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Developments in Russia

[21(2) *European Public Law* (2015) 229-238]

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1 INTRODUCTION

There have been a number of significant developments in Russian public law since the last report in 2011; I believe five call for mention in this survey. In chronological order these are: 1. increase in the terms of office of the President and the elected legislative chamber, the State *Duma*; 2. resolution of the ‘turf war’ between the Supreme Court and the Constitutional Court over powers to declare legislation unconstitutional; 3. creation of a new Supreme Court of the Russian Federation to replace the previous Supreme Court and Highest *Arbitrazh* (Commercial) Court; 4. changes (yet again) to the rules for the election of deputies to the State *Duma*; and 5. expansion of the Russian Federation by the inclusion of two new Federation subjects. Assessment of which of these changes will have most significance in the long run is beyond the powers of this rapporteur, but the totality indicates that Russia is (yet again) in the state of transition and flux.

2 INCREASE IN TERMS OF OFFICE OF THE PRESIDENT AND STATE *DUMA*

When the 1993 Constitution of the Russian Federation (RF) was adopted,¹ the term of office for the President was set in Article 81(1) as 4 years (replacing the 5 years under the previous legislation for which Yeltsin was elected in 1991 as the first Russian President). Article 96 defined the period for which State *Duma* deputies were elected also to be 4 years.² Unfortunately, this resulted in an extended period of electioneering every 4 years, when deputies (existing and potential) gave all their energies to campaigning for December *Duma* elections, and then supporting candidates for the presidential elections the following March. The decision was therefore taken to ‘uncouple’ the two sets of elections and in December 2008, during the presidency of Dmitrii Medvedev, amendments to the Constitution were

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¹ See J. Henderson, ‘Russia’s New Constitution’, *European Public Law* 1, no. 4 (1995): 508-513.

² Apart from the *Duma*’s first convocation, when it was exceptionally two years: see 1993 Constitution RF, Section 2 Concluding and Transitional Provisions: 7. English translation of the Constitution in W. Butler, *Russian Public Law*, 3rd edn (London: Wildy, Simmonds & Hill, 2013) 4-32.

successfully adopted to change both time periods.³ The revised terms of office, to apply from the next election, were set as six years for the President and five years for the *Duma* deputies. The existing provision that the same individual may not serve as President more than two terms *in succession* was retained (Article 81(3), emphasis added).

Despite the stringent requirements necessary for adoption of any constitutional amendment, the process was impressively smooth.⁴ Changes to the *Duma* electoral rules had resulted in the *Duma* elected in 2007 being composed entirely from party lists on the basis of proportional representation, with a 7 per cent threshold. Only four parties gained seats and the so-called ‘party of power’, Unified Russia (*Edinaia Rossiia*, sometimes translated as ‘United Russia’) had 70 per cent of them. Unified Russia had been created in 2001 with the specific aim of giving support to President Putin,⁵ and when Putin stood down after serving his two four-year terms as President, Unified Russia gave allegiance to Medvedev, his chosen heir, who stood for President in March 2008 (with a campaign promise that Vladimir Putin would be his Prime Minister). Medvedev therefore had no difficulty in getting the required two-thirds majority vote in the *Duma* for the proposed reforms, and received similar support in the second chamber, the Federation Council, where a three-quarters majority was needed. Unified Russia had also done well in elections to regional legislatures, so the requirement of approval of the proposed constitutional amendments by legislatures in two-thirds of the subjects of the Russian Federation did not provide any hindrance either.

The new time periods operated from the December 2011 *Duma* election and March 2012 presidential election. Since then, the two elections will not coincide for 30 years. Of course, mathematically adept readers will immediately be aware that changing just one of the terms of office would have broken the link; the motivation behind extending both has not been made clear. However circumstances raise the suspicion that Medvedev’s reforms may have been for Putin’s benefit, especially in the light of the decision presented on 24 September 2011 by Putin to Unified Russia’s congress that he and not Medvedev would be the forthcoming presidential candidate, despite Medvedev being eligible to stand for a second term.⁶ At least amongst the educated, urban, *intelligentsia* or ‘creative classes’, the perceived

³ By a Federal Constitutional Law of 30 December 2008, No 6-FKZ.

⁴ Only provisions in chapters 3-8 are subject to amendment by the legislature, the Federal Assembly. The procedure is the same as for adoption of a federal constitutional law, plus approval by regional legislatures at least two-thirds of Russia’s federal subjects (Article 136, Constitution RF).

⁵ See J. Henderson, ‘The Russian Constitutional Court to the Rescue: Freedom of Political Comment Reasserted’, *European Public Law* 11, no. 1 (2005): 17-29, at p.17.

⁶ An article on the following day ‘Election’s Funeral’ in *Russian Law Online* 25 Sept. 2011 pointed out a linguistic quirk in English not evident in Russian because the latter has neither definite nor indefinite articles:

cynicism of this so-called castling arrangement (named after the chess move under European chess rules, whereby the King and rook make a simultaneous strategic move) fuelled anger which then manifested in street demonstrations following the December 2011 *Duma* elections, where electoral fraud was apparently rife.⁷

The reforms mean that Vladimir Putin, who returned to presidential office in May 2012 after winning the March election, has the possibility of twelve years from then at the helm, assuming a successful re-election in 2018 and no personal health issues. Neither of these two factors may be taken for granted; a drop in world oil prices combined with the impact of Western sanctions following the annexation of Crimea in the spring of 2014 may adversely affect the Russian standard of living and hence dent Putin's popularity, and the physical impact of some of his exploits may take their toll on his well-being.⁸

3 RESOLUTION OF THE "TURF WAR"

For a number of years there had been an unfortunate disagreement between the (previous) Supreme Court and the Constitutional Court over who may decide whether a law is unconstitutional.⁹ The root of the dispute was inconsistent legislation. On the one hand, the Constitution itself says that it has 'highest legal force, [and] direct effect ... Laws and other legal acts ... must not be contrary to the Constitution' (Article 15 (1)). On this basis, in 1995

The article in English is a treacherous thing. It can transform an innocent statement into a political proclamation. Let's take, for example, the following sentence: 'On the 4th of March 2012, Russia will be electing a president' and change it just a little, almost unnoticeably: 'On the 4th of March 2012, Russia will be electing the president'. A whole new world of meanings has appeared in what had seemed a mere statement of fact.

See <http://www.russianlawonline.com/content/elections%E2%80%99funeral>, (accessed 6 October 2014).

⁷ See J. Henderson, 'Law in Russian Politics, Politics in Russian Law', (2012) 37 *Rusistika* (online journal). For an earlier overview with examples of Russian electoral manipulation, see S. White, 'Elections Russian-Style' *Europe-Asia Studies* 63, no. 4 (2011): 531 – 556. In relation to the 2011 *Duma* elections, see T. Wesolowsky, 'Allegations Of Electoral Violations Made Across Russia -- And Online' *Radio Free Europe/Radio Liberty* 5 Dec. 2011 available at www.rferl.org/content/russia_voter_fraud_youtube_video_carousel_voting/24411464.html (accessed 6 Oct. 2014).

And T. Balmforth, 'International Watchdogs Slam Russian Vote' *Radio Free Europe/Radio Liberty* 5 Dec. 2011 available at www.rferl.org/content/international_observers_say_vote_violations_marred_russian_vote/24411949.html (accessed 6 Oct. 2014).

⁸ There is suspicion that he injured his back in the execution of his plan to show storks raised in captivity how to migrate; aspiration described in <http://www.telegraph.co.uk/news/worldnews/vladimir-putin/9522977/Putin-to-fly-with-cranes-in-latest-publicity-stunt.html> (accessed 6 Oct. 2014). See also on Putin's increasing isolation B. Judah, 'The President. Inside the bullet-proof bubble of the West's Public Enemy Number One' *Newsweek* 1 Sept. 2014: 28 – 34.

⁹ See W. Burham and A. Trochev, 'Russia's war between the courts The Struggle over the Jurisdictional Boundary between the Constitutional Court and Regular Courts' 55 *Am. J. Comp. L.* (2007): 381; J. Henderson, *The Constitution of the Russian Federation* (Oxford: Hart Publishing, 2011) 217–8.

the Supreme Court Plenum told the judges subordinate to it in the domestic court hierarchy that they had the power to disapply any unconstitutional law. On the other hand, the 1994 Federal Constitutional Law on the Constitutional Court RF says a judge in an ordinary court, faced with facts which require the application of legislation thought by the judge to be unconstitutional, ‘may’ refer that issue to the Constitutional Court.¹⁰ If the Constitutional Court then deems the law unconstitutional, it may not be applied by any court. The wording of the 1994 Federal Constitutional was deliberately vague, saying ‘may’ rather than ‘must’.¹¹ However, in June 1998 the Constitutional Court declared that referral to it was mandatory. The Supreme Court did not concede. There was a ‘stand-off’; domestic court judges continued to disapply legislation they believed unconstitutional, although their individual actions had no precedential effect. Only the Constitutional Court could render legislation generally inapplicable. ‘This discrepancy between two jurisdictions lasted fifteen years’.¹²

Now the situation has been resolved by the Supreme Court acceding to the Constitutional Court’s view. It issued a ruling on 16 April 2013 which amended its 1995 Plenum ruling cited above.

This *volte face* came a few months before a response by the Russian Constitutional Court in another ongoing dispute, between it and the European Court of Human Rights (ECtHR). The Russian Constitutional Court has declared itself reluctant to apply caselaw from the ECtHR, if Russia had not been a party. Crystallizing that view, the Constitutional Court issued a ruling in December 2013, in which it ‘expressly has forbidden Russian courts from implementing allegedly unconstitutional judgments of the ECtHR and, also, has barred these courts from assessing the constitutionality of Russian legislation which is applied in such cases.’¹³ In that ruling the Constitutional Court ‘confirmed its triumph over the RF Supreme Court’.¹⁴

Clarity is to be welcomed, although not at the expense of the Constitution’s status as a directly applicable legal document. Also, it may be doubted whether the Constitutional Court will be able to cope with the flood of referrals. Since reforms of June 2009, the Constitutional Court only sits in plenary session so is limited to hearing one case at a time (under the 1994 legislation as originally enacted, it could sit in two Chambers). The number of cases the

¹⁰ The particular litigant can also refer the issue of the particular legislation’s constitutionality to the Constitutional Court.

¹¹ See Burham and Trochev *supra* n. 9 at 402-4.

¹² M. Antonov, ‘Conservatism in Russia and Sovereignty in Human Rights’ *Review of Central and East European Law* 39 (2014) 1-40 at 17 (fnote 58)

¹³ *Ibid.*

¹⁴ *Ibid.*

Constitutional Court can hear each year is inevitably limited, while the volume of potentially unconstitutional legislation is vast. Channelling decision-making on the issue solely to the Constitutional Court may well create a significant backlog, or induce judges in the other court to turn a blind eye to apparent breaches of the Constitution by applicable legislation, rather than have the inevitable delay caused by sending a reference to the Constitutional Court.

4 CREATION OF A NEW SUPREME COURT OF THE RUSSIAN FEDERATION

On 21 June 2013 *ITAR-TASS* news agency reported that President Putin had announced at a plenary session of the St Petersburg International Economic Forum that he proposed to put forward legislation to unite the Supreme Court and the Highest *Arbitrazh* Court.¹⁵ This was a great surprise. Some commentators saw it as part of a political battle between the (old) Chairman of the Supreme Court, Viacheslav Lebedev, and the (comparatively young, and friend of Medvedev) Chairman of the Highest *Arbitrazh* Court, Anton Ivanov.¹⁶ Deep scepticism was expressed at Putin's idea, with few commentators thinking it would improve the quality of justice. For example, Alexei Yelayev, a member of the Russian Lawyers' Union, rounded off his Weekly Report with the following:

The reason why there are no comments is that non-specialists do not understand anything in it and specialists apparently think the person who proposed this is mad, or, if they choose to be loyal to the current administration, write articles justifying the brilliant idea of the Kremlin speechwriter.¹⁷

However, despite some lobbying against the reform, it was carried through. As with the 2008 constitutional amendments discussed above, compliant federal and regional legislatures ensured that the procedural hoops were smoothly jumped. On 5 February 2014, the Constitution was amended and a new Federal Constitutional Law passed with the effect of dissolving the existing Supreme Court and Highest *Arbitrazh* (Commercial) Court and setting

¹⁵ 'Putin proposes to unite Supreme Court, Supreme Arbitration Court' *ITAR-TASS World Service* 21 June, available via Westlaw.

¹⁶ See, for example, 'Moscow Daily Senses Victory for Supreme Court Chairman Over Merger With Higher Court of Arbitration' *World News Connection* report 25 June 2013 available via Westlaw citing *Nezavisimaia Gazeta*.

¹⁷ A. Yelayev, 'Supreme Court may become tripartite' *Interfax Russia & CIS Business Law Weekly* 2 July 2013 available via Westlaw.

up a new Supreme Court of the Russian Federation. As well as the Constitution, another 28 legislative acts needed to be amended.¹⁸

One ancillary change is that, although it will retain an office in Moscow, from 2017 the new Supreme Court RF will have its main base to St. Petersburg.¹⁹ The Constitutional Court moved there from Moscow in 2008; this caused serious disruption. It is to be hoped that lessons have been learned, so that there is no similar hiatus in the Supreme Court's functioning.

The lower level *arbitrazh* courts as separate specialist courts have been retained, to the relief of those opposed to the reform. Under Ivanov's chairmanship, the Highest *Arbitrazh* Court and the *arbitrazh* courts it supervised had gained a reputation for fairness and transparency. There had been fear that these positive features would be diluted by a complete merger with the ordinary domestic courts, whose reputation is less respected.²⁰

The new Supreme Court is to be composed of 170 judges, selected by a special qualifications collegium (board), with 27 members, that is: a representative of the President, the Public Chamber, and the national public associations of lawyers, with the remaining members elected by the councils of judges of the Russian regions. Controversially, tenure of former Supreme Court and Highest *Arbitrazh* Court judges ended with the demise of those courts, and individuals had to be approved by the new qualification collegium, if they wished to sit in the new Supreme Court. Anyone with relatives abroad (particularly if they had taken foreign nationality) was ineligible.²¹ At least seven of the most experienced Supreme *Arbitrazh* Court judges resigned when the bill to reform their court was presented to the State *Duma* by the Presidential Administration, preferring retirement to the indignity of re-attestation.²²

The new Supreme Court began work on 6 August 2014, after a six-month transition period during which jurisdiction was transferred. Its full complement of 170 judges was not

¹⁸ 'Federation Council approves law on unification of Supreme Court, Supreme Arbitration Court' *Interfax Russia & CIS Business Law Weekly*, 5 Dec. 2013, available via Westlaw.

¹⁹ I. Petrov, 'Day of Judgment', *Rossiiskaia Gazeta*, 7 Aug. 2014 (translated). Original 'Sudnyi den' 'Day of Judgment' available at <http://www.rg.ru/printable/2014/08/07/verhsud.html> (accessed 6 Oct. 2014).

²⁰ See 'Judicial Backsliding in Russia' *Legal Monitor Worldwide* 1 Oct. 2014, available via Westlaw.

²¹ A. Kornya, 'Following Soviet Example' *Vedomosti*, 27 May 2014, p. 2 translation in 'What The Papers Say (Russia)' Issue 1092 *Media Monitoring Agency* available via Westlaw.

²² A. Zanina and A. Pushkarskaya 'At Least 7 Judges Quit Supreme Arbitration Court' *Kommersant* 10 Oct. 2013 in *BBC Monitoring Former Soviet Union* Summary of Russian press for 10 Oct. 2013 available via Westlaw; 'At Least 7 Judges Quit Supreme Arbitration Court' *The Moscow Times* Issue 523210 Oct. 2013 available at <http://www.themoscowtimes.com/news/article/at-least-7-judges-quit-supreme-arbitration-court/487638.html#ixzz2hdGaSsWD> (accessed 6 Oct. 2014).

yet in post (only just over 90).²³ It has a Plenum, a Presidium and seven chambers (*collegia*): criminal, civil, administrative, economic, military, as well as a judicial disciplinary chamber²⁴ and an appellate chamber.²⁵

A couple of months earlier, in a closed door session, the special qualifications collegium had recommended for appointment as Chair of the new Court Viacheslav Lebedev, who had been the Chair of the previous Supreme Court since 1989.²⁶ RIA Novosti reported on 21 May that he had been duly appointed by the second chamber of the legislature, the Federation Council, on the President's nomination, following the special qualifications collegium's positive recommendation.²⁷ Under Article 12 of the new Federal Constitutional Law on the Supreme Court RF, Lebedev's appointment as Chair is for six years, with the possibility of unlimited renewals. Lebedev's was born in 1943, the same year as the incumbent Chairman of the Constitutional Court, Valery Zorkin. Under current legislation, the usual judicial retirement age of 70 does not apply to either of these Court Chairman. For the time being, at least, President Putin seems happy to keep continuity in these two highest judicial offices, as did Medvedev before him.

5 RETURN TO MIXED SYSTEM OF STATE DUMA DEPUTY ELECTIONS

In December 2011, President Medvedev responded to the street demonstrations following the 'stolen' *Duma* elections²⁸ with a number of promises of reform, including a return to half the *Duma* deputies being directly elected from constituencies. He did not manage to fulfil this particular promise, but his successor Putin did. On 24 February 2014 Putin signed into force a new 'Federal Law On the Election of Deputies of the State *Duma* of the Federal Assembly of the Russian Federation'.²⁹ Under this, there is a return to a mixed system for *Duma* deputy elections, whereby half will be elected on a first past the post basis in single-mandate electoral districts (one deputy per district) while the other half will be elected based on the proportion of nationwide votes given to political parties listed on the ballot paper, with a

²³ For details of the unfilled posts, see Petrov, *supra* n. 19.

²⁴ See for its precursor J. Henderson, 'Tenure and Discipline Developments in Russia'. *European Public Law* 17, no. 1 (2011): 1–10.

²⁵ Article 3, 2014 Federal Constitutional Law on the Supreme Court of the Russian Federation.

²⁶ A. Kornya, 'The one and only Lebedev' *Vedomosti* 14 May 2014 *BBC Monitoring Former Soviet Union* Summary of Russian press for 14 May 2014, available via Westlaw.

²⁷ 'New Supreme Court chairman appointed' *RIA Novosti* Moscow, 21 May 2014 *BBC Monitoring Former Soviet Union* Summary of Russian press for 21 May 2014, available via Westlaw.

²⁸ *Supra*, text to n. 7.

²⁹ Law of 22 February 2014 No. 20 FZ.

threshold of 5 per cent (Article 88(7) and (8)). The law also establishes the procedures for nominating candidates, both directly and through the party lists, and the procedures for registering candidates for the single-mandate electoral districts and parties for the party lists and the rules for creating electoral funds.

In a separate development, on 14 February 2014 the State *Duma* passed a law disqualifying those convicted of serious crimes from running for governorships or the Russian presidency.³⁰

The measure... restricts the electoral eligibility of those who commit serious and very serious crimes for periods of 10 and 15 years, respectively. ... Ex-prisoners had previously been completely banned from running for office, though the Constitutional Court ruled that a lifetime ban was unconstitutional last year.³¹

Although this reform therefore sounds like an improvement on the previous situation, it was adopted in the context of what appeared to be a staged fraud prosecution the previous year of a leading opposition figure, Alexei Navalny, after he had made it clear he had presidential aspirations. Although Navalny's five-year imprisonment term was suspended, the disqualification law prohibits him from being a presidential candidate until 2030. It is feared that it might prove too tempting to those in power to induce 'prosecutions to order' to eliminate potential rivals, especially in the circumstances where the allocation of cases in court can be controlled by supportive judicial chair men and women.³²

6 EXPANSION OF THE RUSSIAN FEDERATION

Finally, we will note that on 18 March 2014 two more federal subjects – the Republic of Crimea and the city of federal significance Sevastopol – were added to the 83 which formed the Russian Federation at that time. The process followed the 2001 Federal constitutional law 'On the procedure of acceptance into the Russian Federation and formation within its competence of a new subject of the Russian Federation'.³³ Russian's Foreign Minister, Sergei Lavrov, explained to the State *Duma* on 20 March 2014:

³⁰ 'Duma Passes Law Barring Ex-Prisoners From Elections for Governor, President', Moscow Times 17 Feb. 2014, available via Westlaw.

³¹ *Ibid.*

³² See 'Judicial Backsliding in Russia', *supra* n. 20.

³³ Adopted 17 December 2001; as amended to 31 October 2005 in Butler *supra* n. 2, at p. 700.

The decision about the acceptance of the Republic of Crimea into the Russian Federation is based on the free will of the multinational people of Crimea during the referendum of the 16 March. This decision corresponds to international law, including the principle of the sovereign equality of state and the right of people to self-determination, which is stated as a goal of the UN in its Charter.

As a result of the referendum and on the basis of the Declaration of Independence of the Republic of Crimea of 17 March, the Supreme Council of the Autonomous Republic of Crimea proclaimed Crimea an independent, sovereign state and turned to Russia proposing for it to accept the Republic of Crimea into Russia.

On the 18 March, the President of Russia, Vladimir Putin, signed the Decree about the recognition of the Republic of Crimea. According to the Federal Constitutional Law "On the Procedure of Acceptance into the Russian Federation and Creation within it of a new constituent entity of the Russian Federation", the President of Russia notified the Council of the Federation, the State Duma and the Government about the proposition of the Republic of Crimea and signed the Agreement presented for your consideration, with this state.

According to the established procedure, the Constitutional Court of Russia verified the Agreement for its compliance with the Constitution of the Russian Federation and gave a positive opinion.

This Agreement legally formalizes the accession of the Republic of Crimea into Russia, as well as envisaging the creation of new constituent entities of the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol.³⁴

Thus, from the Russian perspective, the return of Crimea to Russia after an absence of 60 years (having previously been part of the Russian Empire since at least 1783) has been carried out perfectly lawfully.

³⁴ Text of 'Speech by the Russian Foreign Minister, Sergey Lavrov, and his answers to questions from deputies during the plenary session of the State Duma of the Russian Federation, Moscow, 20 March 2014' in English on the Russian Ministry of Foreign Affairs website, 21 March 2014, available at http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/94d6676508bc6c4844257ca2005b0613!OpenDocument (accessed 6 Oct. 2014). See also 'Speech by the Russian Foreign Minister, Sergey Lavrov, and his answers to questions from deputies during the 349th extraordinary session of the Federation Council of the Federal Assembly of the Russian Federation, Moscow, 21 March 2014' available at http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/1eb0f5937a80b6b444257ca500519090!OpenDocument (accessed 6 Oct. 2014).

This report has touched on a number of events, but has perforce only given a brief account; the tip of the iceberg for each. In the very few years since the last Report was published, there has been a marked change in the orientation of both Russia's internal and external affairs. However, it seems impossible at the current time to give an assessment of the long-term impact of this new situation. Current Kremlinologists have been complaining that Russia's direction of development is unclear.³⁵ There is clearly a new reset in the relations between Russia and its near and not so near neighbours. There may also be some second thoughts as to Russia's willingness to accept a western view of rule of law. Within Russia there are unresolved political questions and an increasing economic uncertainty, which may prove to be a toxic mix. We will continue to monitor future developments, but with a degree of apprehension almost unprecedented in the last quarter century.

³⁵ See, for example, B. Whitmore, 'The Power Vertical Podcast: Fear And Foreboding In The Kremlin Court' 26 September 2014 <http://www.rferl.org/content/podcast-fear-and-forbeboding-in-the-kremlin-court/26608005.html>