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Current problems with the implementation of the ECHR case law in the Russian legal system

General

The novel "Anna Karenina" written by Lev Tolstoy, starts with the very famous wording: "All happy families resemble one another, each unhappy family is unhappy in its own way." And the author did not let us know the recipe which contains necessary ingredients and techniques of how to achieve a successful partnership, except common understanding of necessity to improve the quality of life of ordinary people (Levin family). Tolstoy also describes a plenty of reason of problems relations from simple adultery in Oblonsky family to complex social problems in Karenin family in connection with the status of a woman at that time and even with the discrimination of women.

The novel was written in the XIX century. As of that time we know many successful and dramatic stories, and it remains to be an actual issue. We still have many unanswered questions and face many unresolved challenges. For example, are there any interconnections between these advantages and shortcomings in partnerships? Do we need a dialogue to maintain a successful partnership? What kind of dialogue?

We can imagine how much should be done to have successful partnership by both parties and how many efforts both need to make to preserve and to maintain the harmony. We can understand that the stability and sustainability of good relations, credibility between partners depend on many factors. Especially if the international institutions and governments play a role of partners. And of course we know in practice that it takes a lot of time to create something which could be destroyed shortly. It is therefore very interesting to analyze the development of such relations their ups and downs. I will look at the dialogue between the European Court of Human rights and the Russian authorities.

Success

After joining the Convention in 1998 the Russian Government led by Boris Eltsin was very optimistic. Russia has adopted new procedural codes for criminal and civil cases in 2001 and 2002 providing more procedural

guarantees and declaring principles of fair trial, equality of arms and rule of law. Criminal, administrative and tax laws were strengthened by rules banning retrospective application of new heavier penalties and other provisions worsening the legal position of private persons.

Russian supreme courts actively implemented the ECHR's general approaches. The Russian Constitutional Court has applied the proportionality test in tax cases, and recently it applied this test to an unlimited ban for former criminals to stay as candidates for parliamentary elections.

On the basis of the Court's case law (*Ryabykh v Russia*, 2003; *Pravednaya v Russia*, 2004) the role of supervisory review in commercial cases was limited in 2005 to fundamental defects including violations of fundamental rights and freedoms (for civil cases it was done in 2010). The Russian Supreme Commercial Court actively accepted this position of the Court and the Russian court has developed other areas of rule of law including application of legal certainty, foreseeability and predictability of law in a number of cases examined by it. It took more time for the Russian Supreme Court to do that, but the reform of supervisory review was also completed.

The Supreme Court judges were active in establishing legal framework for arrests and detention in line with Article 5 of the Convention, transferring authorisation powers from prosecutors to the courts of first instance and instructing judges to justify the detention. Unfortunately, the Court did not specify how the arrest should be justified, but that was the essence of the ECHR approach to pay attention to factual circumstances and behavior of the suspect and to explain all that in the arrest decision.

Detention is closely linked to the problem of overcrowding of Russian pre-trial detention centers and prisons. After the Court's judgment in the case *Kalashnikov v Russia* (2002) the Government itself realized that it was not an isolated case, but a structural problem. Within next 10 years authorities have renovated existing and built new pre-trial detention facilities, reduced the number of prisoners from 1,3 million to about 800 000. The efforts were not sufficient due to lack of financing and in 2012 the Court adopted a pilot judgment in the case *Ananyev v Russia* where it has specified a number of general measures to be taken by the authorities. The Russian Government has positively reacted on this judgment and prepared a comprehensive action plan.

As regards the problems of non-execution of court orders and lengthy proceedings, the Russian government executed the well-known pilot judgment in the case of *Burdov v Russia* (2009) implementing within very short period of time the Law on compensation for non-execution of monetary obligations of the State and delays in court proceedings in 2010. As regards *restitutio in integrum* (non-monetary, in-kind obligations of the State), the Government did not implement such a mechanism due to uncertainties for the Russian budget, and the ECHR reasonably waited for some time (4 years) before rendering another judgment in a case *Gerasimov v Russia* to provide the Government with the opportunity to be ready for the implementation of additional measures.

However, even before that Russian judges were not satisfied with non-execution of their judgments, so they insisted to set up a special procedure in the Russian Budgetary Code in 2006, so that the court orders would be executed automatically after receiving writs of execution by treasury departments of the Ministry of finance. That was the State's own initiative to introduce the appropriate mechanism to avoid problems in the future, although some problems remain with execution of judgments by municipal authorities.

Problems

At the same time there are some ECHR judgments which are not accepted by Russian authorities, in particular, by the Russian Ministry for foreign affairs and the Russian Constitutional Court. Those judgments relate to:

A. Foreign policy of the State:

- the effective control of the Russian authorities over the Republic of Transnistria (*Ilaşcu and others v Moldova and Russia, Catan and others v Moldova and Russia*);
- participation of the Russian partisans in the Second World War (*Kononov v Latvia*) and their actions against alleged combatants;
- conflict with Georgia (*Georgia v Russia*) in connection with recognition by Russia of the independence of two breakaway regions - South Ossetia and Abkhazia

B. Constitutionality of Russian laws and their conformity with the Convention where the Constitutional Court did not find violations:

- parental leave allowances for military servicemen (*Konstantin Markin v Russia*);
- limitation period of three years to impose tax penalty (*Yukos v Russia*);
- prisoners' right to vote at parliamentary elections (*Anchugov and Gladkov v Russia*); this case affects the norm of the Russian Constitution limiting the participation in elections.

Examples of differences in positions of Russian Government and ECHR:

1) effective control in Transnistria (*Catan*):

Russian Government:

The Russian Government contended that it was the will of the Contracting States, as expressed in the text of Article 1 of the Convention, that in the absence of an express declaration under Article 56 each State's jurisdiction should be limited to its territorial borders. For the Russian Government, jurisdiction could exceptionally be extended extra-territorially where a Contracting state exercised effective control over another territory, equivalent to the degree of control exercised over its own territory in peacetime.

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The Court accepted that there is no evidence of any direct involvement of Russian agents in the action taken against the applicants. However, the Court concluded that the "MRT" was able to continue in existence, resisting Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, only because of Russian military, economic and political support. In these circumstances, the "MRT"'s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the "MRT" administration during the period of the schools' crisis. (p. 122);

2) parental leave allowances (*Markin*)

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112. The Government further argued that States had a wide margin of appreciation in matters of national security, as well as in matters relating to general measures of economic and social strategy (they referred to *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98, and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, Reports 1997-VII). Because of their direct knowledge of the society and its needs, the national authorities were better placed than the international judge

to appreciate what was “in the public interest”. The Court should respect the legislature's policy choice unless it was “manifestly without reasonable foundation”.

113. They referred to the judgment of the Constitutional Court, which had found that military service imposed specific demands in so far as it required uninterrupted performance of duties by servicemen and that, consequently, the taking of parental leave by servicemen on a large scale would have a negative effect on the fighting power and operational effectiveness of the armed forces.

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130. It is true that Article 8 does not include a right to parental leave or impose any positive obligation on States to provide parental leave allowances. At the same time, by enabling one of the parents to stay at home to look after the children, parental leave and related allowances promote family life and necessarily affect the way in which it is organised. Parental leave and parental allowances therefore come within the scope of Article 8 of the Convention. It follows that Article 14, taken together with Article 8, is applicable. Accordingly, if a State does decide to create a parental leave scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see Petrovic, cited above, §§ 26-29).

148...By excluding servicemen from the entitlement to parental leave, the provision imposes a blanket restriction. It applies automatically to all servicemen, irrespective of their position in the army, the availability of a replacement or their individual situation. Such a general and automatic restriction applied to a group of people on the basis of their sex must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 14.

Conclusive remarks

1) Advantages:

- mutual understanding that there is a structural problem that needs to be resolved;
- understanding by the authorities that the problem is not isolated, but structural and vital for the society;
- feeling responsibility not before the Committee of Ministers but before the local society;
- competition between the systems of civil and commercial Court's for internal positive image and good reputation in society;

- endless development of a system for human rights protection where there is always an opportunity for national courts to be even more active than ECHR as it respects margin of appreciation and subsidiary role of international institutions;

2) Remaining issues for a dialogue:

- lack of independence and impartiality of local authorities increases the role of the Court;
- sensitive political issues require strong and irrefutable arguments for finding violation of the Convention;
- mutual respect and readiness to recognize mistakes;
- different understanding of national and European values (democracy, rule of law, fundamental rights and freedoms, tolerance, pluralism) in the spheres of extradition (of suspects in terrorism, religious extremism) and parades of sexual minorities;
- different assessment of threats and challenges for the society (in particular, in cases against political parties and religious communities);
- influence of international political pressure on independence and impartiality of the Court;
- win/lose understanding of the Court judgments;
- conformity of Russian laws with the Convention and the Russian Constitution.