Judicial Review of Governmental Actions: A Tool for Russian NGOs?

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Introduction

This contribution takes its starting point in the idea of domestication of international standards and human rights, and the legal tools that such a process provides for NGOs and individuals, such as judicial review, rights enforcement, and a rights-based idea of public law. It focuses on the role of NGOs in this process, as potential public interest litigators on the one hand, and providers of free legal aid, assistance and representation on the other. Three questions will be discussed: first, what are the standing rules for NGOs before the Constitutional Court of the Russian Federation, and courts of general jurisdiction within the field of public law? Secondly, what role can NGOs play as providers of legal assistance and legal aid in Russia? And finally, in what political climate do Russian NGOs find themselves today and what are the potential consequences for individuals' rights protection? As we shall see, the prospect for Russian NGOs being able to use judicial review of governmental actions as a tool for claiming accountability and help individuals to obtain redress is very important, taking into account the not-so-generous Russian State legal aid scheme concerning civil and administrative law issues. However, it is becoming increasingly limited due to the Russian State’s hardening attitude towards human rights organizations, which obviously constitutes a serious reason for concern.

The Support Structure Explanation and Why Human Rights NGOs are Important

In his book The Rights Revolution, Charles R. Epp shows that rights revolutions are primarily a function of pressure from below and that the pressure from below is helped by an effective support structure for legal mobilization. Support structures preceded and supported the rise of rights revolutions in, for example, the United States. The support structure for legal mobilization consists of, inter alia, rights-advocacy organizations, rights-advocacy lawyers, and differentiated and pluralistic sources

1 Governmental action is broadly defined for the purpose of this contribution and, hence, includes statutes, sub-statutory legislative acts, decisions, etc.

of financing, for example governmental financing and private funding. Earlier research shows that political pressure and organized support for protection of individual rights did have an impact on the judicial agenda. However, Epp’s study differs from this research in that his emphasis is on material resources, difficulties in obtaining these, and the key role of material resources in civil rights litigation. This is called the support structure explanation of rights revolutions.

It could be argued, and rightly so, that the Russian case is not comparable to the countries that Epp discusses. Russia does not have a 200-year history of liberalism, and Russian courts have not been dealing with business disputes for 150 years before turning to civil rights. In addition, Russia has a civil law system and not a common law system. However, that fact does not in itself make an investigation of Russian NGOs and their use of judicial review superfluous, especially since a support structure in itself is vital for a process of changing concepts of rights in countries experiencing a legal transition. Additionally, it is reasonable to apply Epp’s reasoning also in studies of states with a civil law tradition, especially if the state in question either has a constitutional court or a chamber of the supreme court practicing judicial review, with the power to declare laws violating the constitution null and void. In this sense, a ‘negative law-making process’ exists which can be used by citizens to manifest discontent with the outcome of the political process. One important aspect related to the (negative) law-creating activity of courts is that this activity depends on specific actors, for example private parties, NGOs, and labor unions, to initiate the proceedings. Few courts have the right to initiate cases ex officio. Therefore, an actor perspective will contribute to an increased understanding of the potential societal effects of judicial review.

Using the legal system to achieve political and legislative ends is not uncommon in both common law and civil law legal systems. Developing a support structure to use the courts for political change has been a political strategy of liberals and egalitarians, especially in the United States. In civil law countries, the phenomenon is relatively new, but on the increase.

4 Ibid., 3.
5 Ibid., 22. Using courts for political agendas is not uncommon in Europe. However, the support structure strategy does not seem to be as developed. Nevertheless, in the European post-socialist States, public interest law organizations have constituted a vital part of democratization and rule-of-law building projects.