

Book Review



Lauri Mälksoo, Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect*; (European Inter-University Centre for Human Rights and Democratisation (EIUIC) Cambridge University Press, December 2018), 418 p. £. 27,99 paperback

In 1998 Russia became a member to the Strasbourg based Council of Europe and consequently of the European Court of Human Rights (ECtHR), which enforces the Convention for the protection of human rights and fundamental freedoms. In the valuable publication *Russia and the European Court of Human Rights: The Strasbourg Effect* fifteen authors look back upon two decades of mixed experiences at best.

The editors succeeded in engaging a diverse group of authors: academics from East and West, law practitioners, (former) judges, Russian and non-Russian human rights lawyers. The book is not (only) a collection of legal essays, also the geopolitical, and domestic and cultural context is analysed. The introductory chapters describe the historical and conceptual background. Furthermore, the practise of adjudicating the scope of European Convention rights in Russian courts, in particular the role of the Constitutional Court, is described against the background of developments regarding legal and cultural traditions as well as responses to the European/liberal idea of human rights. Last but not least, the book also gives an overview of human rights law case from the ECtHR with respect to Russia.

The editors remind us that the Helsinki Final Act of 1975, almost unexpectedly, had a positive effect upon the human rights situation in the Soviet-Union (4).¹ They ask themselves whether Russian membership of the Council of Europe did result in a comparable “Strasbourg effect”. The editors must have been aware of the huge differences between the seventies and the nineties. After 1975 Russian human rights defenders, to a certain extent, could use the

1 Numbers between brackets refer to the pages of the book.

leverage of the so-called 3rd basket on humanitarian co-operation in order to force political change in the calcified Soviet-Union. When in 1998 the Duma ratified the European Convention on Human Rights everything in Russia was on the move. The main question was what would and could be the role of the European Court in a stabilizing Russia when chaos of the time had come to rest. Therefore, the “Strasbourg effect” could not at all be compared to the “Helsinki effect”.

The interrelationship between Russia and the ECtHR got its shape as part of the broader developments on our continent. This refers, on the one hand, to the gradual establishment of an authoritarian government in Russia, and on the other hand, to the return of the political and military antagonism between Russia and the West. The authors of this volume succeed in presenting in a balanced way the rather sad story of Russia’s integration into the international legal community, covering the both hopeful nineties and the disenchantment of new century.

It was clear from the outset that in 1998 Russia did not meet the criteria for accession to the Council of Europe. Above all, political considerations with respect to Russia’s integration in the European continent were decisive. Russian membership signified a commitment regarding the future, rather than what already had already been achieved (3).

In the first years, one could hope that Russia’s accession would gradually create the conditions of full membership, in particular with respect to legal reforms, improved legal practise and access for Russians citizens to the ECtHR. Russia became one of the major member states of the organisation, paying more than 10% of the budget. Ministers and parliamentarians actively participated in the Council of Europe’s statutory bodies. Undoubtedly, in this first-period progress was made and legislation adapted; in many cases, financial compensation decided by the Court was paid. But legal practise clearly lagged behind. The legal system of Russia in many respects did not fit well with that of the Western European member states. On the whole, Russian membership was “à la carte”, the necessary homework was done reluctantly and tardily. Several authors for the measurement of progress use the concept of “socialisation”, which is not very satisfactory; even if “socialisation” is conceived – as it is indeed expressly done – as a two-way process, inadvertently it places Russia in the junior role of the party to be educated.

At least in one respect, Russian membership was a great success: the number of applications by Russian citizens remained voluminous, in many years even above 10,000. As a consequence, the Strasbourg Court was forced to improve its administrative procedures in order to cope with this workload. In the end, the Court was successful in this endeavour. The book contains some

quantitative data, but they are dispersed and do not provide the full picture; therefore, a statistical annexe would have been useful.

The book provides an impressive and painful overview of case law against the Russian state, dealing among other things with the tragic practise of removing organs of dead persons without informing the family, prison's conditions, property rights, and LGBT-rights.

Important and remarkable are the more than 260 judgments by the Court in relation to the war in Chechnya pertaining to the treatment of civilians and prisoners, torture and abductions (255ff). Despite the lack of co-operation by the Russian authorities ("the wall of silence"), this body of jurisprudence was identified by the Parliamentary Assembly of the Council of Europe as the most serious for the entire Council of Europe region. The Northern Caucasus case law has also had the effect of clarifying how international law applies in situations of armed conflict. In addition, the European Court dealt with the handling by the Russian authorities of the hostage-taking in 2002 in the Moscow Dubrovka theatre and the tragic Beslan school siege in North Ossetia in 2004.

Initially, there was no question about the domestic status of the Convention and the reach of the ECtHR. Under the Russian Constitution of 1993, international treaties became part of the Russian legal system. Consequently, international law was to take precedence over national legislation and the judgments of the Court were binding (61ff). Gradually, however, this changed. The Constitutional Court claimed the authority to assess the compliance of Court decisions with the Russian Constitution on an equal footing with the European Court. Understandably, this was regarded as placing "filters of implementation" over Court decisions. In July 2015, this development culminated in the formal decision by the Constitutional Court to disregard a Strasbourg judgment if it cannot be executed without violating the Russian Constitution. Partly, the Russian about-turn emanated from strong disagreement, even indignation, on the Russian side about a number of specific judgments of the Court. This refers in particular to the Markin-case of 2012 on gender discrimination, and the Yukos-case decision of 2014 in which the ECtHR decided that the shareholders of this oil-firm should be compensated for more than € 1.8 billion.² However, the course of events was closely linked to the evolving conviction that Russian values were radically different from Western European liberal values and that Russia's judicial system should be based upon indigenous Russian values and traditional, autocratic principles of government. These ideas

2 Recently the ECtHR in the case of the former Yukos-executives Chodorkovsky and Lebedev unanimously held that there had been breaches of the applicants' right to a fair trial. Press Release ECtHR dd. 14-01-2020.

also shaped public opinion and politics, in particular the policies of the dominating party 'United Russia' and ideas on "sovereign democracy" (as developed by president Putin's advisor Surkov).³ The political context of the Russian change of course, is illustrated by several authors with diametrically opposing quotations from the same Russian authorities, in particular the long-time chairman of the Constitutional Court, Valery Zorkin, defending international precedence over the 1993 Constitution before 2015, and strongly advocating national legal primacy after 2015.

There is no doubt that the Russian authorities are serious about this issue. President Putin in his annual address to the Federal Assembly in January 2020 announced that, as a further step, the Constitution itself will be amended accordingly, which would dramatically reverse the text of the 1993 Constitution.

One of the Russian authors, however, contends that the 2015 crisis should not be exaggerated: disagreements concentrate upon a few 'political' cases, while the vast majority of cases are dealt with in a normal manner. The European Court of Human Rights and the Constitutional Court should conduct a "duet" instead of a "duel" (93ff). Much would depend upon the frequency and practise of the concept of national "priority" stemming from the 2015 decision by the Constitutional Court. The then Secretary General of the Council of Europe, Thorbjørn Jagland, in 2016 seemed to point in the same direction in the *New York Times* advocating a "margin of appreciation...that gives member states some discretion in interpreting their convention obligations when faced with sensitive issues on which there is no Continental consensus".⁴ Fortunately, none of the authors are pleading for a fundamental review of the human rights provisions codified in the European Convention, compromising these with the conservative convictions described. That probably would be the end of the affair.

Equally important for the interrelationship between Russia and the European Court have been the consequences of the annexation of the Crimean peninsula, which led to a sharp increase of political and military tensions between Russia and the West. In the wake of the annexation, the Parliamentary Assembly of the Council of Europe decided in April 2014 to suspend the voting rights of its Russian members. Consequently, the Russian government in 2017 stopped its payments to the organisation.

The book under review was published in 2017, so it could not assess the return of Russia into the Assembly in June 2019. After a heated debate, the vast majority of the Assembly wanted Russia to continue as one of the 47 members

³ It is disturbing that a comparable development is occurring in some EU member states.

⁴ Thorbjørn Jagland, 'Don't caricature Europe's Court', *The New York Times*, 12-12-2016.

of the Council of Europe and resume participation in the Assembly. For many, however, it was difficult to accept that Russia's return went without concessions. On the contrary, Russia's position was reinforced; *de facto*, from now on a suspension of rights of a member state is almost impossible.⁵ At least under the new rules the monitoring of implementation of the Court's judgments should be intensified. A crucial consideration for re-admittance was that exclusion would end the possibilities for Russian citizens to apply to the European Court. For this reason, a group of Russian human rights defenders in December 2018 signed a memorandum stating that the departure of Russia from the Council of Europe should be avoided. One might add that in particular, the Non-Governmental Organisations would be hurt; they do have a strong position for intervening and for representing applicants in the Strasbourg system, which is of great importance after the tightening of Russian foreign agents' legislation.⁶

What surprised many was the hard-handed reset of the rules. Probably this is what the Russian government sees as a step towards normalisation of the relations after the Crimean annexation, for which the Council of Europe was deliberately chosen as a tool.

The closing chapter of the book is not very optimistic about the future development of the relationship between Russia and the Court and about the "Strasbourg effect" upon the Russian judiciary; the current trend could lead toward the disintegration of the political and consequently also the legal level (399). Recent events are not a reason to change that conclusion. What remains is the observation of the editors that both the ECtHR and the Russian Federation have managed to influence each other in a tense, complex and uneasy relationship (10).

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- 5 PACE Resolution 2277 (2019), "Role and mission of the Parliamentary Assembly: main challenges for the future", in particular paragraph 15. Firstly, suspension of member states from its rights should bear upon both statutory organs, the Assembly and the Committee of Ministers. Secondly, suspension, as an ultimate sanction in a step-by-step process, should be imposed by a common decision of the Assembly, the Committee and the Secretary General.
- 6 Under the Russian foreign agents' legislation NGOs, media organisations, but also individual citizens receiving funding from abroad are included in the Ministry of Justice's Foreign Agents Register; they are obliged to disclose their sources.