Introduction

Russia, Strasbourg, and the paradox of a human rights backlash

LAURI MÄLKSOO

I.1 Introduction

When the Russian State Duma ratified the European Convention on Human Rights (ECHR) in May 1998, it was an event of world historical potential. Here was the continuator state of one of the two competing superpowers of the Cold War that agreed to give up the final word in human rights matters to the European Court of Human Rights (ECtHR), the crown jewel of the Council of Europe (CoE), which had been founded in 1949 as an ideologically designed organization of capitalist Western Europe. The USSR had consistently refused to become subject to any international adjudication, and now Yeltsin’s post-Soviet Russia agreed to subject itself to regular human rights supervision by the ECtHR, accepting complaints by Russian citizens and other individuals under its jurisdiction but in principle also by governments of other CoE member states. Until perestroika, the USSR had vehemently argued that human rights belonged exclusively to each government’s domaine réserve\(^1\); now, judges from other CoE member states would regularly decide on human rights cases originating from post-Soviet Russia. It was a legal revolution for Russia and no small change for the CoE either. In case symbolic proof was sought for the fact that the Cold War had indeed ended and a transformation favorable to human rights at the heart of the former Cold War adversary was possible, Russia’s ratification of the ECHR in 1998 must have been it.

At the same time, Russia’s accession to the CoE in 1996 and ratification of the ECHR in 1998 was more like a commitment regarding the

---

future and less of an acknowledgment for what had already been achieved in terms of democracy and human rights, notwithstanding the adoption of the democratic Constitution of the Russian Federation in 1993. In 1996, both the Russian government and high-level experts of the CoE concluded that, objectively, the Russian Federation did not yet meet the membership criteria of the CoE. Both Strasbourg and Moscow knew that a tremendous amount of work needed to be done in order to achieve a human rights–friendly transformation in Russia. The amount of work ahead was the main reason why it was emphasized that it was better to be inclusive toward the country rather than wait for changes to happen (or perhaps not happen) on their own. Therefore, the main political justification for Russia’s accession to the CoE, notwithstanding the country’s objective non-readiness, was thought to be that the CoE and the ECtHR would provide both the necessary socialization and outside legal support for carrying out liberal judicial and other reforms in Russia. If the Helsinki Final Act of 1975 had, almost unexpectedly, triggered a certain “Helsinki effect” in the USSR, it was postulated that Russia’s membership in the European human rights protection system would cause a positive “Strasbourg effect.”

Accordingly, there was a considerable political and historical subtext in Russia’s accession to the CoE in 1996 and ratification of the ECHR in 1998. Just as the young Tsar Peter the Great had learned shipbuilding and navigation from the Dutch in Amsterdam in 1697, now post-Soviet Russia, with the help of eminent West European human rights lawyers in Strasbourg, had to learn about the application of human rights, democracy, and the rule of law after the Soviets had for decades rejected Western versions of these concepts.

Some of the political justifications for including Russia in the CoE human rights protection system in 1996/1998, notwithstanding the country’s actual non-readiness at the time, seem retrospectively like the liberal Western desire for a mission civilisatrice. After all, what could have given a sweeter sense of victory than the former Cold War superpower taking catch-up lessons in human rights, democracy, and the rule of law? These


were the values based on which the West waged the Cold War in the first place. Seen in this way, it was almost a religious story of Saul wanting to become Paul. The argument and widespread hope in 1996/1998 was that, although post-Soviet Russia was still quite far from being “there,” with the help of the CoE and the ECHR it would have a chance to get “there” eventually.

Twenty years have passed since then, and Russia is still far from being “there.” Rather, instead of the desired approximation with liberal democracies in Western Europe, Russia’s membership in the CoE and acceptance of the jurisdiction of the ECHR have not been able to prevent a backlash in terms of democracy and human rights in the country. It is a matter of debate as to when exactly the backlash started, but in any case it has been present for about half the time of Russia’s participation in the ECHR.

Taking stock of Russia’s performance in the CoE and the ECHR in 2010, Katlijn Malfliet and Stephan Parmentier concluded that Russia had become “increasingly reluctant to learn democracy and human rights” and increasingly played the role of the spoiler. They even asked whether the CoE had let in a Trojan horse, or an undercover subversive member.

Today, and concerning the ECHR in particular, the Russian government in most (but not all) cases established by the Strasbourg Court pays compensation to individual victims of human rights violations. However, in terms of the bigger picture, it is by now a widespread view of human rights experts and foreign diplomats that the overall human rights situation in Russia has become worse and legislative amendments have been used to tighten the screws. One would be forgiven for thinking that the Russian government has started to use its membership in the CoE,
and especially being under the jurisdiction of the ECtHR, as indulgences were used by certain people in medieval Europe – by paying money for one’s sins one can actually keep committing them or perhaps even committing more of them. In 2010, Malflriet and Parmentier postulated that Russia was using the CoE (presumably accepting the ECtHR as a necessary evil) as a political forum for its own foreign policy.\(^7\)

Thus, at the beginning of our book stands a certain paradox: while Russia’s accession to the ECHR almost twenty years ago was meant to assist making the human rights situation in the country gradually better, the overall situation has become much less optimistic over the past decade. This is also reflected in the practice of the ECtHR, where Russia is among the “bad boys” both qualitatively and quantitatively: cases against it are numerous and many of them concern violations of core rights enshrined in the ECHR. The nature of a number of Russian human rights cases at the ECtHR and the repetitiveness of some of these cases has been such that it is difficult to avoid the question whether the Russian government still respects the ECHR as a binding international treaty or not. Moreover, there is a strengthening ideological countermovement in Russia to aspects of the ECHR as interpreted by the ECtHR, represented by prominent government and parliament members and religious leaders such as the head of the Russian Orthodox Church (ROC), Patriarch Kirill I,\(^8\) who recently even called some human rights “heresy.”\(^9\) Altogether, matters concerning human rights and Russia have not turned out the way they were idealistically hoped for by Russian liberals and optimistic CoE politicians back in 1996/1998.

This new normality in Russia has raised a number of questions that are, if not always openly discussed, at least thought about when the PACE meets in Strasbourg where the voting rights of Russian parliamentarians have been suspended since the Crimean events of 2014. Does Russia still have a future in the CoE and the ECtHR? How to deal with cases of noncompliance with judgments of the ECtHR and legislative


changes that undermine the spirit of the ECHR? Taking into account the human rights backlash, the repetitive nature of some human rights violations in Russia, and the fact that the Russian government has avoided implementing general measures following from judgments of the ECHR, does the Russian government still overall comply with the ECHR in good faith or has it actually stopped doing so? In the context of the human rights backlash, can Russia’s membership in the CoE still be justified or has it become a farce, an alibi of sorts in which the Russian government coexists with the ECtHR according to the principle “we will (usually but not always) pay the fines but will otherwise continue to live in our own way”? Moreover, can Russia’s noncompliance with, and resistance to, certain ECtHR judgments become contagious in other CoE member states as well, bearing in mind that Russia is not the only CoE country having problems with compliance? When does the level of noncompliance with judgments reach such a level that it would be more appropriate for a country to leave the institution or for the organization to expel a systematically noncomplying member state?

These are primarily political, not academic questions. They are not easy questions, also because in the present state of European affairs it is not entirely clear who should address them and who is responsible for answering them authoritatively. However, the answers that will eventually be given to these questions will make a big difference for the legal and political order of the Russian Federation—and for Europe as a whole.

Now before such fateful political questions can be meaningfully addressed in the CoE, what is required is a thorough analysis of the situation. Thus, academic researchers should also make their contribution and give their appraisals of the relationship between Russia and the ECtHR. It is necessary to think about the bigger picture and attempt a certain generalization beyond the case law of Russia’s almost twenty years under the jurisdiction of the ECtHR.

To contribute to the creation of such a big picture is the main ambition of this book. Thus, we will address the following set of questions: What have been the achievements and failures of almost twenty years of Russia’s interaction with the ECtHR? What role has the ECtHR played for Russia (“the Strasbourg effect”), and vice versa, what role has Russia played for the ECtHR since the country has been under its jurisdiction? Can Russia’s recent human rights backlash and the rise of antiliberal nativist ideologies among the state leadership be reconciled with the country’s membership in the CoE? Have instances occurred of positive legal and societal transformation being facilitated by ECtHR case law and
Russia’s participation in the Strasbourg system? Why did the optimistic expectations of 1996/1998 regarding Russia’s positive socialization not materialize? What is the transformative potential of regional courts such as the ECtHR in recalcitrant countries like Russia?

Thus, the focus of this book is primarily empirical. That is, it is an extended – and we believe, important – case study of post-Soviet Russia under the jurisdiction of the ECtHR. However, our case study has relevance for a number of larger theoretical, historical, and dogmatic debates in the field of human rights law that will be further explained in this introductory chapter. These questions include what the proper relationship is between national constitutional law and European human rights law, to what extent progress (or lack thereof) in human rights is historically, culturally, and “civilizationally” determined, and what the socialization effects are of regional courts such as the ECtHR beyond case law. These questions will be discussed in more detail in the next section of this chapter.

In this book, we argue that the significance of the ECtHR for Russia and of Russia for the ECtHR goes beyond case law, which by definition concerns individual cases. Post-Soviet Russia has provided the ECtHR with unique and rich life material that was not available in such a form elsewhere in CoE member states. For example, consider the so-called Chechen cases and their impact on the discussion concerning the applicability of international human rights law during armed conflict.\(^\text{10}\)

Moreover, Russian and other East European judges and also governments have played a key role in certain spectacular outcomes in the ECtHR – consider, for example, the U-turn that the Grand Chamber of the ECtHR made in the *Lautsi v. Italy* case concerning crucifixes in Italian classrooms.\(^\text{11}\) Although Russian judges at the ECtHR have occasionally been in a hopeless minority on the bench, Judge Anatoly Kovler’s separate opinions have had their own qualities and have been discussed in legal scholarship in their own right.\(^\text{12}\) Additionally, Russia being under

---


\(^{11}\) ECtHR, Case No. 30814/06, *Lautsi and Others v. Italy*, Grand Chamber Judgment, 18 March 2011; second section judgment, 3 November 2009.

the jurisdiction of the ECtHR since 1998 has arguably already to some extent transformed, Europeanized, and internationalized the younger generation of Russian lawyers.\(^{13}\) Moreover, the academic study of the ECHR and the case law of the ECtHR may have given a certain boost to the further internationalization and Europeanization of Russia’s legal scholarship and education, at least at some elite universities.\(^{14}\)

Some of the impact of Russia on Strasbourg has been relatively recent, although probably not reflecting expectations among the pertinent political-legal elites in 1996 and 1998. Consider the 14 July 2015 judgment of the Russian Constitutional Court (Russian CC), in which it held that before judgments of the ECtHR would be implemented in Russia they would be subject to constitutional review. The Russian CC held that judgments of the ECtHR that were not compatible with the Russian Constitution would not be implemented in Russia.\(^{15}\) Subsequently, the Russian CC has already implemented this doctrine in cases concerning prisoners’ voting rights and in the Yukos compensation case. However, it is doubtful that this trend is in accordance with what Russia signed up to in 1998. Another question is to what extent Russia’s new doctrine of constitutional supremacy reflects a wider trend and might become “contagious” in other CoE member states as well.

That the situation is serious enough can be seen from the fact that on 18 May 2016, the Secretary General of the CoE, Thorbjørn Jagland, said the following when submitting his annual report on the State of Human Rights, Democracy and the Rule of Law across Europe:

[W]e now see the ECHR and the judgments of the ECtHR openly challenged – with some invoking the supremacy of national constitutions,
or parliaments, or public opinion instead. But the Convention system hinges on Article 46, which all States have signed up to, and which says that they will ‘undertake to abide by the final judgment of the Court’. Take this away, and the entire system begins to unravel. If this is allowed to happen, the loss to Europe will be immense.  

In the report itself, the Secretary General of the CoE lamented the fact that “a growing chorus of voices now openly questions the authority of the European Court of Human Rights and the obligation to execute its judgments.” If a chorus of such voices is growing, then with the judgment of the Russian CC of 14 July 2015, the subsequent legislative changes in Russian laws, and further cases in the Constitutional Court, Russia has become one of the cheerleaders. The project of Europe’s mission civilisatrice did not turn out as was envisaged in 1996/1998. Psychologically, the main difference between 1996/1998 and 2016 is that, unlike then, nowadays both Russia and the CoE do not have too many illusions left about each other.

Nevertheless, we proceed from the assumption that over the last twenty years positive changes and European influences have still occurred in terms of human rights law and policy in Russia. Being part of the Strasbourg human rights protection system has changed Russian realities in some ways – at least in the sense that an adequate response to human rights violations has become possible. Both the ECtHR and the Russian Federation have already managed to influence each other in a tense, complex, and uneasy relationship, which has not been a one-way street. Mutual influences (socialization) have taken place but in ways and with outcomes that were not initially expected by political optimists. However, Russia’s historically established tradition of a strong state with illiberal tendencies has proven resistant and has rejected certain major liberal human rights influences from Europe to the extent that the country’s compliance with the ECHR is currently in doubt.

1.2 Wider issues raised by Russian interaction with the ECtHR

The importance of understanding the Russian experience in the ECtHR goes far beyond the country itself. The following are some contexts in which the experience of Russia has a wider relevance.

16 T. Jagland, speech at the 126th session of the Committee of Ministers, www.coe.int/en/web/secretary-general/speeches/-/asset_publisher/gFMvIoSKOUrv/content/126th-session-of-the-committee-of-ministers?_101_INSTANCE_gFMvIoSKOUrv_viewMode=view.

I.2.1 Comparing Russia with other countries

One can ask what would be the broader value or universal lesson from studying just one country in its interaction with the ECtHR. Concerning the ECtHR, academic lawyers and political scientists have usually asked research questions not focused on a single member state of the CoE. Even when they have primarily focused on postcommunist Eastern Europe, they have focused on this European subregion as a whole, not just on a single country. Legal scholars interested in the ECHR and the ECtHR have examined the case law of the ECtHR and what the Court does and represents, naturally drawing from ECtHR practice concerning various CoE member states. Political scientists have examined issues such as compliance with judgments of the ECtHR across different CoE member states, comparing it with other regional human rights protection systems such as the Inter-American Court of Human Rights.

However, we are convinced that Russia’s interaction with the ECtHR justifies academic research with this specific focus. Russia is a special case on a number of accounts, a special client of the ECtHR in a number of ways. With 143 million inhabitants, it is the largest CoE member state. It is the continuator state of the USSR, the former superpower that had ideologically challenged the CoE (and the West more generally) also not the least on account of the meaning and importance of human rights and what a good life means in domestic and international politics. The sheer magnitude of Russia’s historic and ideological transformations in the twentieth century has been unprecedented, and this cannot but have influenced the country’s interaction with the ECtHR. In a world where resources matter, Russia also contributes about 10 percent of the CoE budget, although this is now in danger since Moscow recently announced that it would stop paying at least parts of this sum until its parliamentary delegation continues to be suspended at the Parliamentary Assembly of the Council of Europe (PACE). Last but not least, Russia currently

---

21 See www.ng.ru/politics/2017-07-05/3_7022_strasburg.html.
deserves special attention because it was Russia’s Constitutional Court that with its judgment of 14 July 2015 gave a further boost to the debate on the interrelationship between the ECHR and the constitutional orders of the CoE member states – and to compliance problems in the European human rights protection system as a whole.

At the same time, it is clear that the interaction between Russia and the ECTHR should not be understood in isolation, without comparative analytical perspectives in mind. For example, in terms of a human rights backlash or problematic human rights violations more generally, the Russian Federation of course does not constitute the only possible case of interest in the context of the CoE member states. Over recent years authoritarian tendencies have increased in Turkey, led by President Recep Tayyip Erdoğan. Moreover, elites in other CoE member states in Central and Eastern Europe have expressed conservative reservations to certain liberal ideas and criticized too far-reaching “progressive” interpretations of the ECHR by the ECTHR. In particular the governments in Hungary and Poland are facing criticism as increasingly illiberal. Moreover, in terms of rejecting some of the outcomes in the ECTHR – on the human rights of terror suspects or prisoners’ voting rights, for instance – and criticizing judicial activism by the ECTHR, Great Britain presents another major case of comparative interest.

Leo Tolstoy has started his novel Anna Karenina with the famous sentence that all happy families are alike, but each unhappy family is unhappy in its own way. If so, then perhaps this also applies to CoE member states, where dissatisfaction with Strasbourg and occasional noncompliance with judgments of the ECTHR can have different origins. For example, both Russia and Turkey have throughout history struggled with the dilemma of whether they are (recognized as) “European” countries or not; their European-ness has been contested both within these countries and in Western Europe.23 Turkey’s