

Russia and the European Court of Human Rights

Reform of the Court and of Russian judicial practice?

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The main news from the Russian judicial system over the past months has been the ratification by the Duma, on 15 January 2010, of Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms. This means that long-awaited reform of the European Court of Human Rights (ECHR) can now begin. This reform aims, *inter alia*, to improve the independence of ECHR judges, through the extension of their terms of office from six to nine years, and to speed up the handling of cases. Russia was the last of the 47 member states of the Council of Europe to ratify Protocol 14, and so it now enters into force for all member states.

The State Duma of the Russian Federation first considered the question of ratification of Protocol 14 in December 2006, but it failed to pass. The deputies who voted against it gave various technical and legal explanations.

Why did Russia not ratify Protocol 14 for such a long time? And why has it now decided to ratify it after four years of delay?

In interviews, state officials insisted that the Council of Europe had taken the Russian Federation's opinion on Protocol 14 into account. In reality, however, this is impossible, because the Council of Europe could not have modified Protocol 14 after 46 other member-states had already ratified it. Only the authentic text of Protocol 14 could be ratified by the Russian Federation. The correct comment could be to say that Russia took into account the Council of Europe's explanations (assurances) regarding the nature of reforms of the ECHR introduced with Protocol 14.

When faced with the problem of Russia blocking the Protocol, it became obvious that the procedure for making such reforms of the ECHR had itself to be changed and made more flexible. At a seminar in 2008 to celebrate the tenth anniversary of the entry into force of Protocol 11 to the Convention (which restructured the ECHR), participants agreed that in order to save the right of the individual to petition the ECHR, there would need to be reform, even without Protocol 14. It was suggested that the method of adopting Protocols should be abandoned in favour of procedural changes that the 'Statute of the Court' could handle. This would enable changes to be made to the working procedures of the Court without resorting to a complicated and time-consuming process of ratification of Protocols to the Convention. The Committee of Ministers of the Council of Europe would introduce changes by

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issuing resolutions without having to introduce amendments to the Convention every single time. But still there might be a possibility of blocking reforms if resolutions are delivered by unanimous decisions.

Then on 30 April 2009, the Parliamentary Assembly of the Council of Europe issued Protocol 14-bis to the Convention. In general, Protocol 14-bis has the same aim and rules (regarding the speed of handling cases before the ECHR) as did Protocol 14. The major difference is that the rules of Protocol 14-bis enter into force roughly three months after the date on which three High Contracting Parties to the Convention have agreed to be bound by the Protocol. There is no requirement that all 47 member states must ratify it, but it will be applicable only for those member states that do ratify it. And then Protocol 14-bis is withdrawn when Protocol No. 14 comes into force. Thus the Council of Europe continued to reform the ECHR through Protocol 14-bis without the consent of Russia. As a result, any deliberate (if indeed it was deliberate) blocking of reforms by Russia no longer had any effect.

However, recent statements by the Russian President and other high state officials in conjunction with recent judgements by Russia's highest courts indicate that Russia has ratified Protocol 14 in good faith. Notably, President Dmitry Medvedev, recently made the following statement:

We are interested in improving our judicial system so as to make it effective and to create an environment where our citizens do not need to resort to international courts or, at the very least, will need to do so much less often. Our task is to create a national system, effectively ensuring justice in Russia. But this is not an easy process.¹

This statement was also spread through mass media by many other politicians. For instance, the Minister of Justice of the Russian Federation, Alexander Kononov, stated:

Justice must be administered by taking into account the case-law of the European Court of Human Rights.²

It appears therefore that the political will to ratify Protocol 14 extended not only to reforming the ECHR, but also to improving the quality of the administration of justice in Russia. Thus on 26 February 2010, the Constitutional Court of the Russian Federation delivered its judgement N 4-P, which stated that the parliament has the obligation to introduce ...

a mechanism of execution of final judgements of the European Court of Human Rights which would secure adequate redress for violations of rights determined by the European Court of Human Rights.

In theory, the Constitution of the Russian Federation has already stated the priority of norms of international law over national law. Nevertheless, until today, the opportunity to reopen a national case on the basis of a judgement by the ECHR has only existed for criminal and commercial cases. It was not recognised under the Civil Procedure Code. Since the Constitutional Court issued its judgement, however, the Duma must amend the Civil Procedure Code to introduce a mechanism to give effect to judgements by the ECHR against Russia.

The Constitutional Court differs from other courts in its implementation of the Convention in its judgements. During the period following the accession of the Russian Federation to the Council of Europe on 28 February 1996 and before the ratification of the Convention on 5 May 1998, the Constitutional Court was the first one to implement norms of the Convention (when the Convention was not yet in force in Russia). Over this period of time, three Constitutional Court judgements have made reference to the Convention. By August 2004, 54 judgements had quoted the Convention. Of these, only 12 made reference to the case-law of the ECHR. The other 42 judgements only referred to norms of the Convention, which can hardly be called "implementation" of the Convention given that "States give effect to the Convention in their legal order, in the light of the case-law of the European Court of Human Rights."³ Since 2004, there have been some changes in the practice of implementation of the Convention by the Constitutional Court, which now refers to the Convention

¹ Opening Remarks at Meeting on Improving the Judicial System, Gorki, 4 February 2010 (see http://eng.kremlin.ru/text/speeches/2010/02/04/2105_type82913_224134.shtml).

² The Minister made this statement in evaluating the progress of efforts to reform the justice system in Russia. (see Александр Рогонов выступает за новый облик Минюста. <http://www.advgazeta.ru/newsd/110>).

³ Recommendation of the Committee of Ministers of the Council of Europe Rec(2004)5.

more often than before. At the same time, the quality of implementation of the Convention has improved.

However the Constitutional Court is not the Russian judicial system. The question remains whether courts of general jurisdiction headed by the Supreme Court will follow the positive practice of the Constitutional Court? In fact, so far the Supreme Court has not applied the Convention with any degree of regularity or competence, despite the fact that the Supreme Court provided the lower courts with a special Regulation of 10 October 2003 on the application of international law. Although the Supreme Court started to invoke the ECHR's case-law after 2003, it does so very rarely, with many faults and selectivity. Often the Supreme Court ignores issues raised by applicants invoking the Convention, or gives no substantial grounds for rejecting applicants' references to the Convention. It is a curious situation in which a national Supreme Court, having issued a special regulation that orders all lower courts to apply the Convention by taking into account ECHR's case-law, does not follow the provisions of its own document in its own jurisprudence. So there is little evidence of preventive application of norms of the Convention.⁴

Nevertheless, there are examples where the Supreme Court has implemented the Convention after the ECHR found that it had violated the Convention. In the first issue of its official Bulletin for 2010, the Supreme Court published a judgement of its Presidium on the application of the Convention. This specific judgement stipulates that a violation of the Convention is an admissible ground for reopening of a criminal case. And this case is not the only example of a case being reopened following a judgement by the ECHR that the Convention had been violated.

In conclusion, we may hope that the full ratification now of Protocol 14 allows not only the beginning of a long-awaited reform of the ECHR, but also a campaign to improve the work of the Russian courts, and therefore provide fewer reasons for applications by individuals to the ECHR. The political will is demonstrated. There is evidence that the highest courts share this sentiment or, in other words, follow in practise the provision of Article 15(4) of the Russian Constitution which establishes the superiority of international legal obligations.⁵ The number of applications before the ECHR will be significantly reduced by accurately applying the principles of the Convention in light of the case-law of the ECHR. This implies that every case pending before a court of first instance would be considered through the prism of the Convention. It is crucial that the highest courts show a good example in the conduct of such practice. The other components of the Russian judicial system will then follow suit.

The overall conclusion seems therefore to be a double one. On the one hand, Russia discovered that its attempt to block reform of the ECHR was becoming ineffective, since the other 46 member states of the Council of Europe had successfully devised a route to bypass its veto. On other hand, there are forces at work within the Russian judicial system and its political leadership who are committed to improving Russia's domestic judicial system. They see that the reform of the ECHR could actually help that process. Why not make a virtue out of necessity, as the old saying goes?

⁴ For details on implementation of the Convention by the Constitutional Court and the Supreme Court, see A. Burkov, *The Convention for the Protection of Human Rights in Russian Courts* (in Russian), Moscow: Wolters Kluwer, 2010 (<http://sutyajnik.ru/bal/wolters>).

⁵ "The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation stipulates other rules than those envisaged by national statute, the rules of the international agreement shall be applied."