals. In the judgement No. 4-P of 2 February 1996 "On the Constitutionality of Clause 5 of Part 2 of Article 371, Part 3 of Article 374 and Clause 4 of Part 2 of Article 384 of the Criminal Procedure Code of the RSFSR in Connection with Complaints by Citizens K. M. Kulynev, V. S. Laluev, Yu. V. Lukashov and I. P. Serebrennikov"[5] the Constitutional Court provided that:

"…decisions of inter-state organs [concerned with the protection of human rights and freedoms] may lead to the reconsideration of specific cases by the highest courts of the Russian Federation and, consequently, establish their competence with respect to the institution of new proceedings aimed at changing the previously rendered decisions, including decisions handed down by the highest domestic judicial instance".[6]

The Constitutional Court recognized that decisions of international tribunals may trigger the reconsideration of cases decided in violation of norms of international law. This provision goes much further than just a conclusion that international treaties are part of the Russian legal system. It means that the Constitutional Court characterised decisions of international tribunals against Russia as sources of Russian law, as a ground on which a national court could pass a decision on a particular case. Today, after ratification of the Convention, judgments delivered by national courts could be reviewed based on judgments of the ECHR. This is a novel approach for a civil law country like the Russian Federation where courts' jurisprudence is not normally considered to be a source of law.

In the next sentence of Paragraph 2 of Part 7 of the judgement, the Constitutional Court's reasoning goes further:

"[i]t would be illogical to deny indicated jurisdiction [to institute new proceedings] in instances when necessity of alteration of judicial decisions may be revealed without application to international bodies".

Once again, it might not be a coincidence that this legal principle [pravovaia pozitsiia] was promulgated by the Constitutional Court just 26 days before the Russian Federation joined the Council of Europe.

After the accession to the Council of Europe and ratification of the Convention, similar legal principles were expressed in many other Constitutional Court judgments. The Constitutional Court started directly apply provisions of the Convention, albeit, without referring to the case-law of the ECHR, even before Russia ratified the Convention.

In its judgment No. 1-P of 25 January 2001 "On the Constitutionality of the Provision of Clause 2 of Article 1070 of the Civil Code of the Russian Federation in Connection with Complaints from Citizens

[5] *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 2 (1996).

[6] See Paragraph 2 of Part 7 of the judgment.

I. V. Bogdanov, A. B. Zernov, S. I. Kalyanov and N. V. Trukhanov" (Bogdanov case)[7] the Constitutional Court reiterated the significance of the Constitutional provision stating that the Convention is part of the Russian legal system, and of the provision of the last paragraph of Article 1 of the 1998 Law on the Ratification of the Convention that the Russian Federation recognized the jurisdiction of the ECHR stating that

"[The Convention] is ratified by the Russian Federation and is in force in all its territory and, consequently, forms part of the domestic legal system. Further more the Russian Federation *recognised the jurisdiction of the European Court of Human Rights* and assumed an obligation to bring law enforcement practice in particular judicial practice, in accordance with obligations of the Russian Federation arisen from its participation in the Convention and its Protocols".[8]

The Constitutional Court elaborated on the Article 15(4) provision once again confirming that under this constitutional provision the Russian Federation assumed an obligation to bring in line with the Convention not only its legislation but also judicial and other national practices. This is a straightforward recognition of the obligation to implement the Convention in national courts. However, the Constitutional Court did not specify whether recognition of the ECHR jurisdiction meant the acceptance of the interpretation of the Convention given by the ECHR (in cases against Russia only or other countries as well), or only the jurisdiction of the latter to consider complaints against the Russian Federation.

In 2007 the Constitutional Court established an obligation to give direct domestic effect to decisions of the ECHR – "ECHR judgments are part of the Russian legal system and thus shall be taken into account by the federal legislature… and by the law enforcement bodies…" (judgement of 5 February 2007). This language was in article and speeches by Chief Justice of the Constitutional Court.

In one of the recent judgements (26 February 2010) the Constitutional Court stated that Parliament has the obligation to introduce to the Civil Procedure Code "a mechanism of execution of final judgments of the ECHR which would allow to secure adequate redress for violations of rights determined by the ECHR".

This language was produced right after statement by President Dmitry Medvedev: "We are interested in improving our judicial system so as to make it effective and to create an environment where our citizens do not need to resort to international courts."[9] This echoed by many state officials, for instance by the Minister of Justice of the Russian Federation Alexander Konovalov: "Justice must be administered by taking into account the case-law of the European Court of Human Rights."[10]

4. CURRENT DEVELOPMENTS OF THE LEGAL POSITION OF THE CONSTITUTIONAL COURT REGARDING THE ECHR CASE LAW.

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7 *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii* 3 (2001).

8 Ibid. Paragraph 4, Part 6.

9 Opening Remarks at Meeting on Improving the Judicial System, Gorki, 4 February 2010. (see http://archive.kremlin.ru/eng/text/speeches/2010/02/04/2105_type82913_224134.shtml).

10 The Minister made this statement in evaluating the progress of efforts to reform the justice system in Russia. (see Александр Коновалов выступает за новый облик Минюста. http://www.advgazeta.ru/newsd/110).

The point of recent statement by the Chair of the Constitutional Court is that one can choose judgments of the ECHR that could be executed and ones that could be ignored.[11] This statement was cause by Markin v. Russia judgment where the ECHR criticized the Constitutional Court and the Russian legislation in regard to its provision on the right of male military personnel to maternity leave.

After this statement On 11 December 2010 at the meeting with judges, the President made a statement which echoed statement by the Chairman of the Constitutional Court:

«I think that our cooperation with our foreign partners and the European institutions should above all be determined by the scope of competence we have delegated to the European Court [of Human Rights] when concluding the relevant agreements and signing the relevant laws. But as I see it, we have never handed over any part of sovereignty that would give any international or foreign court the right to make decisions changing our national legislation».[12]

This statement reminded the statement by A. Ya. Vyshinsky, mostly known as Prosecutor General of the USSR, expressed in 1948, about the primacy of USSR legislature over an international treaty provisions:

"It is impossible to consent that international law is allegedly a basis of national law. To the contrary, it is possible to assert that national law is a source and a basis of policy and methods of settlement of external relationships one or another state with other members of so-called international relation".[13]

5. CONCLUSION

As we could see, the legal history repeats itself. Statements by politicians (including the Chair of the Constitutional Court) depend on the political situation, not the law. For this reason we cannot leave the function of "bringing international human rights home" to politicians. Direct application of international human rights standards should be undertaken by practising lawyers who argue cases before courts. The more they insist on application of international law by national courts, the less room we leave for political rhetoric, the more national legal system has a chance to take international law into account, leaving less and less cases for consideration before the European Court of Human Rights.

[11] V. Zorkin. Predel Ustupchivosti. Rossiyaskaya gazeta. 29 October 2010, http://www.rg.ru/2010/10/29/zorkin.html

[12] http://eng.news.kremlin.ru/transcripts/1464/print

[13] Vyshinsky, A. Ya. "Mezhdunarodnoe Pravo i Mezhdunaradnaia Organizatsiia." *Sovetskoe Gosudarstvo i Pravo* 1 (1948). P. 17.