

## **Russian Constitutional court and Human Rights: Unfulfilled Potential**

By Marina Agaltsova, attorney at Human Rights Center “Memorial”

### **Introduction**

“You are not a Constitutional court judge, you are a human rights defender”. These are the words used to reproach Anatoly Kononov, a now-retired Constitutional court judge by the colleagues – other judges of Russian Constitutional court.

I am a human rights lawyer, I work for Human rights center Memorial. We deal with cases where people were killed, tortured, abducted and never found alive. In addition to these sad cases, we get to litigate cases on civil liberties like a freedom of speech, freedom of movement, of assembly.

It is my firm belief that the government should be not for itself but for the people. Not surprisingly, human rights, especially civil liberties, in my opinion, should be the main concern for the government and particularly for the Constitutional court.

When a judge of the Constitutional court is reproached by his colleague for being an adamant human rights defender, it is very sad. The bill of rights in the Russian Constitution is located in the second chapter, right after general provisions. This tells us about the significance of human rights for the founding fathers of the Constitution.

How could this happen that a text that was drafted to defend rights did not manage to create an effective mechanism for human rights protection?

### **No Teeth**

In my opinion, the problem is not in the text of the Constitution. The bill of rights is drafted in a good way. I think the problem is that without sharp teeth, the Constitution is just a nice piece of paper. By “teeth” I mean the courts that actually enforce the Constitution (meaning lower courts and the Constitutional court itself) and the parliament that passes new laws when the Constitutional court finds that a law violates the Constitution.

First, the parliament. Unfortunately, I don’t have the statistics for 2017 but in 2016 the Constitutional court adopted 20 decisions that required a change of law. A year later only 8 were implemented. Other decisions were waiting to be executed. Unfortunately, some of the decisions of the Constitutional court are still waiting ... since 2008.

The second problem, I think, lies with courts. Russian lower courts are not enthusiastic about directly applying either the Constitution or the decisions of the Constitutional court. Some procedural codes (like the Code of Commercial Procedure) do not even mention decisions of the Constitutional court among sources of law. In contrast, this code mentions the decisions of the Supreme court as the good law. I think it sends signals to the courts about the significance of the Constitutional court decisions.

The third reason why I think that the Constitution lacks sharp teeth lies with the Constitutional court itself. The Constitutional court has limited jurisdiction. The court cannot review mistakes of the lower courts in one particular case, even if the courts violated the Constitution. In order to bring the case to the Constitutional court, we need to prove that a case is not a mere aberration from otherwise good law enforcement. We need to go way further and prove that Russian courts, in general, interpret the law in such a way that it violates the Constitution.

The final reason, in my opinion, lies with how the Constitutional court sees its role. In 1992-1993 the Constitutional court passed breathtaking decisions that went against other branches. At this time Russia was in a constitutional crisis, almost on the edge of a civil war. The president Boris Yeltsin was fighting the parliament. On 20 March 1993, the president appeared on TV and announced that he would give himself extraordinary powers and could annul any laws that he deemed necessary. In three days the Constitutional court ruled that the president violated the Constitution. This decision opened a direct confrontation between the Court and the president. In the same year, the Constitutional court ruled twice against the president and several times against the parliament. However, this activism ended badly for the Constitutional court and its chief justice – Mr. Zorkin. The president dissolved the court saying that the court was in a deep crisis. Mr. Zorkin had to resign.

The Court reconvened a year later with a limited jurisdiction. It was never able to become such a powerful player again. And in the last decade, I had never seen the Constitutional court be in an open confrontation with any branch. Even when the decisions of the Constitutional court are not enforced for years, clearly showing disrespect, the Constitutional court publicly talks about that it but does not push for faster execution.

### **Values of the Constitutional court**

When I was a law student, I was so thrilled by the Constitutional law. In fact, Constitutional law was the focus of my studies. However, after working for ten years as a lawyer, I became disappointed in the Court. I think the Constitutional court failed to fulfill its potential.

I believe that it is partly because as a human rights lawyer I tend to take cases which involve civil liberties, like the freedom of thought, press, or movement.

Mr. Zorkin, the chief justice of the Constitutional court, does not seem to be a big fan of these values. We know it because he happens to be a quite prolific writer. In articles and interviews, he translates values that he approves and rejects.

In a recent article published this October, Zorkin criticized western countries (in particular, America) for promoting democracy. He argued that aggressive democracy and human rights promotion led to the spread of terrorism. In addition, he said an interesting quote “I would like to underline that the rights of minorities can be protected only to such an extent which is supported by the majority. One cannot impose laws which undermine collective values, shared by the majority”.

My problem with the statement of Mr. Zorkin is that almost all civil liberties started as minority issues. Freedom of religion, freedom of assembly, right to vote for women ... you name it.

Of course, there are rights that Mr. Zorkin favors. These are social rights. He considers that social inequality, poverty and weak protection of labor rights are the main problems faced by Russian society. To me, it sets priorities of the Constitutional court very clear.

Therefore, when a year ago we got a case of a prominent Russian physicist Mr. Danilov involving social rights, I was pretty confident we would have the Constitutional court on our side. Memorial together with Institute for Law and Public Policy applied to the Constitutional court and the court supported us.

Now we are trying a less obvious case. Our client – a Russian actor - wants to get access to the case file of his grandfather who had been sentenced to death for stealing bricks and glass during Stalin time, in 1933. More than 80 years had passed since the grandfather was killed but the case file is sealed. The courts say that the law on rehabilitation of the victims of Soviet political repressions prohibits access. When this Saturday I talked to people who drafted the law, they did not believe me. They could not believe that the law which was passed to protect the rights of the victims is now being used to harm them.

We know that we have good chances to win this case in the European Court of Human Rights but we wanted to try arguing this case in the Constitutional court. The reason for this is simple. If we win the case in the Constitutional court, the chances that our victory will help other people to get access to archives, is much higher than if the European court adopts a decision in our favor.

### **Constitutional court Picks Side of the Government in Civil Rights Cases**

Another aspect that makes the Constitutional court less effective in advancing human rights is the fact that the Court supported the government in a number of civil liberty cases.

I was in the United States this spring for three months. At this time America was in hysteria about Russian meddling into the US elections. We had the same hysteria several years ago about American meddling into Russian affairs. In 2011 we had elections to the Parliament. It turned out that there were many electoral frauds which caused massive demonstrations. Since the frauds were uncovered by NGOs that were foreign funded, Russian decision makers became afraid of the western (especially American) long hands. Therefore, a legislation was introduced to slender NGOs that receive foreign funding by labeling them, 'foreign agents'. A term 'foreign agent' was used during the Soviet times to imply a spy. Around 80 % of Russians continue to understand this term in the Soviet way, according to the polls.

Human Rights NGOs took this law to the Constitutional court. The court citing international human rights treaties ruled that a foreign agent law is fine because it ensures transparency of funding. The NGOs objected saying that they were all for transparency but the term 'foreign agent' stigmatizes them. Addressing this concern, the Constitutional court said the Soviet way of understanding this term is outdated and therefore should not be taken into consideration. It went further on to say that being a foreign agent does not mean something negative.

Unfortunately, not only ordinary people understand this term in a Soviet way, but also governmental agencies. For instance, Russian Ministry of Justice when publishing news regarding its activities against "foreign agents" uses a picture of a sleek man in a black suit with half of the face covered by an umbrella to demonstrate who it really fights with.

## **Conclusion**

When I was going through the US border control yesterday, an officer asked the reasons for my stay in DC. I told that I am here to participate in a conference about Russian Constitution and Constitutional court.

"The Constitution? You have the Constitution? I thought you had just President Putin", - said the officer.

He is not the only one to think this way. Russian people consider that it is much more effective to complain to the president than to the courts. Almost 60% trust the president and two times less trust the courts – 28 %. The trust for courts less than the trust for the police - 31%, Russian Orthodox church, and security services.

To conclude, I do think that the Constitution has good potential. However, according to the polls, 60% of Russians do not see the benefit of the Constitution for protection of their rights.

To me, these figures symbolize a significant mistrust of Russians towards the Constitution and the Constitutional court. I hope in my lifetime we will see this situation change. Because there is no heavier burden than an unfulfilled potential.