

20 Years of the Constitution of the Russian Federation

Theory and Practice

СТАТЬЯ 29
КАЖДОМУ ГАРАНТИРУЕТСЯ СВОБОДА МЫСЛИ И СЛОВА.
НИКТО НЕ МОЖЕТ БЫТЬ ПРИНУЖДЕН К ВЫРАЖЕНИЮ СВОИХ
МНЕНИЙ И УБЕЖДЕНИЙ ИЛИ ОТКАЗУ ОТ НИХ.
КАЖДЫЙ ИМЕЕТ ПРАВО СВОБОДНО ИСКАТЬ, ПОЛУЧАТЬ, ПЕРЕДАВАТЬ,
ПРОИЗВОДИТЬ И РАСПРОСТРАНЯТЬ ИНФОРМАЦИЮ ЛЮБЫМ ЗАКОННЫМ СПОСОБОМ.
ГАРАНТИРУЕТСЯ СВОБОДА МАССОВОЙ ИНФОРМАЦИИ.
ЦЕНЗУРА ЗАПРЕЩАЕТСЯ.
конституция РФ.

Study commissioned by Werner Schulz MdEP

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The Greens | European Free Alliance
in the European Parliament

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Foreword

On the 12th of December, 1993, a new Russian constitution was adopted in a referendum, with just under sixty percent of the vote. It declared the Russian Federation to be a democratic and social state under the rule-of-law. It guaranteed human rights, the right to life, democracy, the separation of powers, individual liberty rights and diversity of political parties and opinion. Thus the new Constitution was similar in its wording to those of Western countries. It was a step towards the rule of law and legal security, although not all of its precepts were implemented equally.

At least since the beginning of Vladimir Putin's third term in office, however, one has been forced to wonder whether the Constitution and political reality are still congruent. This report draws on a series of examples to obtain a picture of the legal situation in Russia today. The results are alarming. Although the Russian Constitution itself has remained essentially unchanged, the fundamental rights it enshrines – such as the freedoms of expression, religion and assembly – have been permanently curtailed by “normal” legislation and by the rulings of the Russian Constitutional Court. One of the instruments used stems from the Constitution itself: Article 55 allows fundamental rights and freedoms to be limited by federal laws when “necessary for the purposes of defence of the foundations of the constitutional system, morality, health, rights and legal interests of other persons and ensuring the defence of the country and security of the State”.

Statements made by Valerii Zor'kin, the chairman of the Constitutional Court, are a typical expression of this form of legal nihilism with regard to fundamental rights. He has warned against a one-sided emphasis of legal form in the face of an “extreme imperfection of reality”. He explains that the interior and exterior threats to the Russian Federation make it far more important at present to achieve the optimal level of democracy possible under the given circumstances and draws a distinction between that optimum and an “ideal democracy”. A legal periphrasis of Putin-managed democracy.

As a result, the balance among constitutional bodies is off kilter. In the everyday business of politics the president dominates parliament and the government. The reins of governance are de facto in his hands. His prime minister and cabinet have been demoted more or less to administrative authorities. Although the Constitution establishes the president as just one part of the executive branch, in reality he towers above all other institutions.

The fact that constitutionally protected fundamental rights can now be exercised only with difficulty – if at all – is evidence of the wide gap that exists between constitutional law and constitutional reality in Russia today.

During his third term in office, Putin III has stepped up his policy of restrictions. The impression that he aspires to a “new GDR” grows ever stronger. This is a system in which he was wellversed, thanks to his time as a Dresden-based KGB agent: a pseudo-democratic state headed up by a sovereign ruler, buttressed by a sham parliament, an arbitrary judicial system, an all-powerful secret service, a National Front with puppet political parties and a national economy managed and monopolized by the state.

To my eyes it appears that the European Union and its member states have been reluctant to acknowledge this. In the light of purported dependence on Russian commodities and ambitious with respect to the country's large market, many have shut their eyes to these societal faults. Criticism is voiced only very cautiously and is limited to verbal efforts. The practical consequences: nil. Most recently evidenced when Ukraine abandoned its negotiated association agreement with the EU at the last minute as the result of massive Russian pressure.

Insistence on human rights and the rule of law is an essential basis of Western and/or European foreign policy. Nothing should challenge that. It is in that light that the aim of achieving a partnership, even a “strategic or modernization partnership”, between the European Union and Russia should be scrutinized. Such a partnership can function only on the basis of concurring basic values and the bonds of trust they engender. These prerequisites are not met at present. So I advise the Union and its member states to engage in an honest debate about the conditions which must be in place for a partnership to be forged. Ultimately, at issue is the realignment of the EU Russian policy. This must be accompanied by our full support for the protesting civil society. The EU can and must do more to help democratic forces, for, ultimately, only they can bring about change for the better.



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20 Years of the Constitution of the Russian Federation – Theory and Practice

I. Introduction

The Constitution of the Russian Federation of 1993 speaks a new language compared to that of the Soviet models which preceded it. It declares the Russian Federation to be a democratic and social state governed by the rule of law (arts. 1, 7). Man and his rights and freedoms constitute the highest values (art. 2); human dignity and the right to life obtain the protection of the state; personal liberty rights are granted with no ideological barriers. The establishment of a state ideology is prohibited, and Russia commits itself to plurality in terms of political parties and opinions (art. 13). The Constitution is directly applicable law, and all agencies of government power are obliged to comply with it (art. 15). Through a comprehensive guarantee of legal protection and a constitutional court, rights can be safeguarded and enforced by legal action (arts. 46, 125). The degree to which the Russian Con-

stitution is open to international law is also striking in historical comparison and in comparison with the law of other countries: according to Article 15, international law takes precedence over Russian laws, and the fundamental rights and freedoms of the Constitution are to be construed “according to generally recognized principles and norms of international law” (art. 17).

Thus Russia seeks – and finds – a connection to the “family of constitutional states” in the text of its Constitution. But what is situation like in practice? How well are the principles and standards set down in the Russian Constitution standing up to the country’s realities? We would like to pursue this question below by considering a few examples from Russian legal practice.

II. Adoption of the Constitution

The Russian Constitution of 1993 came into being in the wake of political crises taking the form of confrontations between the Supreme Soviet and President Boris Yeltsin, elected by the Russian people in June of 1992. In the struggle over the procedure for adopting the new constitution, Yeltsin ultimately suspended, by decree, the authorities of both the Supreme Soviet and the Congress of People’s Deputies. In another decree, he ordered a constitutional referendum to be held on 12 Dec. 1993, to vote on the adoption of the new draft constitution Yeltsin himself had presented. At the same time, he reduced the minimum turnout required for a valid constitutional referendum from that prescribed by Russia’s referendum act then in force. It was a tight race: only 58.4% voted in favour of the new constitution, with a voter turnout of 54.8% – had Russia’s referendum act been applied, the proposal to enact the constitution would have failed.

Nonetheless, unlike the situation in the years immediately following these events, the Constitution is now widely accepted as the foundation of Russia’s legal system in both public perception and academic and political discussion.

The text has remained virtually unchanged since that time. The exceptions: an extension of the presidential term in office from four to six years and the State Duma’s term from four to five years, a requirement that the Russian government submit annual reports to the State Duma on the results of its work and the merging of federal subjects. Another amendment is currently under deliberation in conjunction with a plan to consolidate the supreme courts; the change is slated to come into force in the coming year (see section 4.3 below).

III. Democracy

According to Article 3 of the Russian Constitution, the multinational people is the bearer of sovereignty and the sole source of power in the Russian Federation. The people’s power is exercised “directly and also through the agencies of State power and agencies of local self-government.” The referendum and free elections are identified as the supreme expression of state power. Article 13 protects political diversity and the multi-party system. Nonetheless, the Russian Constitutional Court held that the prohibition of regional parties was constitutional

since such parties could pose a threat to territorial integrity and unity (Judgement 1-P of 1 Feb. 2005).

With respect to the rights of individuals, the democratic principle finds its embodiment in the citizen’s right to political participation (Const. RF art. 32). This provision guarantees passive and active electoral rights, which the Constitutional Court has delineated with striking clarity as legally enforceable rights in numerous decisions. The Court recognizes the principles of free elections held on

the basis of universal and equal suffrage and secrecy of the ballot, although these principles are not explicitly named in the wording of Article 32. In the spring of 2013, in the wake of protests against alleged electoral fraud in the 2011 State Duma elections, the Constitutional Court also acknowledged the citizens' right to judicial review of election results, after the competent courts had dismissed relevant actions (Judgement 8-P of 22 Apr. 2013). Recently, the Constitutional Court declared a provision barring voting rights to persons serving life sentences to be disproportionate (Judgement 20-P of 10 Oct. 2013).

Even such clear and far-reaching rulings on the part of the Constitutional Court could not, however, prevent the last State Duma elections from being assessed as unfair due to restrictive standards of sub-constitutional legislation and partiality of the administration and the state media (as in OSCE/ODIHR, Russian Federation. Elections to the State Duma 4 December 2011, Election Observation Mission Final Report, 1).

While the Constitutional Court has repeatedly emphasized and developed the individual's right to democratic participation, it did nothing to hinder a significant

intrusion into the structure of the democratic decision-making process and the distribution of powers among the highest constitutional bodies. The procedure for gubernatorial appointments in the Russian regions was restructured in 2004 by federal legislation. Previously, governors were appointed to office through direct popular elections. Under the 2004 law, the federal president nominated gubernatorial candidates, and regional parliaments voted to approve the nomination, with the threat of dissolution looming over any regional parliament which rejected the president's candidate. Through the introduction of this procedure for the de-facto appointment of regional governors, the federal president acquired a great degree of influence both on the regional governments and on the Federation Council. The latter, alongside the State Duma, has far-reaching powers of cooperation in legislative procedures and other procedures, including the appointment of senior officials. Yet contrary to a legal opinion it expressed in an earlier decision, the Constitutional Court could find no violation of the Constitution in this change. With its ruling (Judgement 13-P, 21 Dec. 2005), the Court opened the door to marginalization of the regions and Constitution's principle of federalism.

IV. Rule of law

4.1. Rule of law vs. narrowly construed principle of legality

In a turn away from the principle of "socialist legality", the Russian Constitution enshrines a principle of the rule of law which encompasses equality before the law, the binding force of the Constitution for the legislator, legal certainty, the binding of state authority by the principle of proportionality and the prohibition of the retroactive application of laws. Applying these principles, the Constitutional Court has objected to provisions in sub-constitutional laws in numerous decisions, affecting legislation in the areas of taxation, criminal procedure, civil procedure and others. The Constitutional Court has, though, evinced a reluctance to declare statutory definitions of criminal offenses unconstitutional for being too vague.

Courts, however, have adhered to a formalistic approach to interpreting sub-constitutional laws in many cases. One example from recent years is the decision of the European Court of Human Rights (ECtHR) of 19 July 2007 in *Krasnov und Skuratov v. Russia* (Applications nos. 17864/04 and 21396/04): the election committee had rejected the candidacy of a prominent member of the Communist party in the elections to the State Duma due to minor inaccuracies in the personal information submitted by the candidate, a decision upheld on final appeal by the Supreme Court of the Russian Federation. The ECtHR saw a violation of the right to free elections in this case.

4.2. Role of constitutional jurisdiction

One of the powers of the Constitutional Court is that of examining the conformity of legislation to the Constitution, for instance, in response to complaints from affected citizens; another power is that of settling cases involving disputes concerning agencies of state power (Const. RF art. 125). However, constitutional complaints are limited to violations of basic rights by legislation: unlike Germany's Constitutional Court, for instance, the Russian Constitutional Court is precluded from examining whether laws have been applied in conformity with the Constitution in specific cases – it is responsible only for verifying the constitutionality of legal provisions.

The practice of the Constitutional Court presents a divided picture: while its rulings in the area of basic rights have in many cases been citizen-friendly, the Court has been unwilling to do anything to check the unilateral expansion of the powers of the president at the expense of the Federal Assembly from the start. The Court's 1995 decision on the Chechen War is considered game-changing in this respect: in it, the Court derived unwritten powers from the president's position under Article 80 of the Russian Constitution as guarantor of the Constitution and of the rights and freedoms of citizens, in addition to those explicitly enumerated in the Constitution. On that basis, the Court approved the act of deciding to go to war without involving the legislature (Judgement 10-P of 31 July 1995). The Court's ruling on the elimination of the

popular election of regional governors, mentioned above, should also be viewed in this context.

Before the constitutional crisis of 1993, the Constitutional Court was very active politically; when the chairman of the Court publicly blamed President Yeltsin for violating the constitution during the constitutional crisis in the autumn of 1993, Yeltsin dissolved the Court. After its reestablishment in 1994, the Court no longer expressed its views outside of ongoing proceedings, and it repeatedly strengthened the already very powerful position of the president through its rulings (see the decisions on abolishing the regional gubernatorial elections and on the Chechen conflict mentioned above). Beginning in 2000, a remarkably large number of legislative amendments addressed the organization of the Constitutional Court and the way judges are appointed. The dependence of the Court's chairman on the goodwill of the federal president and his powers within the court were strengthened; causing a significant increase in the degree to which the Court itself is subject to the president's influence.

Although there is no direct precursor for the Court in Russian legal history, the Court has established itself in constitutional life and has helped establish the pre-eminence of the Constitution over other law in many cases.

4.3. Independence of the judiciary

The rule-of-law principle in the Russian Constitution is further developed by the establishment of the independence and irremovability of judges (art. 120 para. 1, art. 121 para. 1) and the open court principle (art. 123 para. 1). The right to judicial defence of rights and freedoms (art. 46), the right to hearing in accordance with the law (art. 47), the right to qualified legal assistance (art. 48) and the presumption of innocence, as well as the principle of *in dubio pro reo* (art. 49), are all acknowledged.

In practice, the constitutional provisions ensuring the independence of the judiciary have proven ineffective. By 2012, the ECtHR had already found 606 violations by Russia of the principle of the fair trial under Article 6 of the European Convention on Human Rights (ECHR) (in addition to numerous violations of the ECHR due to the

length of proceedings and failure to implement court decisions).

There are problems connected with the non-transparent procedures for selecting and promoting judges; a disciplinary system susceptible to abuse featuring underdeveloped rights of defence for judges; and the powerful position of the courts' chairmen, who continue to assign incoming cases among the judges while also participating in appointment, disciplinary and promotional decisions. The powerful position of the public prosecutors in criminal procedures has not been weakened to bring it into balance with that of the defendant (as required by Article 123 paragraph 3 of the Russian Constitution). The ECtHR has reprimanded the Russian Federation for violating the principle of presumed innocence on multiple occasions.

Despite President Medvedev's reiterated calls for strengthening the independence of the judiciary, there have been no attempts to launch such reforms in recent years.

The most recent reform project undertaken in the judicial arena is highly controversial however. The court system with jurisdiction over commercial matters, which has thus far been organizationally separate from the courts of general jurisdiction, is poised to lose its highest court, the Supreme Commercial Court, which is to merge with the Supreme Court. The Supreme Commercial Court had a reputation of engaging in relatively independent interpretation and further development of the law; in fact, criticism of an overly autonomous approach to the law is being put forward as an argument in favour of the new law. It has frequently been suggested that the integration of the Supreme Commercial Court within the Supreme Court is motivated by a desire to gain greater control over jurisdiction on commercial matters. The draft law, which would amend several articles of the Constitution, was adopted by the State Duma on 22 November 2013 and approved by the Federation Council on 27 November 2013. In order to enter into force it requires the consent of the legislative bodies of at least two thirds of the Subjects of the Russian Federation.

V. Social state

According to its Constitution, Russia is a social state "whose policy is directed towards the creation of conditions ensuring a life of dignity and the free development of man" (art. 7). The chapter on fundamental rights and freedoms provides for a series of fundamental social rights ensuring basic needs, such as the rights to health protection, social security, housing and education. In respect of these rights, the Constitutional Court requires the state to fulfil the principles of equality, the support of fiducial relations between the man and the state rather

than provide a certain level of these social guarantees. Repeatedly legal provisions were ruled to be incompatible with the Constitution due to the violation of these rights. The Court does acknowledge that the state has considerable latitude in implementing social policies though.

In the period immediately following adoption of the Constitution, the state was simply not in a position to meet all of the basic needs of its entire people. As the situation of the public coffers improved, the state again acquired a

wider scope within which to pursue social policy, some of which it did use to improve the situation with respect to those fundamental needs. Income levels of retired people and of others dependent on benefits paid by the state have noticeably improved, although the level of retirement payments in a vast majority cases is not adequate to fulfil the guarantees of a life of dignity. Compared to

other countries, Russia does provide quite a good level of social and medical services, but the level still does not meet the expectations of its people. In the system of state medical care the level of grassroots corruption is still very high, which means that the unofficial costs associated with medical services place a serious burden on people.

VI. Fundamental rights and freedoms

Introduction

The chapter of the Constitution addressing fundamental rights and freedoms is extensive and in line with international standards. However, the limitations set out in Article 55, paragraph 3 have proven problematic. Under this provision, a federal law can limit fundamental rights and freedoms to the extent that this is necessary for the “defence of the foundations of the constitutional system, morality, health, rights and legal interests of other people, and ensuring the defence of the country and security of the state.” According to this provision, to rule on specific cases, courts must balance various interests protected by the Constitution. The criteria established by judicial decisions for this balancing process are therefore of crucial importance. With respect to most of the fundamental rights, though, no doctrine or case-law has evolved which would clearly define the scope of protection and limitation of fundamental rights and provide the person applying the law with a framework for this balancing process. This applies in particular for the classic personal liberty rights. The risks to freedoms of individuals are particularly great in conjunction with the creation of criminal offenses and administrative violations whose elements are not clearly defined (for instance the rewording of the definition of the crime of “State treason” by Federal Law 190-FZ of 12 Nov. 2012, *Sobranie zakonadatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2012 No. 47, Item 6401, under which any provision of assistance to foreign states and foreign or international organizations or their representatives in activities which endanger Russia's security is punishable as State treason).

Article 17 of the Russian Constitution requires the “rights and freedoms of man and citizen” to be applied “according to generally recognized principles and norms of international law” (see above). Accordingly, the Constitutional Court now observes the relevant ECtHR case-law in many cases, though not consistently. The Supreme Court urged the lower courts to observe ECtHR case law most recently in June of 2013. In practice, though, this is far from always the case. The courts of general jurisdiction tend to ignore the ECHR and the ECtHR in their practice – though it must be said that the basic rights of the Russian Constitution are also given far less consideration than is their due. Evidence of this has emerged repeatedly in recent years in cases in which artists were prosecuted

for “hooliganism” (*Ugolovnyi kodeks RF* [UK] [Criminal Code] art. 213). Judgements in these cases often fail to even mention the freedom of artistic and other creative activity protected by the Constitution, let alone produce an interpretation in conformity with the Constitution, balancing the constitutional interests involved.

The legal literature has been extremely reticent with respect to offering independent interpretation of the Russian Constitution or deriving a doctrine from its provisions. Instead, legal literature examining the Constitution refers to the relevant legislation when no clear legal precedents are available. Even on the subject of the chapter on fundamental rights, one often reads that the constitutional rights have been “given form” by the laws. Taking that view though, the Constitution can no longer serve as a standard to assess sub-constitutional laws; on the contrary, it would be defined according to them. In addition, legal scholars have only rarely subjected judicial decisions to critical scrutiny.

6.1. Right to life

The Constitution of 1993 was the first Russian Constitution to incorporate protection of the right to life (art. 20 para. 1). Although the legal literature commenting on the Russian Constitution ascribes a special role to the right to life within it and unanimously affirms an obligation on the part of the State to protect life against third parties, the implementation of this protection in practice has proven woefully incomplete. One statistic which helps make this apparent is the number violations of the right to life according to the ECHR found by the ECtHR: 217 violations by 2012 (ECtHR, Violation by Article and by respondent State, 1959-2012, www.echr.coe.int). This is explained to some extent by the fact that neither the Constitutional Court nor legal scholars have managed to map out clear categories of protective obligations on the state's part and establish them in constitutional reality.

Thus many of the ECtHR judgements against Russia relate back to an inability on the part of the state to protect human lives. One area where this applies consists of military and security force deployments which potentially put the right to life in jeopardy. In its *Finogenov* judgement (ECtHR 20 Dec. 2011, Applications nos. 18299/03 and 27311/03) the ECtHR found a violation of the right to life in the inadequate planning and conduct of the hostage

rescue operation at what is known as the “Nord-Ost” Theatre on 23 October 2002. Specifically, the authorities planning the operation failed to ensure the availability of sufficient medical assistance. Moreover, according to ECtHR case law, the state also has a guarantor role arising from custody relationships such as those involved in the detention of prisoners or military service (Judgements of 14 Dec. 2006 in *Tarariyeva v. Russia*, Application no. 4353/03, and of 10 May 2012 in *Putintseva v. Russia*, Application no. 33498/04), which requires that necessary protective measures be taken, as in the case of soldiers at risk of suicide (Judgement of 5 July 2005 in the case *Trubnikov v. Russia*, Application no. 49790/99) for instance.

The State Duma has yet to ratify the 6th protocol to the ECHR, which prohibits the death penalty. The Constitution itself leaves the question of the death penalty up to the legislature. However, the Constitutional Court pronounced a moratorium on death sentences on 2 Feb. 1999 (Judgement 3 P) and again on 19 Nov. 2009 (Judgement 1344 O P). In the latter decision, the Court invokes an “irreversible process” leading to the abolition of the death penalty, which, it says, has already influenced Russia by way of the moratorium already in place for years and of Russia’s obligations under international agreements.

6.2. Freedom of religion

The Russian Constitution guarantees religious freedom both to the individual (art. 28) and to communities (art. 14) and the separation of religion and the state. It is striking, however, that the Constitution does not enshrine freedom of belief in complement to freedom of religion. In practice, the role of the Russian Orthodox Church is very significant, although the Constitution postulates the equality of religious communities. The 1997 Federal Law “on the freedom of conscience and on religious associations” imposes restrictive modalities of state registration, verification and dissolution for smaller “non-traditional” religious communities (other than those explicitly mentioned in the law’s preamble: Orthodoxy, other Christian denominations, Judaism and Islam) while emphasizing the special role of the Orthodox Church in its preamble. In practice, smaller and newer religious communities in particular (though not only they) often meet with great resistance. The ECtHR has ruled that the restrictive practices of authorities in connection with the registration of religious communities constitute a violation of religious freedom (Rulings of 10 Jun. 2010 in *Jehovah’s Witnesses of Moscow v. Russia*, Application no. 302/02, and of 1 Oct. 2009 in *Kimlya and Others v. Russia*, Application no. 76836/01 [concerning the “Church of Scientology”]).

Religious education, introduced as a compulsory subject in 2012, is to a great extent focussed on the religion chosen, however it is being provided solely by the state, not in joint responsibility with the religious communities.

6.3. Freedom of expression

Since the freedoms of thought and speech (Const. RF art. 29) are not deemed absolute, but rather must be balanced with other interests protected by the Constitution, clear case law is necessary to allow the citizen to inform himself about the scope of protection and limitations on his freedom of expression in specific cases. The text of the Constitution itself does not define the nature of the relationship between free speech and constitutional values limiting that freedom, such as religion, personal dignity or the necessary defence of the State. No clear doctrine or case-law has evolved which would enable citizens to anticipate how far criticism can go and where the line is drawn between free speech and punishable acts such as defamation, extremism or hooliganism. Balancing of constitutional interests by the Constitutional Court has, for the most part, been couched in very general terms. For instance, the Court very superficially justified the district of Ryazan’s ban on the “propaganda of non-traditional sexual relationships” to minors by citing the spiritual, moral and emotional defence of children. In its decision, the Court held that laws could restrict freedom of opinion when doing so is in the interest of state security, territorial integrity or public order in the democratic society or when it serves to prevent punishable acts, protect health or morals, protect the reputation or the rights of others, prevent the disclosure of confidential information or to maintain the authority and impartiality of the judiciary (Judgement 151 O O of 19 Nov. 2010). Administrative liability for “propaganda of non-traditional sexual relations among minors” was introduced into the Code of Administrative Violations (CAV, below) just this past summer (Federal Law 135 FZ of 29 June 2013, SZ RF 2013, No. 26, Item 3208).

Moreover, the Criminal Code and the CAV contain numerous legal terms, such as “extremism” and “hooliganism”, which are considered particularly imprecise and vulnerable to abuse. The criminal offences intended to combat “extremism”, introduced in the wake of Federal law 112-FZ on combating extremist activity of 25 Jul. 2002 (SZ RF 2002, No. 30, Item 3029), have repeatedly been toughened in recent years. The Constitutional Court has not declared them unconstitutional, although the Supreme Court has required the ordinary courts to examine whether an infringement on Article 29 of the Russian Constitution is justified and proportional in specific cases when applying individual norms (see, e.g., Plenary Judgement no. 16 of 15 Jun. 2010; Plenary Judgement no. 11 of 28 Jun. 2011). In practice, the freedoms protected by Article 29 are not regularly considered directly by the courts of general, commercial or criminal jurisdiction. The ECtHR has reprimanded the Russian courts for this in the past (see the ruling of 4 Apr. 2013 in *Reznik v. Russia*, Application no. 4977/05 and of 3 Feb. 2011 in *Igor Kabanov v. Russia*, Application no. 8921/05).

Practically no Constitutional Court rulings have been issued in the area of freedom of the media. The only decision of interest in this respect is a ruling on electioneering which forbids journalists from taking a stance in favour of a political party and reduces their role to the “objective” stance of the media in election campaigns (Judgement 15-P of 30 Oct. 2003). There are next to no specific positions on the freedom of establishment of media or to the extent of the State’s influence on the media to be found in case law or the literature. Instead, the literature refers to the law on media. This legislation has undergone major changes in the last 20 years. While the media legislation of 1990 was particularly concerned with freedom to establish media as an instrument of liberalization, today’s media law is used as a repressive instrument with restrictive registration and accreditation regulations.

6.4. Freedom of association

The right of association and the freedom of activity of social associations (below: NGOs) are guaranteed under Article 30 of the Russian Constitution. The activity of such associations was initially regulated by a 1996 law (Federal Law No. 7-FZ of 12 Jan. 1996 on non-profit organizations, SZ RF [Collected Legislation of the Russian Federation] 1996 No. 3, Item 145). The initial language planned for an amendment laying out more restrictive regulations in 2005 was ultimately toned down as a result of objections publicly raised and discussed during the legislative procedure. More stringent reporting requirements were imposed on organizations though; a new and complicated registration procedure was introduced for foreign NGOs and the registration authority was granted new supervisory powers. In 2012 the Law on non-profit organizations was drastically changed again (Federal Law No. 121-FZ of 20 July 2012, SZ RF 2012, No. 30, Item 4172). NGOs which participate “in political activities exercised in the territory of the Russian Federation” and receive funding from “foreign sources” are required to indicate that they are “foreign agents” and have themselves enrolled in a register of foreign agents. Failure to meet this requirement is punishable with a range of sanctions up to and including the organisation’s liquidation. A new criminal offence was created for “malicious non-compliance with obligations imposed by the Law on organizations which exercise the functions of a foreign agent”. The criteria defining “foreign agent” status are described so vaguely that many organizations are uncomfortable. The prevailing perception of the term “foreign agent” in the population is negative. Therefore the new regulations constitute a disproportionate restriction on the right of association.

6.5. Freedom of assembly

Freedom of assembly can be seen as the fundamental right which is most fiercely disputed in Russia. It is protected by Article 31 of the Russian Constitution: “Citizens of the Russian Federation shall have the right to assemble peacefully without weapons, hold assemblies, meetings, and demonstrations, processions, and picketing.”

According to Article 55 of the Constitution this freedom, like the other basic freedoms, can be restricted by federal law “when this is necessary for the purposes of defence of the foundations of the constitutional system, morality, health, rights and legal interests of other persons and ensuring the defence of the country and security of the State.” In the past, the state institutions have obviously derived extremely broad discretion from this passage with respect to limiting the freedom of assembly.

It was not until 19 Jun. 2004 that a legal framework for the practical implementation of assemblies was created through Federal Law 54-FZ “on assemblies, meetings, demonstrations, marches and picketing” (SZ RF 2004 No. 25, Item 2485 – the “Assemblies Act”). This legislature was praised for having created an unambiguous legal basis for what had, until then, been very opaque regulations on assemblies. The substance of the law was criticized, though: extensive registration formalities, particularly the requirement for long advance notice and the personal liability of the organizer for violations were seen as severe restrictions on the freedom of assembly. This liability applies in other respects as well, including when the declared number of participants was exceeded, if the organizer should have known the more exact figure, and is thus responsible for a risk to public safety and order (as acknowledged by the Constitutional Court in a restrictive construction: Judgement 12-P of 18 May 2012). Intervention rights on the part of the authorities were not defined with sufficient clarity. Moreover, the principle of proportionality enshrined in the Constitution was not expressed clearly.

An amendment enacted on 8 June 2012 further strengthened the rights of state institutions to interfere in public assemblies. In addition, the punishments for violations were drastically increased. The relevant norms of the CAV were also rendered much more stringent. The Constitutional Court declared this development to be incompatible with the Constitution only in part: in its Judgement 4-P of 14 Feb. 2013, it rejected as unconstitutional the provision making the organizer of a public event liable without fault under civil law for all damages caused by participants (Federal Law 54 FZ art. 5 para. 6) and the drastic increase of administrative fines for breaches of the Assemblies Act and, in particular, the provisions which provide for fines for citizens of not less than 10,000 roubles and for officials of not less than 50,000 roubles (CAV, art. 20.2). It did not raise objections to other norms, such as that barring persons who have been sentenced twice for assembly-law related administrative offences from organizing assemblies (Federal Law 54FZ art. 5 para. 2).

Back in 2010, the ECtHR established in its judgement in *Alekseyev v. Russia* that prohibiting assemblies of homosexuals or their supporters across the board as incompatible with the religious or moral values of the

majority of the society constituted a breach of Article 11 in conjunction with Article 14 of the ECHR. Moreover, the ECtHR ruled that the Convention requires state institutions to provide sufficient protection from disruptions at such assemblies (Applications nos. 4916/07, 25924/08 and 14599/09). This has not yet been implemented consistently in constitutional reality.

The drastic proceedings against numerous participants in demonstrations of 6 May 2012, who faced criminal

charges for participating in mass unrest (UK [Criminal Code], art. 212) and violence against police officers (UK, art. 318) are extremely problematic; while there is public criticism contending that the confrontation between state security authorities and demonstrations was provoked by the state authorities. Finally, one must criticize the fact that cases of non-proportional violent disturbances effected by state authorities themselves have not, as a rule, been prosecuted.

VII. Concluding remarks

The entry into force of the Russian Constitution of 1993 was an important step towards a state based on the rule of law which takes man as the “starting point” for the state system. Though much of what the Constitution calls for has not yet been achieved, it is nonetheless a most important argument for progressing toward those ends and is generally accepted as the standard for assessing the quality of governance.

The issues raised here concerning the gap between the normative heights of the Constitution and the reality which falls short of them are being discussed within Russia as well – questions of this kind, by their nature, arise in every legal system. Remarks made by the Chairman of the Constitutional Court, Valerii Zor’kin are characteristic of outlook that is widely shared and influential. In a 2009 essay, he was still warning against a one-sided emphasis of legal form in the face of an “extreme imperfection

of reality”. In his view the interior and exterior threats to the Russian Federation render it at present far more important to achieve the optimal level of democracy possible under the given circumstances, drawing a distinction between that optimum and an “ideal democracy”. The “middle course” he envisages would retain the contents of the Constitution while postponing its full implementation to some later time – the situation in Russia, he believes, is not yet sufficiently stable. The task for now, he says, is to “overcome legal nihilism and create an awareness of rights within the judiciary and the entire people, which is in fact capable of acting on the basis of legal principles...” This approach relativizes the normative effect of the Constitution. One has to ask whether the stabilization aspired to would not be better achieved by strengthening the role of fundamental legal rules than through this kind of relativization.

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