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# Civil and Human Rights and the Courts under the New Constitution of the Russian Federation

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## RECENT DEVELOPMENTS

WILLIAM W SCHWARZER\*

### Civil and Human Rights and the Courts Under the New Constitution of the Russian Federation

Most of the controversy surrounding the new constitution of the Russian Federation, adopted December 12, 1993, has focused on two subjects: the power of the president vis-à-vis the legislature and the power of the central government vis-à-vis the constituent parts of the Federation. Reasonable minds can differ on whether these issues of separation of powers and federalism are resolved in a fashion most conducive to democratic government. As for its guarantees of civil and human rights, however, the new constitution can only be applauded. The drafters borrowed heavily from the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and the United States Constitution. Indeed, in some respects the drafters went beyond those documents. This article reviews and analyzes the substance of the relevant articles and the provisions for their enforcement.

Like the United States Constitution, the constitution of the Russian Federation has a supremacy clause. The constitution is given “supreme legal force . . .

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\*Senior United States District Judge; Director, Federal Judicial Center. I am grateful to Judge Yuri Ulturgashev of the Supreme Court of the Republic of Khakasia for his review of and helpful comments on this paper.

throughout the territory of the Russian Federation . . . [and all] organs of [government] . . . officials [and] citizens are obliged to observe" it.<sup>1</sup> Whether the constitution will be observed will depend in part on political factors, but also to a considerable extent on effective judicial enforcement.

To consider the latter point, one must begin by examining the judiciary articles.<sup>2</sup> Yet one cannot stop there because the significance and impact of those articles depends on substantive and procedural articles scattered throughout the constitution.

## I. Structure of the Judicial System

### A. THE HIGHEST COURTS

The constitution retains the three existing top-level courts, although it makes certain changes in their structure and jurisdiction.

The Constitutional Court is enlarged from the present thirteen to nineteen justices.<sup>3</sup> It has jurisdiction to issue interpretations of the constitution, to determine the constitutional validity of acts of any organ of government, and to resolve disputes among organs of government.<sup>4</sup> It appears also to have jurisdiction to decide constitutional questions on a citizen's complaint—a departure from the prevalent European practice of limiting constitutional courts to controversies emerging from the legislature or the executive branch.

The Supreme Court is described as "the highest judicial organ for criminal, civil, administrative, or other cases"<sup>5</sup> in courts of general jurisdiction. It also "exercises judicial oversight over the activities" of these courts and "provides clarification on questions of judicial practice."<sup>6</sup> These provisions raise the question whether the Supreme Court is now charged, not only with adjudicatory oversight of the lower courts, but also with administrative oversight, including the supervision, training, assignment, and discipline of judges. The Ministry of Justice, a part of the executive branch, had traditionally exercised the administrative oversight of the courts, precluding the existence of genuine judicial independence. Since the constitution specifically calls for the independence of the judiciary,<sup>7</sup> a genuine separation of the judicial from the executive branch might now occur.

The Superior Court of Arbitration is "the highest judicial organ for the resolution of economic disputes and other cases examined by the courts of arbitration."<sup>8</sup>

1. RUSS. FED'N CONST. sec. I, ch. 1, art. 15, §§ 1, 2.

2. *Id.* ch. 7, arts. 118-129.

3. *Id.* art. 125.

4. *Id.*

5. *Id.* art. 126.

6. *Id.*

7. *Id.* art. 120 ("Justices are independent"); *Id.* art. 10 ("State power . . . is exercised on the basis of the separation of legislative, executive, and judicial powers").

8. *Id.* ch. 7, art. 127.

Article 127 preserves the courts of arbitration that existed in the Soviet Union. These courts heard so-called economic disputes, but functioned more like administrative agencies carrying out the economic and other policies of the government. As a genuine commercial law develops, one hopes that its enforcement will move into the mainstream by coming under the courts of general jurisdiction and a system governed by the rule of law.

The justices of these three courts are appointed by the Federation Council, the upper house of the newly created parliament composed of two members elected from each of the constituent parts of the Russian Federation<sup>9</sup> on the submission of the president of the Russian Federation.<sup>10</sup>

## B. THE LOWER COURTS

Although the constitution makes no specific reference to lower courts, it clearly contemplates their existence. In the pre-constitution state of affairs, intermediate level courts consisted of (1) a supreme court of each republic, (2) oblast courts, and (3) kray courts, the latter two being courts of regions within a republic. Judges of the supreme courts were appointed by the parliaments of the respective republics; judges of oblasts and krays were appointed by the parliament of the Russian Federation. In addition, at the lowest level, districts and towns had courts whose judges were appointed by regional or local parliaments. All of these courts applied federal law. These courts may remain in operation unless legislation alters the current structure. There is perhaps an argument that the courts of republics, oblasts, krays, districts, and towns should retain their current status and acquire jurisdiction of legislation adopted by local parliaments. The constitution recognizes and guarantees "local self-government."<sup>11</sup> Under its federal structure, state power not assigned to the Federation<sup>12</sup> or within the joint jurisdiction of the Federation and its components<sup>13</sup> is possessed by the components.<sup>14</sup> Under that allocation, the federal and constituent governments share legislative and regulatory jurisdiction over many areas in which much litigation would originate, such as civil rights, public safety, land use and ownership, the environment, and the protection of the family.<sup>15</sup>

Other provisions of the constitution, however, strongly imply federal preemp-

9. *Id.* ch. 8, art. 95, § 2.

10. *Id.* ch. 4, art. 83(f); *see* ch. 5, art. 102(g).

11. *Id.* ch. 1, art. 12; *see also* ch. 8, arts. 130-132 (guaranteeing local self-government).

12. *Id.* ch. 3, art. 71.

13. *Id.* art. 72.

14. *Id.* art. 73; *see* ch. 1, art. 76, § 4. Article 5 explains that the Russian Federation consists of various components, such as republics, krays, oblasts, and cities. Each has its own charter or constitution, legislation, and state power. *Id.* ch. 1, art. 5. The federal structure of the Russian Federation rests on an allocation of state power between the federal government and component governments. *Id.* Laws of the components, however, may not conflict with the laws of the Federation. *Id.* ch. 3, art. 76, § 5.

15. *Id.* ch. 3, art. 72.

tion of the court system. The constitution states that “[t]he judicial system of the Russian Federation is established by the Constitution . . . and by federal constitutional law;”<sup>16</sup> the Federation is given exclusive jurisdiction of “the judicial system . . . legislation in the field of criminal [law and procedure,] . . . civil law . . . and . . . procedure and the law of arbitral procedure.”<sup>17</sup> “The financing of courts is effected solely from the federal budget, and must ensure the possibility of the complete and independent exercise of justice in accordance with federal law.”<sup>18</sup> If the implementation of the constitution conforms to these provisions, the local courts could be eliminated or absorbed into the federal court system, in which case the Federation and federal law would wholly control the administration of civil and criminal justice.

In any event, it is clear that under the constitution judges of all courts will be appointed by the president of the Russian Federation in compliance with the provisions of the constitution and federal law.<sup>19</sup>

### C. THE JUSTICES

The constitution also contains detailed provisions covering justices. They must be twenty-five years old, have a higher legal education and five years’ legal experience, and meet other requirements imposed by federal law.<sup>20</sup> They must be independent and subordinate only to the constitution and federal law.<sup>21</sup> They may not be removed, and their powers may not be terminated or suspended except in accordance with federal law.<sup>22</sup> They are appointed by the president in accordance with federal law, except for justices of the three high courts who are appointed by the Federation Council “on the submission of the President.”<sup>23</sup>

## II. Substantive and Procedural Rights

The role the courts will play and how they will function under the constitution is defined by the substantive and procedural rights guaranteed to Federation citizens. The constitution guarantees state (which presumably includes judicial) protection of “human and civil rights and freedoms” and entitles persons to protect their rights and freedoms by any lawful method.<sup>24</sup>

16. *Id.* ch. 7, art. 118, § 3.

17. *Id.* ch 3, art. 71(n). By way of comparison, article 72 lists those subjects that fall within the “joint jurisdiction of the Russian Federation and [its] . . . components.” *Id.* art. 72.

18. *Id.* ch. 7, art. 124.

19. *Id.* ch. 4, art. 83(f); ch. 7, art. 119; ch. 8, art. 128, § 2.

20. *Id.*, ch. 7, art. 119.

21. *Id.* art. 120, § 1.

22. *Id.* art. 121.

23. *Id.* art. 128.

24. *Id.* ch. 2, arts. 45-46.

## A. SUBSTANTIVE RIGHTS

Many of the rights enumerated in the constitution are aspirational rights derived from the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights, such as rights to work, leisure, social security, housing, education, health care, and a decent environment.<sup>25</sup> Although these rights, for practical purposes, are not judicially enforceable, their inclusion was regarded as a political necessity, since they had been included in the earlier Brezhnev and other socialist constitutions and their elimination would have jeopardized public support for the new constitution. Nevertheless the constitution also articulates in detail an expansive array of fundamental human and civil rights that are guaranteed and enforceable in the courts.<sup>26</sup> If these rights are taken seriously, they will have a dramatic effect, not only on the lives of the people, but on the courts, on the operation of the government, and on society as a whole. For example, city residence permits currently required would have to be eliminated under the new system.

These rights may be summarized as follows:

- The constitution guarantees equality before the law and bars discrimination on the basis of sex, race, nationality, language, origin, property and position, place of residence, religion, and "other circumstances."<sup>27</sup>
- Other rights include privacy; freedom of speech and expression (excluding hate speech), religion, assembly, and association; freedom of movement, travel, and choice of residence; and the right to ownership of property, including land. The rights to fair compensation for property taken, to strike, to vote, and to petition the government and participate in its activities are also guaranteed.<sup>28</sup>
- No person's dwelling may be entered other than according to law or under court order.<sup>29</sup>
- No person may be held in custody for more than forty-eight hours without a court order.<sup>30</sup>
- The collection and use of private information about persons is prohibited, and all persons have the right of access to materials affecting their rights or freedoms from the Federation.<sup>31</sup>
- The right to privacy is guaranteed and surveillance of mail, telephone, and other communications requires a court order.<sup>32</sup>

25. See ch. 1, art. 13; see also ch. 2, arts. 17, 21, 34, 37-43.

26. *Id.* ch. 2, arts. 45, 46, § 1; see also ch. 1, art. 15, § 1; ch. 2, art. 17, § 1, art. 18; ch. 7, art. 120, § 2.

27. *Id.* ch. 2, art. 19.

28. *Id.* ch. 1, arts. 8, 9, 19, 23, 27-33, 35-36, 44.

29. *Id.* ch. 2, art. 25.

30. *Id.* art. 22.

31. *Id.* art. 24.

32. *Id.* art. 23.

- Citizenship may not be revoked other than according to law, and citizens may not be expelled from the Federation.<sup>33</sup>
- Persons are entitled to asylum according to international law and may not be extradited if faced with political persecution.<sup>34</sup>

Specific guarantees of some of these rights are reinforced by other provisions of the constitution, such as the recognition of political pluralism and “equality of social associations,”<sup>35</sup> prohibition against the establishment of a state religion, and guaranty of the separation of church and state.<sup>36</sup> In addition, the constitution contains multiple guarantees of the right to own property<sup>37</sup> and of freedom of economic activity.<sup>38</sup>

The constitution also recognizes group rights, such as the right to determine one’s nationality and use one’s native language (subject to the status of Russian as the state language of the Federation),<sup>39</sup> and guarantees the rights of indigenous and other groups of numerically few peoples.<sup>40</sup>

## B. ENFORCEMENT OF SUBSTANTIVE RIGHTS

Several questions arise concerning the operation and enforcement of these rights. The constitution provides that “[h]uman and civil rights and freedoms are direct-acting.”<sup>41</sup> The interpretation of this language is not clear, but it presumably means that these constitutional guarantees are self-executing, that is they are binding and effective without the need for further legislation. Thus, they would at least prohibit any government action that would contravene the constitution. But the vitality of those prohibitions depends on the effectiveness of the courts’ enforcement against the government. Will courts enjoin unconstitutional acts? Will they award damages in favor of their victims? As noted below, the courts have the power to do so, but whether they will use it remains to be seen.

The American experience, especially under the Fourteenth Amendment, indicates that meaningful realization of some constitutional rights, in particular equality rights, depends on implementing legislation. Legislation is needed to particularize rights only generally expressed in the constitution. Thus, one cannot predict from the constitutional text, for example, whether women will have an enforceable right to receive equal pay for equal work. Legislation is useful also to clarify the existence of a right to relief, as in the case of the federal civil rights laws implementing the Fourteenth Amendment.<sup>42</sup>

33. *Id.* ch. 1, art. 6, § 1; *see also* ch. 2, art. 61, § 1.

34. *Id.* ch. 2, art. 63.

35. *Id.* art. 13.

36. *Id.* art. 14.

37. *Id.* ch. 1, arts. 8, § 2, 9, § 2; *see also id.* ch. 2, arts. 35, 36.

38. *Id.* ch. 1, art. 8, § 1; *see also id.* ch. 2, art. 34, § 1.

39. *Id.* ch. 2, art. 26; *see also* ch. 3, art. 68.

40. *Id.* ch. 3, art. 69.

41. *Id.* ch. 2, art. 18.

42. *See generally* 42 U.S.C. § 1983.

An important question raised by the constitution is whether its guarantees of civil rights may be enforced only against the state and its officials, as is true of the United States Constitution, or whether they are enforceable also against private persons. Americans view the civil rights provisions of the United States Constitution primarily as regulating the relationship between the citizen and the government. The Federation's constitution is ambiguous on this point. It states broadly that "each person is guaranteed judicial protection of his rights and freedoms,"<sup>43</sup> and that citizens as well as state organs "are obliged to observe" it.<sup>44</sup> Some of its language suggests the creation of torts, not merely of limitations on government power; it provides, for example, that "[n]o one is entitled to enter a dwelling against the wishes of the persons residing there."<sup>45</sup> On the other hand, the constitution states that human and civil rights "determine . . . the activity of [the government]" and organs of the government are obliged to observe it.<sup>46</sup>

Clearly, the constitution controls the relations between the citizen and the government. The drafters may have intended to regulate relations among citizens as well. But even if the cited provisions guaranteeing certain civil rights are not enforceable against citizens, other powers under the constitution would support legislation having a similar effect. Much civil rights legislation in the United States derives its constitutional authority from the commerce clause. The constitution also gives the Federation broad legislative powers, including "the regulation and protection of human and civil rights and freedoms" and "the establishment of the fundamentals of federal policy and federal programs in the sphere of state, economic . . . social, [and] cultural . . . development."<sup>47</sup> These powers would authorize legislation for the enforcement of civil rights among citizens.

### C. GENERAL PROCEDURAL RIGHTS

The new constitution affords a comprehensive procedural framework for the enforcement of substantive rights. That framework sets forth elements of due process, including a qualified right to jury trial in civil cases, and an absolute right in criminal cases.<sup>48</sup> Jury trials are now being held on a limited experimental basis. The jury trial provisions are reinforced by a guarantee of the citizens' right "to take part in the administration of the state's affairs,"<sup>49</sup> which may include the administration of justice. The provision echoes the reasoning of recent United States Supreme Court decisions restricting the use of preemptory challenges in part to assure citizens the right to serve on juries.

43. RUSS. FED'N CONST. sec. I, ch. 2, art. 46, § 1.

44. *Id.* ch. 1, art. 15, § 2.

45. *Id.* art. 25.

46. *Id.* art. 18; *see also id.* ch. 1, art. 15, § 2.

47. *Id.* ch. 3, art. 71.

48. *Id.* ch. 2, art. 47, § 2; *see also id.* ch. 7, art. 123, § 4.

49. *Id.* ch. 2, art. 32, § 1.

The due process rights are briefly summarized:

- Laws must be published; unpublished laws may not be applied.<sup>50</sup>
- Persons are “guaranteed judicial protection of rights and freedoms” and may appeal acts and omissions of state agencies and officials to the courts.<sup>51</sup>
- Persons are entitled to receive qualified legal assistance free of charge as provided by law.<sup>52</sup>
- Persons are entitled to have the cases against them heard by the court of proper jurisdiction.<sup>53</sup>
- Trials, which may not be closed unless permitted by law, are to be conducted “on the basis of the adversarial system,” and before a jury where provided by law.<sup>54</sup>
- Laws imposing liability may not be retroactive; ex post facto laws are prohibited.<sup>55</sup>
- Persons may recover damages caused by unlawful acts or omissions of the state or its officials, and victims of crimes or of abuses of power are guaranteed compensation by the state.<sup>56</sup>

#### D. RIGHTS OF CRIMINAL DEFENDANTS

Additional rights are extended to persons charged with crimes. These rights are a significant advance over past practice, incorporating substantially all of the guarantees under the United States Constitution. One important change from the past is the reduction of the power of the prosecutor general. The conduct of pretrial investigations, including searches and seizure and detention of defendants, which was formerly the province of the prosecutor, is now subject to judicial control. The rights are briefly summarized:

- Persons charged with a crime are entitled to counsel from the moment of detention and to an open trial before a court and jury. They are presumed innocent and are not obliged to prove their innocence or to testify against themselves, and will have any “undispelled doubt” interpreted in their favor. In addition, criminal defendants have the right to appeal their sentence and cannot be tried twice for the same offense.<sup>57</sup>
- The use of illegally obtained evidence is barred.<sup>58</sup>
- No one is required to testify against himself, a spouse, or close relative.<sup>59</sup>

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50. *Id.* ch. 1, art. 15, § 3.

51. *Id.* ch. 2, art. 46, §§ 1, 2.

52. *Id.* ch. 2, art. 48, § 1.

53. *Id.* art. 47, § 1.

54. *Id.* ch. 7, art. 123.

55. *Id.* ch. 2, art. 54.

56. *Id.* arts. 52-53.

57. *Id.* arts. 47-50.

58. *Id.* art. 50, § 2.

59. *Id.* art. 51, § 1.

- No one may be subjected to torture, violence, or other brutal or humiliating treatment or punishment.<sup>60</sup>
- No one may be tried in absentia except according to law.<sup>61</sup>

#### E. SUSPENSION OF RIGHTS AND FREEDOMS

These rights and freedoms, except as noted below, may be curtailed or suspended by law in an emergency or to “protect[] the foundations of the constitutional system, morality, and the health, rights, and legitimate interests of other individuals, or . . . the country’s defense and . . . security.”<sup>62</sup> The following rights “may not be restricted”:<sup>63</sup> freedom of conscience and religion; the right to life; the right to privacy; the right to access to government files affecting one’s rights and freedoms; the right to pursue economic activity; the right to housing; the right to judicial protection; the right to trial, counsel, and legal aid; the right to appeal; the right to compensation from the state; the presumption of innocence; and the bar against self incrimination and against ex post facto laws.

### III. Words Versus Reality

One would be hard pressed to find fault with this document as a charter of human and civil rights. It incorporates the body of rights developed under the United States Constitution through court decisions and legislation and, in some respects, transcends it. For example, it prohibits the government from collecting and disseminating private information about persons, subjecting persons to experiments without their consent, and concealing facts creating a threat to people’s lives and health.<sup>64</sup> Only time will tell, however, whether this document will become, as James Madison put it, more than a parchment barrier. Significant obstacles presently stand in the way of full realization of its promise.

In the Russian culture, citizens are not accustomed to look to the legal process as the means for resolving grievances and vindicating their constitutional rights. And though the constitution specifically mandates the adversary process, lawyers have not been acculturated to the aggressive pursuit of their clients’ rights through litigation, especially when their claims are against the government.

Although the constitution, on the whole, is a realistic document, resource limitations are likely to hamper its effective implementation. Courts even now are badly underfunded; computers, critical to effective court administration, are few and far between, and many facilities are inadequate. It is doubtful that without substantial infusion of resources they could effectively perform the functions the

60. *Id.* art. 21, § 2.

61. *Id.* art. 123, § 2.

62. *Id.* art. 55, § 3, art. 56, § 1.

63. *Id.* art. 56, § 3.

64. *Id.* art. 21, § 2, art. 24, § 1, art. 41, § 3.

constitution assigns to them. Further, the categorical rights to compensation of victims of crimes and of unlawful government actions are unlikely to be funded.

Whether judges will have the independence, skill, and inclination to make the often unpopular decisions that constitutional litigation requires is a serious question. This constitution confronts them with a huge and unaccustomed challenge; to respond they will have to enter *terra incognita*. In addition to the affirmative obligations discussed above, courts will also have a duty to strike down laws that contravene the constitution, a duty wholly foreign to their past experiences.<sup>65</sup>

One hopes, of course, that the president and the parliament will comply with the constitution, minimizing the need for judicial enforcement. Nevertheless, without the threat of judicial enforcement, a constitution is meaningless. Little in Russian history would lead one to look with confidence to the legal process as a vehicle for furthering democracy, and yet the writing of this constitution and its adoption by popular referendum gives cause for optimism.

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65. *Id.* art. 120, § 2.