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Alexei Trochev

Judging Russia: Constitutional Court in Russian Politics, 1990-2006

Cambridge: Cambridge University Press, 2008

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Review by Prof Bill Bowring, Birkbeck College, University of London

Alexei Trochev is ideally qualified to write this magnificent and highly important book. This will be required reading not only for those interested in public law and constitutional adjudication, but also anyone wishing to gain an understanding of contemporary Russia.

Trochev combines the two disciplines necessary for such a study. He graduated in law (a five year degree, in the classic Russian system) in State University of Syktyvkar, capital of the Komi Republic in northwestern Russia in the 1990s, and taught constitutional law in Arkhangelsk. But he is also highly qualified in political science, with an MPA from Kansas, and he obtained his PhD at the University of Toronto, where his mentor has been Peter Solomon. He now teaches in the United States.

His fieldwork is highly impressive. He spent two months in the Russian Constitutional Court (RCC) in 2001, and was given access to the Court's entire archives, including a great deal of unpublished material. He put his political science skills to good use, interviewing 14 judges and officials, in Moscow and in the regions. He has read all the judgments of the Court and consulted a very wide range of sources in Russian and in English.¹

His subject-matter is fascinating both in terms of its legal authority and innovation and of its political impact. The RCC has the reputation of being the most – perhaps the only – independent judicial institution in contemporary Russia (apart that is from the juries, which now hear the most serious criminal cases in every part of Russia except Chechnya). It is not so well known that the present court, which has been existence since 1995 – fourteen years of uninterrupted activity, is the third manifestation of constitutional justice in Russia since the dying days of the USSR.

¹ The RCC website contains a great deal of material – indeed, 99% of the unpublished decisions can now be found there. See <http://www.ksrf.ru/Pages/default.aspx>

The first was the Committee for Constitutional Supervision of the USSR, which was established in 1988, in Gorbachev's perestroika, and continued work until the collapse and disintegration of the USSR in 1991.

The second was the first RCC, which sat from 1992 to October 1993, when it was suspended by President Yeltsin, who also tore up the Constitution then in force – that of the Russian Socialist Federation of Soviet Republics (RSFSR) - and brought in the tanks to shell the Parliament (Supreme Soviet) of the RSFSR in the White House. The Court's Chairman was the tough-minded Valerii Zorkin. It was he who summoned the judges to sit all night to condemn Yeltsin's action as unconstitutional.

Although the Court did not sit again until 1995, all the judges were appointed to the new Court under the December 1993 Constitution. In 2003 the Chairman of the First Court, Valerii Zorkin, was elected Chairman of the Second, and is now beginning his third term, as I write.²

Trochev states his core argument in his very first sentence. It is that: "... rulers – regardless of their authoritarian or democratic pedigree – create and tolerate new constitutional courts as long as the latter: (a) provide important benefits for the new rulers, and (b) do not interfere too much with public policies."³

He concludes, rather dismally, that "Short-term calculations of political elites appear to be everywhere: in the debates over the powers of the Court and its financial independence, and over the selection of the judges and their tenure. The Russian bureaucrats also appear to obey unfavourable Court judgments only when their bosses order them to do so."⁴ His research demonstrates that "... the impact of Russian constitutional review on the lives of ordinary citizens, who courageously keep suing the state, has been limited."⁵

My only significant concern with this triumph of meticulous scholarship is the attention given to the effect of Russia's membership of the Council of Europe since 1996, and its ratification of the European Convention on Human Rights in 1998. The Russian judge at Strasbourg is one of the best judges on the Court, Anatolii Kovler. Speaking in May 2008, when a draft law was laid before the State Duma to seek to provide Russians with better domestic remedies for violations, he gave some facts and figures. In the ten years since ratification, 450 judgments have been rendered against Russia, three quarters of them from 2005 to 2007. There were 82 judgments in

² See "Valerii Zorkin vnov izbran predsedatelem Konstitutsionnovo suda (Valerii Zorkin is again elected Chairman of the Constitutional Court)" 20 February 2009, at <http://www.newsru.com/russia/20feb2009/zorkin.html>

³ Trochev (2008) p.19

⁴ Trochev (2008) p.301

⁵ Trochev (2008) p.302

2005, 102 in 2006, and 192 in 2007. This tempo is being maintained. This costs money for the Russian State. In 2006 Russian applicants were awarded a total of €1.4 million in compensation, and in 2007 €4.3 million.⁶ Russia always pays.

Has this had an effect on the RCC? Trochev's book is not the source of answers to this question, and perhaps this is a reflection of his recent training and work in North America. Although he notes that "... the RCC examines the ECHR judgments in every instance of constitutional rights litigation; nevertheless, it does not always include references to them in the text of the decision..."⁷, he does not examine in any detail the cases where they do.

Perhaps I am biased: I am a human rights lawyer. But I am struck by the fact that the revival of the RCC on 24 June 1994, with a new Law which the judges themselves had drafted, and an increased complement of 19 judges, immediately preceded Russia's engagement with the Council of Europe. It was a positive omen that continuity was retained, with all the pre-1993 judges keeping their positions, including the controversial former Chairman – and now once again Chairman - Valerii Zorkin. Even before ratification of the ECHR, the RCC began to refer to and apply the jurisprudence of the ECHR.⁸

A breakthrough was made in the case of *Maslov*, decided on 27 June 2000.⁹ The case concerned the constitutionality of Articles 47 and 51 of the (previous) Criminal Procedural Code, and the issue at stake was the right to defence counsel following detention. According to the Code, a person in detention as a "suspected person" or an "accused", was entitled as of right to the presence of a defender. But this was not the case for a person brought to a police station to be interrogated as a "witness", even though attendance was compulsory, and might well lead to transformation into a suspect or accused. The Court not only referred to Article 14 of the UN's ICCPR¹⁰ and Articles 5 and 6 of the ECHR, but for the first time cited the jurisprudence. The cases - six in all - to which they referred were *Quaranta v Switzerland*¹¹, *Imbrioscia v Switzerland*¹², *John Murray v United Kingdom*¹³, *Deweerd v Belgium*¹⁴, *Eckle v Federal Republic of Germany*¹⁵, and *Foti v Italy*¹⁶. The Court held that the Code must not be read

⁶ See <http://www.newsru.com/russia/16may2008/vszakon.html>, and <http://www.newsru.com/arch/russia/15may2008/strasburg2008.html>

⁷ Trochev (1998) p.176

⁸ W. B. Simons "Russia's Constitutional Court and a Decade of Hard Cases: A Postscript" *"Review of Central and East European Law*, 1 September 2003, vol. 28, no. 3-4, pp. 655-678

⁹ Case 11-P of 27 June 2000 – Trochev discusses these cases at p.175, note 238

¹⁰ International Covenant on Civil and Political Rights

¹¹ Series A No 205 (1991)

¹² Series A No 275 (1993)

¹³ 8 February 1996, Reports 1996-1, Vol 1

¹⁴ Series A No 35 (1980)

¹⁵ 15 July 1982 (no.51), 5 EHRR 12

literally, since this would violate the spirit of the Constitution and of the Convention as interpreted by the Court. Witnesses too must have the right to a lawyer.

Furthermore, Trochev did not have the opportunity to consult the work of Anton Burkov on *The Impact of the European Convention on Human and Application on Russian Law: Legislation and Application in 1996-2006*¹⁷. Burkov is now completing a PhD at Cambridge University, and his results are eagerly awaited. In his 2007 book, he reviewed the 54 judgments by August 2004 citing the ECHR out of 215 altogether since the founding of the RCC in 1991, 166 since Russia's accession to the Council, and 116 since ratification.¹⁸ Like Trochev, however, he is critical of the failure of the RCC to evaluate the case-law to which it refers, or even to reference it properly.

The Justices of the RCC also played a leading role in another legal breakthrough. In the Soviet period, the USSR was perhaps the most assiduous ratifier of UN instruments, but never allowed these to have any serious internal effect. Thus, content must be given to Article 15 of the 1993 Constitution¹⁹, which provides not only that the Constitution itself has "the highest legal force and direct effect", but, by Article 15.4

"Generally recognised principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If other rules have been established by an international treaty of the Russian federation than provided for by law, the rules of the international treaty shall apply."

The apotheosis of this new relationship seemed to have truly arrived with the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003. The Resolution is entitled *On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation*.²⁰ The Supreme Court consulted widely in composing this Resolution: participants in discussion included justices of the RCC, Justice Kovler, and other experts.²¹

¹⁶ Series A No 56 (1982)

¹⁷ Anton Burkov *The Impact of the European Convention on Human and Application on Russian Law: Legislation and Application in 1996-2006* (Stuttgart: ibidem-Verlag 2007)

¹⁸ Burkov (2007) *ibid*, p.36

¹⁹ The 1993 Constitution can be found in English at <http://www.kremlin.ru/eng/articles/ConstMain.shtml>

²⁰ Resolution No. 5 adopted by the Plenum of the Supreme Court of the Russian Federation, 10 October 2003, English translation to be found on the web-site of the Supreme Court, at <http://www.supcourt.ru/EN/resolution.htm>

²¹ Although former justice, now consultant, at the Constitutional Court, Tamara Morshchakova, takes the view that the resolution itself violates the Constitution – conversations with the author.

This Resolution at last gave detailed instructions to the lower courts as to how to apply Article 15(4), and the Federal Law of July 1995 “On International Treaties of the Russian Federation”²², to the same effect. Thus,

“... the rights and liberties of man in conformity with commonly recognized principles and the norms of the international law, as well as the international treaties of the Russian Federation shall have direct effect within the jurisdiction of the Russian Federation. They shall determine the meaning, content and application of the laws, and the activities of the legislative and executive branches and local governments, and shall be secured by the judiciary.”

Furthermore, with respect to the European Convention on Human Rights, the Plenum directed that:

“The courts within their scope of competence should act so as to ensure the implementation of obligations of the State stemming from the participation of the Russian Federation in the Convention on Protection of Human Rights and Basic Freedoms.... If the court in hearing a case has established the circumstances that contributed to the violation of the rights and liberties of citizens guaranteed by the Convention, the court has the right to issue its ruling (or decision) which would draw attention of relevant organisations and officials to the circumstances and facts of violation of the rights and liberties requiring that necessary measures be taken.”

However, this last instruction appears to fall somewhat short of the requirement of the Constitution as to direct effect. The logic of the Constitution would appear to be that a Russian court would have the duty, not merely the right, to take measures to provide an effective remedy for a violation of Convention rights.²³ As Trochev notes, applicants do not need to appeal to the RCC before going to Strasbourg.²⁴ And the lower courts are not anything like as good as the RCC at paying attention to the ECHR.

Indeed, until recently, the Constitutional Court was the only relatively independent part of the Russian judicial system. However, the Court has now been punished for its independence: it has been sent into exile. This has happened since Trochev’s book went to press; I can confirm that the book was in no way responsible.²⁵

The independence of this Court has led inexorably to a political decision, taken at the highest level, to move it well away from the centre of Russian power. In 2005 Professor Peter Solomon reported on plans, then apparently then ‘on hold’, to move the Constitutional Court from

²² Federal law No 101-FZ dated 15 July 1995 “On the International Treaties of the Russian Federation”

²³ See for more detail Bowring, B “Russia in a Common European Legal Space. Developing effective remedies for the violations of rights by public bodies: compliance with the European Convention on Human Rights” in Kaj Hober (ed) *The Uppsala Yearbook of East European Law 2004* (London: Wildy, Simmonds and Hill, 2005) pp.89-116

²⁴ Trochev (2008) p.162

²⁵ Trochev (2008) discusses the move at pp.88-90

Moscow to St Petersburg – one example of the new ‘counterreform’, as Solomon expressed it, launched by then President Putin.²⁶

There was some delay in implementing this highly controversial decision, but the relevant law was enacted²⁷, and the Constitutional Court was obliged to move, and did so in June 2008. Many commentators, and Judge Zorkin himself²⁸, considered that this would mean a significant weakening of the Court. I note that the Court now occupies the lavishly refurbished palace of the Tsarist Senate, the highest court of the Russian Empire; and the judges each received a newly built neo-classical mansion in their own exclusive walled and gated community. This is rightly seen as a pay-off.

This is not the only evidence of clear conflict between the Russian Government and the Constitutional Court as a result of its relative independence. In June 2007 Judge Zorkin sent to the State Duma a list of 15 Orders and 9 Determinations of the Court which have not – contrary to law – been actioned by the Duma, the oldest dated 23 December 2007. And on 22 February 2008 it was reported that the Russian Government had for the third year running ignored the Determination of the Court of February 2005 on the raising of pensions.²⁹ Thus, sending the Court into exile is the continuation of a policy of rank disrespect. Indeed, two chapters of Trochev’s book are devoted to the problems of non-implementation of the RCC’s judgments.

It remains to be seen whether the Court will once again recover, as it did after 1993.

2,649 words including footnotes

²⁶ Solomon, P (2005) “Threats of Judicial Counterreform in Putin's Russia” v.13 *Demokratizatsiya: The Journal of Post-Soviet Democratization*, 325

²⁷ Kolesnikov, A (2007) ‘Pereyezd okonchatelniy, obzhalovaniyu ne podlezhit’ (The transfer decision is final, no appeal is possible’ *Kommersant* 24 December No 237(3813) at <http://www.kommersant.ru/doc.aspx?DocsID=839229>

²⁸ See “Glava Konstitutsionnovo suda protivitsya pereyezdu v Peterburg (Head of the Constitutional Court opposes the move to St Petersburg)” *Russia On-Line* 24 November 2006 at <http://www.lenta.ru/news/2006/11/24/court/>; and see also Syuzanna Farizova, Yurii Chernega “Valerii Zorkin khochet ostavit chast sudei v Moskve. A Kreml opravlyayet KS v Peterburg v polnom sostave (Valerii Zorkin wants to leave part of the judges in Moscow. And the Kremlin is sending the Constitutional Court to St Petersburg en bloc)” *Kommersant* 24 November 2006 at <http://www.kommersant.ru/doc.aspx?DocsID=724706>

²⁹ ‘Pravitelstvo RF uzhe tretiy god ignoriruet postanovleniye KS o povishenii pensii (The Government of the RF already for the third year ignores the order of the CC on raising pensions) at <http://www.newsru.com/russia/22feb2008/kskabmin.html>