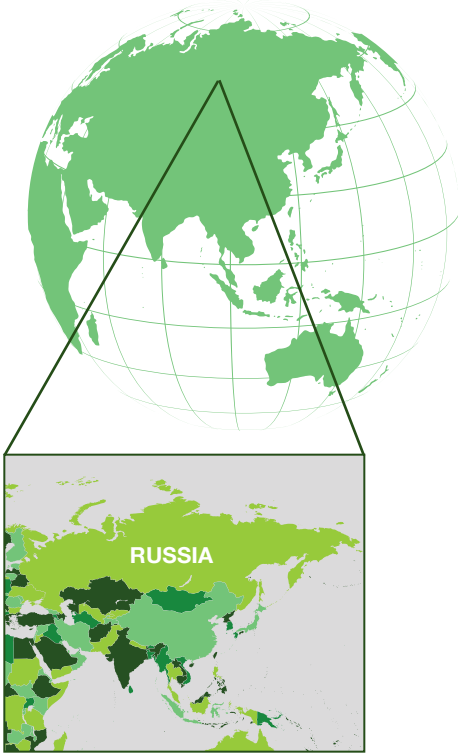




Russia

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I. INTRODUCTION

During 2019, as in previous years, Russia was the center of attention in the international media for alleged interference in a number of important elections, including those of the European Parliament. These international geo-political speculations were intertwined with the narrative concerning the so-called ‘illiberal democracies’, amongst which Russia is counted by some observers. The interest in these issues is linked to the global development of populism, which has found inspiration in some of President Putin’s speeches (including the interview published in the *Financial Times* on 28 June 2019 in which he openly challenged the continuing validity of liberal ideas) and in those of the main architect of Russia’s ‘sovereign democracy’ doctrine, Vladislav Surkov. In an interview with *Nezavisimaya Gazeta* on 11 February 2019, Surkov legitimized Putin’s continuity in power as justified on the grounds of the ‘deep’ characteristics of the Russian people. At the same time, he acknowledged the attraction of ‘Putinism’ outside Russia.

Russian relations with European organizations experienced both light and dark moments in 2019. While participation of the Russian delegation in the Parliamentary Assembly of the Council of Europe was reinstated by the Resolution of 26 June 2019, relations with the European Union were somewhat more controversial. Two Resolutions of the European Parliament (one on 12 March 2019 – ‘On the state of EU-Russia political relations’ and the other on 19 September 2019 – ‘On the importance of European

memory for the future of Europe’, of which the latter equates Nazism with Stalinism) – have provoked in Russia an acute resentment of Western ‘disinformation’. It is claimed that European institutions have misrepresented a series of historical events considered by Russians as central to their sense of national identity; e.g., the victory over Nazi fascism during the ‘great patriotic war’ (see in particular the reaction of the speakers of the federal Parliament in their meeting with President Putin on 24 December 2019).

The trends in constitutional jurisprudence in 2019 did not differ greatly from previous years, although there were some attempts to mitigate the restrictions on the freedoms of assembly, political participation and the media. However, the Constitutional Court remained deferential towards authority, continuing a trend of consistent subordination that dates back to the entry into force of the current Constitution. This subordination was further reinforced by legislative reforms that have systematically reduced the autonomy of judges over the years. The Russian CC has never been an independent actor and does not deal with politically sensitive issues. However, it plays a significant role in the protection of social and economic rights, which are quite fragile in the current political context.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

During 2019, three legislative packages restricting the freedom of the Internet were adopted. They penalise defamation of the authorities and the nation, target fake-news

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sources and, lastly, introduce the so-called ‘sovereign Internet’. In the first two packages (Acts of 18 March 2019), there was a modification of the federal Act ‘On Information, on Information Technologies and on Information Protection’ and of the Code on administrative offenses. In the third legislative package (Acts of 1 May 2019) the Act ‘On Communications’ was modified along with the Act ‘On information ...’. The prevailing logic of the three legislative packages is clear; the Kremlin intends to increase its control of the web particularly in the light of significant upcoming electoral events (the Duma in 2021 and the Russian presidency in 2024).

With regard to the first package, the changes equate the dissemination of content that ‘insults the state, society or authorities’ with acts of minor vandalism, thus extending the concept of a ‘public place’ to include the virtual space of the web. With regard to the second package, ‘misinformation’ is considered a sort of abuse of free speech; therefore, those who disseminate as true false information that is of public interest and which could have serious consequences for individual health or social stability are punished. In both cases, the state communications watchdog *Roskomnadzor* (Federal Communications Supervision Service, introduced in 2008) will play an important role. At its request, Internet Service Providers have a legal obligation to block websites where prohibited information was published. The criteria for establishing whether the information or declarations are forbidden are vague, thus relying on the discretion of the prosecutor in establishing the adequacy, accuracy and thus legality of online content.

The power of the *Roskomnadzor* and of other public bodies is even greater in the third package, which reforms the way in which the current global Internet access web infrastructure and electronic communication services work. The overall aim is to build an autonomous national web network (RU.NET). Internet providers will be obliged to install devices to filter traffic, and the *Roskomnadzor* will have unparalleled powers, including exclusive control of the ‘off switch’ to deploy as it sees fit. The official justifica-

tion for these measures is to avoid interruptions of network services by foreign servers and/or cyber attacks originating mainly from the USA (thus providing for the progressive disconnection of service providers in Russia from foreign servers and their reconnection to a new national domain system).

The Russian doctrine of constitutional law is almost entirely silent on concerns that pre-occupy international legal doctrine, such as restrictions on the freedoms of association, assembly and manifestation of thought (Internet censorship being the most recent example). The main constitutional law journals continue to focus on the issues of ‘constitutional values’ and ‘constitutional culture’, topics that seem to echo similar debates occurring in various European countries. In Russia, a conservative reading of constitutional values predominates and sits well with the persistent anti-globalist and anti-liberal rhetoric. However, there are some progressive ideas under discussion, such as those that touch upon election regulations. There is a widespread belief in the need to adopt a single election code to replace the conglomeration of rules that regulate far too minutely every single aspect of the registration of candidates, parties and associations. The excessive detail and the continuous modification of the electoral legislation (a phenomenon noticed since the beginning of the post-communist period) are a sign of a precise political intent: on the one hand, to control elections and parties as much as possible (in this sense, for example, the experiment with electronic voting for the Moscow Duma), and on the other, to continually change the rules to find the most effective combinations to achieve the desired result. This is how one might read the recent proposals to strengthen the uninominal quota to elect the Duma in order to remedy discontent and apathy caused by the pro-Kremlin party, United Russia. Another approach saw it presenting its representatives as independent candidates in the September 2019 Moscow Duma elections. Both from the start and during the election campaign for the holding of these elections, the most heated public protests occurred in response to the failure to register a set of opposition candidates. The mechanisms of presentation of candidates at

each level are overly complex to the point of arousing criticism by international election monitoring bodies.

The protests for ‘fair elections’, which ramped up in the summer of 2019 on the initiative of the candidates of the ‘non-systemic’ opposition who had been refused registration mainly for formal reasons such as the collection of signatures in their support (since legislation exempts from the collection of signatures only the candidates of parties already represented in the legislative bodies), were added in the last year to other types of protests (for pension reform, for corruption, for environmental reasons, etc.). These have also been treated by the police with extreme harshness. Although these protests are a cause for concern for the authorities, they are unlikely to lead to systemic political changes and only a few cosmetic and opportunistic changes are expected.

December 2019 saw a further change to the media law that now requires individuals to declare funding received from abroad. This change brings the regulations in line with the same requirement established in previous years for NGOs. In particular, such an amendment designates individuals who communicate with foreign media outlets as foreign agents. The amendment allows Russian authorities to investigate citizens for any information they spread to international media outlets. This provision is also part of the trend that considers street demonstrations and protests no longer an internal product of the extra-parliamentary ‘liberal’ opposition but instead a reflection of external interference by the West. Such is the perceived interference that a special parliamentary commission of inquiry was established.

III. CONSTITUTIONAL CASES

In 2019, the Constitutional Court issued a total of 3374 decisions: 41 judgments and 3333 ordinances. The cases concerned political rights (freedom of peaceful assembly and freedom of the media), social rights (employment, pensions, including military pensions) and economic rights. The majority of the applications were launched by citizens.

Other applicants included courts of general jurisdiction and arbitration courts, commercial entities and a municipality. Applicants mostly challenged federal laws (especially the provisions of the federal codified statutes: the Tax Code, the Labor Code, the Civil Code, etc.). Only in a handful of cases did the Court scrutinize the laws of subnational units. In eighteen judgements, the disputed provisions were declared completely or partially unconstitutional.

1. Review of the constitutionality of Article 19.1 of the Act on Mass Media

In January 2019, the Constitutional Court reviewed the constitutionality of Article 19.1 of the Act on Mass Media ('The Mass Media Act'). This article, adopted as an amendment to the Mass Media Act in 2014, provides that those Russian citizens who hold a citizenship of another country cannot own more than 20 percent of shares in Russian mass media companies. As a result of this amendment, Mr. Finkelstein, a Russian citizen who held a citizenship of the Netherlands, forfeited the right to participate in the management of radio station Chance LLC, in which he owned 49 percent of shares. Specifically, he could not contest the unilateral decision of the second shareholder to take over the radio's broadcasting license. After a series of appeals, the matter came before the Constitutional Court. The Court recognized that, although by operation of law, Mr. Finkelstein's shareholding in the company was reduced to 20 percent, he did not entirely forfeit his right to participate in the management of the company and avail of any other remedies and legal protections provided under applicable laws. The failure to acknowledge the rights attached to Mr. Finkelstein's reduced share in the company is in violation of several articles of the Constitution, namely Articles 19.1 (equal protection under laws), 34.1, 35.1, 35.2 (property rights and protection of private property), 55.3 (limitations on constitutional rights and freedoms) and 62.2 (citizenship).

However, the Constitutional Court, by limiting its decision to the issue of rights and legal protections of shareholders, failed to address the concerns of those who opposed

the law due to its negative impacts on the independence of the media. In this regard, in a separate opinion attached to the judgment, Justice Konstantin Aranovsky offers useful guidance regarding the broader implications of the Mass Media Act amendments for constitutional rights and freedoms. Particularly, Justice Aranovsky argued that the amendments to the Act were unconstitutional because they imposed unreasonable limitations on the freedom of expression and information under Article 29 of the Constitution. Further, he pointed out that any constitutional rights, freedoms and guarantees can be limited only to the extent necessary to protect the fundamental foundations of the constitutional system: morality, health, rights and legitimate interests of persons and purposes of national defense and security (the constitutional doctrine refers to this list contained in Article 55.3 of the Constitution as 'constitutional values'). However, the evidence provided by the government failed to demonstrate an immediate, potential or existing threat to the constitutional values. In other words, the contested article of the Mass Media Act limited access to information without any reasonable justification.

2. Review of the constitutionality of some provisions of the Act on Public Assemblies, Rallies, Demonstrations, Marches and Pickets

The Act on Public Assemblies, Rallies, Demonstrations, Marches and Pickets ('The Act on Public Assemblies') was adopted in 2004 to regulate the exercise of the constitutional right to peaceful assembly. According to Article 5.4.5 of this Act, organizers of public events – assemblies, rallies, demonstrations, marches and pickets – must ensure public order and safety during these events. To comply with public safety requirements, organizers must cooperate with local law enforcement authorities and local government. Article 7 of the Act on Public Assemblies requires that an organizer of a public event notify local authorities about it and explain how he or she intends to ensure public safety. In August 2018, Mr. Teterin notified the Irkutsk city administration that he intended to hold a small public rally and that the city police and emergency services would

be responsible for public safety during the event. Shortly after the notice was filed, city authorities informed Mr. Teterin that he had failed to comply with the requirements of the Act on Public Assemblies because references to local law enforcement and ambulance services were insufficient to meet public safety requirements.

The Constitutional Court found that this decision of the Irkutsk city authorities violated several articles of the Constitution. Particularly, the Court held that local authorities could not limit the constitutional right to peaceful assembly by placing upon organizers of public events an obligation to ensure public order and safety. Moreover, the Court held that if the local authorities were not satisfied with the public safety information contained in the notice, they were required to cooperate with the organizers to meet the safety requirements.

3. Review of the constitutionality of some provisions of the Act of the Komi Republic on Holding Public Events in the Komi Republic

In 2012, the legislator of the Komi Republic (a federal subject located in the western part of Russia) adopted an Act that regulates the exercise of the constitutional right to peaceful assembly. It prohibits holding public assemblies in the central square of the Republic's capital and also within a 50-meter radius of entrances to all state and municipal buildings of the Republic.

In the summer of 2017, Ms. Tereshonkova and Ms. Sedova notified local authorities that they intended to hold assemblies in two locations that fell under the ambit of the Act. Local authorities, referring to the legal prohibitions, refused to give their consent to the events. The applicants unsuccessfully contested these decisions in the lower courts. In November 2019, the Constitutional Court declared the aforementioned provisions of the Act of the Republic of Komi unconstitutional. First, it held that a general prohibition against the freedom of assembly in one of the central squares violated Section 11 (2) of the European Convention on Human Rights and Article 31 of the Constitution, which guar-

antee the right to peaceful assembly. The Court further acknowledged that the law of the Komi Republic placed unreasonable limitations on the constitutional rights and freedoms of citizens. As was mentioned above, Article 55.3 of the Constitution provides that constitutional rights and freedoms can be limited only to the extent that it is necessary to protect the foundations of the constitutional system: morality, health, rights and legitimate interests of other persons and to defend the country and ensure its national security. The Constitutional Court also noted that the legislator of the Komi Republic did not have jurisdiction to adopt laws that ban public assembly within a 50-meter radius of entrances to all state and municipal buildings of the Republic. This is because under Articles 72.1 (b) and 76.2 of the Constitution, the federal legislator has preemptive jurisdiction to adopt a list of locations where it is unsafe to hold a public assembly, and spaces near state and municipal buildings were not on the list.

4. Review of the constitutionality of some provisions of the Act on Countering Terrorism and of the Act on the Monetary Allowance and the Provision of Separate Payments to Military Personnel

In 2013, Mr. Ponkratov was deployed in a counterterrorist operation in the Chechen Republic and sustained serious injuries that led to a disability. He then received a disability allowance under the Act on Countering Terrorism and, following a rehabilitation period, resumed military service.

In 2017, the military medical board declared that, due to the disability, Mr. Ponkratov was not eligible for military service and he was fired from the Russian armed forces. Following the decision of the board, he applied for additional disability benefits, this time under the Act on the Monetary Allowance and the Provision of Separate Payments to Military Personnel ('The Monetary Allowance Act'). This Act provides for a disability payment for military veterans. However, the military commission and the lower courts concluded that Mr. Ponkratov's claim for disability benefits could not be satisfied due to the fact that he had al-

ready received analogous disability payments under the Act on Countering Terrorism.

In a rather concise decision, the Constitutional Court criticized the lower courts for failing to correctly interpret the purpose of the Act on Countering Terrorism. Particularly, the Court pointed out that by adopting this Act, the legislator, among other things, acknowledged that military personnel deployed in counterterrorism operations enjoyed a special legal status and that they were eligible for additional social benefits. Therefore, the payments under the Act on Countering Terrorism did not substitute for the payments under the Monetary Allowance Act. The Court concluded that the contested administrative and judicial decisions were unconstitutional because they deprived Mr. Ponkratov of his right to equal protection under laws under Article 19 of the Constitution.

IV. LOOKING AHEAD

Since the 2018 presidential elections, there has been intense speculation about the Kremlin's plans for how it will transition power from Putin to Putin when his current term ends in 2024. During the year-end press conference of 19 December 2019, President Putin did not exclude changes to the organizational part of the Constitution as he has done in the past. This opens up speculation about constitutional amendments. The options discussed are essentially two: to allow further mandates to the same President or to strengthen the role of the Prime Minister and the parliamentary majority. This second option was advocated by the Duma speaker Volodin in an interview with *Parlamentskaya Gazeta* of 17 July 2019. But this second scenario has already occurred, with the Constitution unchanged in the period 2004-2008. In Russia, the real problem does not lie with constitutional provisions but with the political feasibility of the different scenarios and with Putin's own agenda, which he has not yet made public. The 'system' has its own strict internal logic and it is certainly not modification of the constitutional rules that will prevent alternation or continuity in power. Any change of mechanism occurs as

a matter of practice following the adjustment of relations between rival power groups. The system still remains monolithic and self-referential, and is impervious to the ritual street protests in the run-up to elections that have been observed on several occasions in recent years.

V. FURTHER READING

Angela Di Gregorio, 'Constitutional Courts in the Context of Constitutional Regression. Some Comparative Remarks', in M. Belov (ed.), *Courts, Politics, and Constitutional Law* (Routledge, Oxford, 2019)

Nikolaj Bondar, 'Information and Digital Space in the Constitutional Dimension: From the Practice of the Constitutional Court of the Russian Federation' (2019), 11 *Zhurnal rossijskogo prava* 26

Jeffrey Kahn, 'The Rule of Law under Pressure: Russia and the European Human Rights System' (2019), 44(3) *Review of Central and East European Law* 275

William Partlett & Mikhail Krasnov, 'Russia's Non-Transformative Constitutional Founding' (2019), 15(4) *European Constitutional Law Review* 644