

THE RIGHT TO TAKE PART IN THE CONDUCT OF PUBLIC AFFAIRS: A FOCUS ON INTERNATIONAL LAW AND CONSTITUTIONAL REGULATION IN RUSSIA

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From the perspective of international human rights standards of public participation, this article explores the constitutional law genesis of the right to take part “in managing state affairs” in Russia. We start our analysis with a brief outlook of the right to public participation in Russia. Then we continue studying the sources of international human rights law guaranteeing a set of participatory rights and to which the Russian Federation is a state party. Finally, the reader is provided with an analysis of the constitutional genesis of participatory rights in Russia: from the RSFSR Constitution of 1918 until the 1993 Constitution of the Russian Federation. Tentative outcomes are summarised in the concluding section.

Introduction

The process of “good administration” rests on the principles of transparency, responsibility, accountability, sensitivity for the needs and aspirations of the people, and public participation in government.¹ This article deals with the last principle in this least, namely with the principle of public participation in government. The issues of public participation are contemplated by many fundamental theories of law and democracy. Among the complexity of such theories, a theory of “Deliberative democracy,” conceived by J. Habermas, would perhaps be the most relevant for legal scholarship. The Habermasian theory looks at the issues of good governance through the prism of the relationships between the steering centre of the state and civil society.² Public participation is understood by Habermas as the deliberation of the most contested political issues with a view to finding a compromise solution. As for the Russian constitutional scholarship, the studies of citizen involvement in decision-making are associated first of all with the name of S.A. Avakian. In his numerous works, Avakian looks at important problems related to public participation such as ensuring legal guarantees for public opinion, the mechanism of civil protests, participation in elections and in the so-called “consultative modes of democracy”, i.e. meetings, demonstrations, petitions, etc.³

¹ Such an understanding of the process of “good governance” was proposed by the former UN Commission on Human Rights in its Resolution 2000/64. UN Commission on Human Rights, *Commission on Human Rights resolution. 2000/64 The role of good governance in the promotion of human rights*, 27 April 2000, E/CN.4/RES/2000/64, reproduced on the official web-page of the UN High Commissioner for Human Rights, available at: <http://www.refworld.org/docid/3b00f28414.html>.

² See, e.g. Jurgen Habermas, *Between Facts and Norms* (The MIT Press, Cambridge, Massachusetts, MA, 1996), Jurgen Habermas, *Legitimation Crisis* (Polity Press, Cambridge, 1989).

³ See e.g. S.A. Avakian, *Politicheskij plyuralizm i obshchestvennye ob"edinaniya v Rossijskoj*

Let us now consider a constitutional law genesis of the right to take part in managing state affairs in Russia, in accordance with universally recognised standards of political rights.

1. International Legal Obligations of the Russian Federation to Ensure the Right to Participation

As a fundamental political right, public participation is guaranteed by art. 25 of the International Covenant on Civil and Political Rights (the ICCPR). This article imposes a legal obligation on state parties to guarantee both the right and *the opportunity* to practice participation in the conduct of public affairs. A very similar right – the right to take part “in managing state affairs” is guaranteed to Russian citizens by art. 32 of the 1993 Constitution of the Russian Federation (the 1993 RF Constitution). The Constitutional Court of the Russian Federation emphasises that public participation is not only an individual right but also an integral part of the electoral process, which belongs to every working democracy.⁴ At least formally, such an interpretation is in line with the guidelines of the UN Human Rights Committee, according to which art. 25 of the ICCPR “lies at the core of democratic government based on the consent of the people”.⁵ The scope of the above-mentioned constitutional article 32 differs from Article 25 of the ICCPR. The ICCPR guarantees the right and opportunity to engage in the exercise of ‘legislative, executive and administrative powers’.⁶ The corresponding provision in the 1993 Russian Constitution also extends to administering justice. Participation in administering justice can be implemented, for instance, through the institution of the jury in criminal trials. Furthermore, unlike the practices outlined by the ICCPR, the 1993 Russian Constitution is silent about the opportunity to participate in political life. Opportunity means not only free consensual participation, but also the presence of an effective means of enjoying this right. True, the non-coercive nature of public participation was reaffirmed by the Constitutional Court of the Russian Federation when it declared that participation in the conduct of state affairs does not belong to the duties of

Federatsii (in Russian) (Moscow: Rossijskij juridicheskij izdatel'skij dom, 1996), S.A. Avakian. *Publichnaya vlast': konstitutsionno-pravovye aspekty* (in Russian), in: 2 Vestnik Tyumenskogo gosudarstvennogo universiteta (2009), pp. 12-21; S.A. Avakian, *Demokratiya protestnykh otnoshenij: konstitutsionno-pravovoe izmerenie* (in Russian), in 1 Konstitutsionnoe i munitsipal'noe pravo (2012), pp. 3-17.

⁴ The Constitutional Court of the Russian Federation, referring to the rights under article 32 of the Constitution, proclaimed that these rights are: ‘the embodiment of both the personal interests of every voter and the public interest resulting in objective outcomes of elections and consequently in the formation of public authorities’. RF, the Constitution Court, *Postanovlenie* of 29 November 2004, No. 17-P, ‘*Po delu o proverke konstitutsionnosti abzatsa pervogo punkta 4 stat'i 64 Zakona Leningradskoi Oblasti “O vyborakh deputatov predstavitelnykh organov mestnogo samoupravleniia v Leningradskoi Oblasti” v sviazi s zhaloboi grazhdan V.I. Gnezdilova i S.V. Pashigorova*’, in *SZ RF*, 6 December, 2004, No. 49, item 4948.

⁵ UN Human Rights Committee, General Comment 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6, at 168 (2003), reproduced at: <http://www.un.org/ru/documents>, par. 1.

⁶ *Ibid.*, par. 5.

citizenship.⁷ Russian law, nonetheless, does not specify any obligation to provide real chances to engage in public participation. One request concerning opportunities for public participation, addressed by plaintiff Osipov to the Constitutional Court, has not been ruled upon. Mr. Osipov claimed in the court that adopting federal and regional statutes without consulting citizens violates the rights guaranteed by article 32 of the Constitution. Without going into details, the Constitutional Court considered the complaint of Mr. Osipov formally inadmissible. Thus, the Russian Constitutional Court avoids confronting the issue of effective opportunities to engage in public participation.⁸

The implementation mechanism of the ICCPR is fortified with the control mechanism which is put in motion via the UN Human Rights Committee. This Committee monitors the implementation of the provisions of the Covenant by virtue of considering state periodic reports and dealing with the individual communications regarding possible violations of the rights, set forth by the Covenant. In order to acknowledge the jurisdiction of the Committee to consider individual communications, the state party to the ISSPR ratifies the Optional Protocol to the Covenant.⁹ Such a protocol on the compulsory jurisdiction of the Human Rights Committee concerning dealing with individual communications entered into force for the Soviet Union on 1 January 1992.¹⁰

In order to implement those legal obligations which had been undertaken by Russia within the frames of the ICCPR, the Russian Federation should primarily introduce legal measures of implementing civil and political rights.¹¹ Of course, the measures of compliance with the provisions of this Covenant should go beyond the threshold of introducing new legislation and providing the means of vindicating the violated rights.¹² Nonetheless, in this article we consider only constitutional law foundations of implementing the right to take part in the conduct of public affairs in

⁷ RF, the Constitutional Court, *Postanovlenie* of 11 June 2006, No. 10-P, 'Po delu o proverke konstitutsionnosti polozhenii punkta i stat'i 64, punkta 11 stat'i 32, punktov 8 b 9 stat'i 35, punktov 2 i 3 stat'i 59 Federal'nogo Zakona "Ob osnovnykh garantiakh izbiratel'nykh prav i prava na uchastie v referendumakh grazhdan Rossiiskoi Federatsii" v svyazi s zaprosami Verkhovnogo Suda Rossiiskoi Federatsii i Tul'skogo Oblastnogo suda', in SZ RF, 24 June, 2002, No. 25, item 2515.

⁸ As far as the applicant had asked to review the constitutionality of the provisions of the basic law, his application was found inadmissible. RF, Constitutional Court, *Opredelenie 'Ob otkaze v prinyatii k rassmotreniiu zhaloby grazhdanina Osipova Ivana Anatol'evitcha na narushenie ego konstitutsionnykh prav zakonodatelstvom Rossiiskoi Federatsii'*, 21 December, 2004, No. 414-O. The document has not as yet been officially published. Derived from the Russian law database 'ConsultantPlus', <http://www.consultant.ru> (accessed 7 May, 2012).

⁹ Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9, reproduced on the official web-page of the UN High Commissioner for Human Rights, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>.

¹⁰ USSR, the Supreme Council, *Postanovlenie* of 05.07.1991 N 2305-1 CCCP, reproduced in the official Russian law database "Consultant," available at: <http://www.consultant.ru>.

¹¹ UN Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), reproduced at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>, par. 6.

¹² *Ibid.*, par. 15.

Russia. Our analysis of the constitutional law genesis of this right is conducted with due consideration of the opinions of the UN Human Rights Committee. Such opinions were expressed in the General Comments of this Committee on Russia. The Russian Federation has submitted six periodic reports to the Committee.

The right to take part in the conduct of public affairs in Russian constitutions.¹³

Constitutional law regulation: before Russia's accession to the ICCPR

The first Russian socialist Constitution of 1918 entrusted the Soviets - mixed-up legislative and executive organs, represented by the privileged social class, i.e. the proletariat, with all the resources of state power. The 1918 RSFSR Constitution guaranteed, however, participatory-related rights and freedoms: freedom of religious and antireligious propaganda (art. 13), freedom of expression (art. 14), freedom of assembly (art. 15), the right to organise, presupposing that workers and peasants receive administrative, financial, and other types of assistance from the state to implement this freedom (art. 16) and access to knowledge, which implied that the state provides complete and free education for workers and the poorest peasants (art. 17).

The 1924 USSR Constitution, which represented the legal basis for the newly established Soviet Union, was aimed primarily at constructing a new national state. It basically concentrated on the division of powers between the central, regional, and local Soviets. Hence, we cannot find any mention of participatory rights, either in the text of this document or in the text of the 1925 Constitution of the RSFSR, which was for the time being one of the republics, constituting the Soviet Union.

The 1936 USSR Constitution again reiterated a set of participatory rights: the right to education (art. 121), freedom of conscience and religion, including the right to anti-religious propaganda (art. 124), the rights to freedom of expression, freedom of the media, freedom of assembly and meetings, freedom of marches and demonstrations (art. 125), as well as the right to form trade unions, cooperatives, youth and sport associations, as well as cultural, technical, and scientific communities. That constitution emphasised the leading role of the Communist Party by promulgating that the most active workers, peasants, and intellectuals should be members of the Communist Party (art. 126). Similar provisions can be found in the 1937 RSFSR Constitution. In the mid 1950s Soviet power and propaganda, at least officially, emphasised the modes in which Soviet citizens could take part in public affairs. For instance, Pizhnikov remarks that a nation-wide discussion of draft legislation became a prevalent practice during the period of 1956-1965.¹⁴ Moreover, workers' conferences were also common throughout the Soviet Union. Such conferences were initiated by the central organs of the administration or by public associations. The following data, provided by Pizhnikov, reveals the character and scale of such practices. For example, during 1953-1960 there were 80 all-Union

¹³ The texts of all these constitutions (in Russian) is available on the Russian law database "Garant", available at: <http://constitution.garant.ru>.

¹⁴ A.V. Pyzhnikov, *Khrushchovskaya "ottepel"* (in Russian) (Moscow: Olma-Press, 2002), p. 137.

conferences of workers entailing altogether more than 100,000 individuals. The Soviet republics organised 80 conferences in 1958, and 125 such events in 1959.¹⁵

2.2 Constitutional law regulation of the right to take part in the conduct of public affairs after Russia's accession to the ICCPR

The 1977 USSR Constitution appears to be the most thorough with respect to participatory guarantees. Perhaps this is owing to the fact that the Soviet Union ratified the ICCPR in 1973, i.e. not long before the constitutional changes of the late 1970s. Hence, the 1977 USSR Constitution promulgated the enhanced participation of citizens in state affairs, the constant consideration of public opinion, the strengthening of control by citizens over state authorities, the enhancement of the activity of voluntary associations (art. 9). All citizens were guaranteed the right to take part in decision-making regarding public affairs (art. 9). The right to discuss laws and political decisions became officially guaranteed (art. 5, art. 48). The 1977 Constitution set forth a solid foundation for including labour collectives in state affairs. This document, defining itself as a socialist constitution, of course, emphasised the role of workers, not citizens in general, in the management of public affairs. Art. 8 of the 1977 Soviet Constitution stipulated that labour collectives take part in discussing public affairs. As for "state affairs", i.e. those issues referring directly to state management and administration, art. 8 mentioned the participation in planning the economy by virtue of engaging in planning the production processes. Labour collectives were also entitled to engage in issues such as discussing and resolving the issues of managing institutions and enterprises, improving the living and labour conditions of workers, educating potential employees, and managing the finances used in developing the production process, as well as social and cultural events or financial incentives to employees. Art. 8 stipulated that the labour collectives should take part in discussing and managing issues such as social development, enhancing competition regarding the best performance at work among the employees, popularising new work methods, upholding the rules of behaviour at working places, educating employees in the spirit of the main communist principles, and developing political culture, consciousness, and professional qualifications. This constitution specifically mentioned the right of trade unions, "All-Union Lenin Communist Youth Union", cooperatives, and other public associations to manage affairs and to make decisions about political, economic, and socio-cultural issues (art. 7). Consonant with the standard participatory entitlements, such as freedom of expression (art. 50), the right to association (art. 51) or the freedom of conscience and religion (art. 52), the 1977 Soviet Union constitution guaranteed other participatory rights. For example, the right to a nation-wide discussion of the most important issues of the state (art. 5), the rights of citizens to exert control over state affairs and the right to take part in the sessions of state organs (art. 48), the right to submit proposals concerning the improvement of state organs, and the right to criticise their work (art. 49). Almost identical provisions were included in the 1978 RSFSR Constitution. After the

¹⁵ *Ibid.*, p. 138.

adoption of the 1978 RSFSR Constitution various organs of public administration composed of the representatives of ordinary citizens became widely spread. Among such organs we can mention e.g. public divisions, groups, subdivisions of the councils, commissions, and inspections under the aegis of public authorities, coordinating councils dealing with educational work with youth or with professional orientation of students.¹⁶

In 1978 when considering the first Periodic report of the USSR - in the part of implementing art. 25 of the ICCPR - the UN Human Rights Committee requested more information from the Soviet representatives on the role of people in the formulation of laws and the nature of the system of people's control.¹⁷ People's control committees represented one of the avenues for participation in the conduct of public affairs during the Soviet regime. Ordinary citizens were empowered to carry out public functions while belonging to these special supervising bodies, which were constitutive parts of the state. We can still find mention of such intermediate organs in the reports of the UN Human Rights Committee. For example, in 1985 the Republic of Belarus, which during those times was one of the Soviet republics, clarified what the "people's control committees" are for the Committee.¹⁸ Such committees were invested with broad control functions in various areas, e.g. they exercised control over implementing the state economy plans and supervised the observance of labour law. Moreover, those committees elaborated the schemes of optimising public expenses, following all possible cases involving the misuse of public resources.¹⁹ The 1965 All-union statute on the organs of people's control established the principles of their activity.²⁰ The decision of the socialist leaders to create a system of citizens' direct control over public administration was ideologically-based, anchored in the belief that the right to control the planned economy belong to the citizenry.

¹⁶ See for example, Ts.A. Yampol'skaya. *Obshchestvennye organizatsii i razvitie sovetskoy sotsialisticheskoy gosudarstvennosti* (in Russian) (Moscow: Yuridicheskaya literatura, 1965), pp. 80-89. G.V. Barabashev, K.F. Sheremet, *Sovetskoe stroitel'stvo* (in Russian) (Moscow: yuridicheskaya literatura, 1981), pp. 560-565.

¹⁷ UN Human Rights Committee, Concluding observations on the USSR. CCPR, A/33/40 (1978), par. 430.

¹⁸ For example, the Republic of Belarus clarified to the Committee that the functions of these organs were to monitor the implementation of economic and social development plans, to ensure the economic use of human and material resources, to combat waste, to promote and encourage the scientific organisation of work and to supervise the progress of work in economic enterprises. In the case of persons guilty of a violation or breach of the law, the organs of people's control endeavoured to encourage criticism and to discuss the errors of their ways with such persons. Any material on misappropriation by officials under investigation by the organs of people's control was sent to the Procurator's Office for a decision on whether criminal proceedings should be initiated.

The members of the organs of people's control were elected for periods of two years by general assemblies of workers. See: UN Human Rights Committee, Concluding Observations on Belarus, UN Doc. CCPR A/40/40 (1985), available at: <http://www.bayefsky.com>, last retrieved 20 February, 2013, par. 375.

¹⁹ On People's control committees see, for example: S.N. Ikonnikov & A.M. Sinitsyn, *Deyatel'nost' organov narodnogo kontrolya Moskvy: 1965-1977* (in Russian) (Moscow: Nauka, 1984); Makarov, *supra* note 108; V.I. Turovtsev, *Narodnyy kontrol' v sotsialisticheskoy obshchestve* (in Russian) (Moscow: Politizdat, 1974).

²⁰ USSR, *Zakon* of 9 December 1965 No. 4224-VI "Ob organakh Narodnogo kontrolya v SSSR", *Vedomosti VS SSSR*, 1965, No. 49 item 718.

In 1985 President Gorbachyov introduced the policy of “*Glasnost*,” which implied a significant relaxation of censorship in the mass-media, the introduction of transparency in public administration, and the possibility of bringing court action against executive organs. However, the period of *post-perestroika* brought a backlash with respect to the participatory rights of Russian citizens. Although the Soviet Union acknowledged the jurisdiction of the UN Human Rights Committee in 1991, the implementation of participatory rights fell short of being effective. The era of *post-perestroika*, which started with the collapse of the Soviet Union in 1991, is known for its disregard for the main avenues of participation.²¹ Nonetheless, in 1985 when dealing with the Second periodic report of the Soviet Union the UN Human Rights Committee acknowledged the progress achieved since the submission of the initial report in implementing the rights set forth by the Covenant. Nonetheless, the Committee requested a percentage of Soviet citizens successful in reaching high office who were not members of the Communist Party.²² In other words, the Committee remained concerned with the requirement of membership in the Soviet Communist party as one of the compulsory terms for access to public office.

The period of 1988–1991 is also significant for the development of substantive participatory rights, as it characterised the further development of the culture of political associations and the rise of multi-partyism. Challenging the leading communist ideology, individuals started to establish informal political associations. De jure, these associations were non-political clubs or citizen movements. However, in practice, they pursued an oppositionist political agenda. The ideas of abolishing art. 6 of the 1977 Soviet Constitution on the leading role of the Communist Party also spilled over to the official level, having been discussed during the First Session of the People’s Deputies of the Soviet Union in 1989. In 1991 Yeltsin issued several decrees, abolishing the activities of the Communist Party.²³ At present, art. 13 of the 1993 Russian Constitution guarantees ideological pluralism and multi-partyism. Nevertheless, in 1990 when considering the Third periodic report of the USSR, the UN Human Rights Committee was concerned with the lack of effective machinery for the full realisation of civil and political rights.²⁴

In 1993 the present Constitution of the Russian Federation was adopted. The 1993 Constitution of the Russian Federation mentions the right to take part in public affairs (art. 32) as well as an array of participatory entitlements, e.g. freedom of conscience and religion (art. 27), freedom of ideas and speech, freedom of mass communication, the right to freely look for, receive, transmit, produce and distribute

²¹ On the post-perestroika period see: S.E. Kurginyan, B.R. Autenshlius, P.S. Goncharov, Yu.V. Gromyko, I.Yu. Sundiev & V.S. Ovchinskii, *Postperestroika: kontseptualnaya model’ razvitiya nashego obshchestva, politicheskikh partij i obshchestvennykh organizatsij* (Moscow: Politizdat, 1990).

²² UN Human Rights Committee, Concluding observations on the USSR. CCPR, A/40/40 (1985), par. 267.

²³ On these decrees see, for example, Michiel Elst, *Copyright, Freedom of Speech, and Cultural Policy in the Russian Federation* (Leiden: Martinus Nijhoff Publishers, 2004), 124.

²⁴ UN Human Rights Committee, Concluding observations on the USSR. CCPR, A/45/40 (1990), par. 74.

information in any legal way (art. 29), the right to association, including the right to set up trade unions (art. 30), the right to assemble peacefully, to hold rallies, meetings and demonstrations, marches and pickets (art. 31), the right to address personally, as well as to submit individual and collective petitions to state organs and local self-government bodies (art. 33), and the right to education (art. 43). Commenting on the Fourth periodic report of the Russian Federation in 1995, which had been submitted after the adoption of the 1993 RF Constitution, the Human Rights Committee considered that chapter 2 of the Constitution, which enumerates the rights and liberties of the individuals, conforms to many of the basic rights provided under the Covenant.²⁵ However, it was pointed out that “much remains to be done to strengthen democratic institutions and respect for the rule of law”.²⁶ Although there were clear failures in public administration in those days and the law was not always implemented by the authorities in good faith, it is impossible to disregard the fact that during the Yeltsin administration, the 1993 Russian Constitution as well as important federal legislation were introduced, representing a legal foundation for participatory opportunities, which are still in progress. Considering the Fifth periodic report of the Russian Federation in 2003 with respect to the rights under art. 25 of the ICCPR, the Committee strongly recommended Russia “to restore the rule of law and political legitimacy in the Republic of Chechnya”.²⁷ Finally, dealing with the Sixth periodic report of Russia in 2009, the Committee was concerned about the reports of excessive use of force by the police during demonstrations, in particular in the context of the 2007 Duma elections and the 2008 presidential elections, with the possibility of criminal liability for defamation and with the excessively wide legal definition of “extremism”.²⁸ Perhaps, it was the result of the diplomatic warning of the Committee or perhaps this amendment came autonomously, however, in 2011 defamation in the form of an insult was decriminalised in Russia.²⁹

Conclusions

Although the 1948 Universal Declaration of Human Rights proclaims in art. 21 (3) that “the will of the people shall be the basis of the authority of government,” the Soviet Union only included the provision about the people as a source of state power in the Soviet Constitution of 1977 (accordingly in the 1978 RSFSR Constitution). Respectively, the right of individuals to take part in the conduct of public affairs first became constitutionally guaranteed in the Soviet Union in 1977, i.e. after the USSR ratified the ICCPR.

²⁵ *Ibid.*, 367.

²⁶ UN Human Rights Committee, Concluding observations on the Russian Federation, A/50/40 (1995), par. 364.

²⁷ UN Human Rights Committee, Concluding observations on the Russian Federation, A/CO/79/RUS (2003), par. 23.

²⁸ UN Human Rights Committee, Concluding observations on the Russian Federation, A/C/RUS/CO/6 (2009).

²⁹ RF, Federal’nyj zakon of 07.12.2011 No. 420-FZ (the most recent amendment of 28.12.2013) “*O vnesenii izmenenij v Ugolovnyj kodeks Rossijskoj Federatsii i otdel’nye zakonodatel’nye akty Rossijskoj Federatsii*”, in SZ RF, 12.12.2011, No. 50 item 7362.

Dealing with the compliance by Russia with its legal obligations to implement the right to public participation according to art. 25 of the ICCPR, the UN Human Rights Committee has sometimes remained concerned with the situation around this right in Russia. Nonetheless, it is a positive finding that Russia is gradually introducing legal amendments, following the recommendations of the Committee. This proves that the legal system of Russia is sensitive to the international standards of political rights.