



Valéry D. Zorkine

**President
of the Constitutional Court of the
Russian Federation**

The Constitutional Court of the Russian Federation is a national judicial body for the protection of human and citizens' rights and freedoms by means of constitutional proceedings in accordance with the generally recognised principles and norms of international law and in conformity with the Constitution.

The founding in 1991 of the Constitutional Court of Russia, a specific judicial institution of constitutional control, was one of the particular events marking adherence of the new Russia to the values of European law. It did not come into being easily. The range of opinions in the heated parliamentary, scientific and public debates on the status of the constitutional control body and the adoption of legislation regarding it was broad: proposals included establishing a subsidiary advisory body attached to Parliament; assigning a constitutional and control function to courts of general jurisdiction; or setting up a system of judicial control of constitutionality on the American model. Ultimately, the European model of constitutional jurisdiction and proceedings was chosen, in view of the affinity between the developing legal system of Russia and the Continental (Roman-Germanic) law family.

The powers of the Constitutional Court, as a judicial body of constitutional control exercising its judicial power independently by means of constitutional proceedings as defined in the current Law on the Constitutional Court of the Russian Federation of 1994, are aimed at guaranteeing the legal superiority and direct application of the Constitution on the entire territory of the Russian Federation and protecting the foundations of the constitutional regime and fundamental human and citizens' rights and freedoms.

In the exercise of its powers, the Constitutional Court of the Russian Federation is governed solely by the Constitution; when taking up office, judges of the Constitutional Court take an oath to obey only the Constitution. According to its Article 15 § 1, it is the Constitution that has supreme legal force; laws and other normative acts adopted in the Federation may not contravene the Constitution. At the same time, Article 17 § 1 recognises and guarantees human and citizens' rights and freedoms in the Russian Federation according to the generally recognised principles and norms of international law and in conformity with the Constitution. These principles and norms, as well as the international treaties of the Russian Federation, form an integral part of its legal order, and an international treaty shall prevail over domestic law in case of conflict (Article 15 § 4).

Accordingly, the provisions of the Constitution that envisage specific human and citizens' rights and freedoms must be interpreted by the Constitutional Court in terms of the generally recognised principles and norms of international law.

The Russian Constitution provides for machinery allowing the introduction of new principles and norms, as well as international treaties, as they arise, into the domestic legal order, and the adaptation of existing ones as they develop.

Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force in respect of Russia on 5 May 1998, is now incorporated into the Russian legal order.

It was stated in the declaration made at the time of ratification of the Convention that Russia “recognises ipso facto and without a special agreement that the jurisdiction of the European Court of Human Rights is obligatory regarding the questions of interpretation and application of the Convention and its Protocols in cases of an alleged violation of these treaties’ provisions by the Russian Federation, when an alleged violation is committed after entry into force of these treaties with respect to the Russian Federation”. Being one of the High Contracting Parties to the Convention, Russia is bound to execute final judgments of the European Court in any case to which it is a party.

Similarly, Russia adheres to self-imposed restrictions, and abides by human rights and the principles of the rule of law and democracy.

Therefore, rights and freedoms provided for in the European Convention on Human Rights, since it is an international treaty, and the judgments and decisions of the European Court of Human Rights, in so far as they express generally recognised principles and norms of international law, form an integral part of the Russian legal order.

The regulation of human rights and freedoms in Russia is governed first of all by the Constitution, and by laws proceeding from the Constitution. However, such regulation must not contravene the Convention. The task of Russian courts, including the Constitutional Court, is to guarantee human rights, whether freedom of the press, the right of property, personal integrity, human rights in the field of criminal procedure or any other right. The Constitutional Court protects the fundamental rights guaranteed by the Constitution, which are essentially the same as those listed in the Convention, the observance of which is overseen by the European Court of Human Rights.

Both the Constitution and the Convention proceed from the fact that generally recognised fundamental human rights and freedoms in a modern State governed by the rule of law are inalienable and belong to everyone from birth.

Hence the Convention occupies a particular place in relation to traditional rules of international law and international treaties. It is defined as “a constitutional instrument of the European legal order” both by the European Court and prevailing legal doctrine. The Convention is uniquely positioned on the Russian legal scene. Under Article 15 § 4 of the Constitution, the Convention as an international treaty is incorporated into the Russian legal order and prevails over federal laws. At the same time, it is fair to say that under Articles 15 and 17 of the Constitution the Convention functions as a constitutional instrument of recognition and protection of human and citizens’ rights and freedoms.

The list of rights guaranteed by the Constitution corresponds to those in the Convention for the Protection of Human Rights and Fundamental Freedoms, and seems to be considerably broader as regards social and economic rights. The exception is the prohibition of slavery, which is provided for in Article 4 § 1 of the Convention but not in the Constitution. Furthermore, under Article 20 § 2 of the Constitution “capital punishment pending its abolition may be established by the federal law as an exceptional punishment for especially serious crimes against life and the accused should be granted the right to have his case considered by a court of jury”.

Russia has signed but not ratified Protocol No. 6 to the Convention and has not signed Protocol No. 13, and has thus not undertaken to prohibit the death penalty in all circumstances. However, under a decision of the Constitutional Court the death penalty may not be imposed at present.

It should be underlined that the two reservations made by Russia at the time of ratification of the Convention regarding temporary application of extrajudicial arrest, detention and holding in custody under the Code of Criminal Procedure in force at the time and under the Disciplinary Regulations of the Armed Forces have been de facto withdrawn by a judgment of the Constitutional Court. The legislator was obliged to follow that move by introducing amendments to the two relevant acts.

THE ROLE OF THE CONSTITUTIONAL COURT IN ENSURING INTERCONNECTION BETWEEN DOMESTIC AND INTERNATIONAL LAW

The practice of the Constitutional Court shows a tendency, predetermined by the Constitution, towards the increased role of judicial power in reinforcing interaction between the domestic and international legal systems, ensuring a more active integration of Russia into the international legal field, including the European legal landscape.

First and foremost, it is the power of the Constitutional Court to review the constitutionality of international treaties not yet in force in the Russian Federation that serves the purpose of reconciling domestic and international law (Article 125 § 2 (d) of the Constitution). Finding such a treaty to be constitutional clears the way for completion of the procedure of its entry into force as regards the Russian Federation through Parliament and for its incorporation into the Russian legal system as an integral part thereof. Otherwise, the international treaty or its particular provisions may not be implemented or applied. This is to avoid conflicts between domestic law and the international obligations of Russia. Another power of the Constitutional Court is to settle disputes between State organs of the Russian Federation and its constituent entities as to competence in connection with the conclusion of international treaties of the Federation.

However, the role of the Constitutional Court in ensuring interconnection between the domestic and international legal systems is not confined to its participation in the introduction of international legal norms into the domestic legal order by means of parliamentary procedure.

The international legal element emerges in a variety of other cases examined by the Constitutional Court where international treaties themselves do not constitute the subject matter. When finding that a particular law or other normative act or their specific provisions are consistent or inconsistent with the Constitution, the Constitutional Court often states that the provisions in issue are in conformity with or, on the contrary, are in contravention of, the generally recognised principles and norms of international law as they are expressed in the European Convention.

From the very outset, the Constitutional Court has leaned heavily on the generally recognised principles and norms of international law, applying them as a standard for the exercise of the human and citizens' rights and freedoms enshrined in the Constitution on the domestic level. The Constitutional Court does not call upon international legal argumentation merely to reinforce its own legal positions, but uses it to interpret the meaning of the constitutional text and to reveal the constitutional sense of the legal provisions under review.

By using international legal arguments to frame legal positions of a general nature which are binding on courts and other State bodies and officials, the Constitutional Court establishes in practice a constitutional rule to the effect that international legal principles and norms belong to the Russian legal order. References to international law add value to the decisions of the Constitutional Court, which at the same time demonstrates that it considers international law to be an essential criterion to which legislation and the courts' practice must correspond. Decisions of the Constitutional Court containing a legal position and interpretation of the constitutional meaning of a law will often provide directions for the proper application of international law, by the legislator when improving legislation, the courts when trying cases and citizens when asserting their rights.

Thus in December 2003 confiscation, which until then had served as an additional measure of punishment, was struck out of criminal legislation by the federal legislator. That measure significantly restricted the ability of the Russian Federation to fulfil its international obligations under a number of conventions to which it was already a party (the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; the United Nations Convention against Transnational Organised Crime of

15 November 2000) or which were being proposed for ratification (the Criminal Law Convention on Corruption adopted within the Council of Europe on 27 January 1999 and the United Nations Convention against Corruption of 9 December 2003).

In its decision no. 251-O of 8 July 2004, the Constitutional Court noted that at present the confiscation of property in the field of criminal justice is governed by a provision enshrined in Article 81 (3.1) of the Code of Criminal Procedure of the Russian Federation (confiscation of property admitted as material evidence in a criminal case). Being inherently a provision of criminal procedure – an independent branch of Russian law – it has its own legal purpose, namely the regulation of material evidence in criminal proceedings. Ensuring the fulfilment of international legal obligations undertaken by the Russian Federation in the field of criminal procedure, it does not and must not take the place of criminal-law provisions which and only which impose confiscation as a criminal sanction and, correspondingly, does not impede the settlement of confiscation matters in the field of criminal legislation having regard to the provisions of the above-mentioned conventions.

Proceeding from this stated legal position, the settlement of confiscation matters in the field of criminal legislation calls not merely for the reinstatement of Article 52 of the Criminal Code, but for the introduction of a new version of penal confiscation that would correspond to the requirements of the above-mentioned conventions.

Here is a further example. When reviewing Article 1070 of the Civil Code of the Russian Federation, under which damage caused in the course of court proceedings shall be compensated only if the fault of the judge is established by a court sentence that has acquired legal force, the Constitutional Court ruled that this provision did not contravene the Constitution since, according to this provision in its constitutional sense, the State is sued for damage caused in the course of civil proceedings as a result of unlawful acts when deciding a case on the merits. In its constitutional sense and combined with Articles 6 and 41 of the Convention, this provision may not serve as an excuse for the State not to compensate damage caused in the course of civil proceedings in other circumstances (that is, when the case is not decided on the merits) as a result of illegal acts or omissions of a court (judge), including violation of the reasonable time requirement, if the guilt of the judge is established not by a court sentence, but by another applicable court decision.

It is noteworthy that the reference to the Convention is made not only in the reasoning part of this decision but in the operative part as well.

SIGNIFICANCE OF THE JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS FOR THE PRACTICE OF THE CONSTITUTIONAL COURT OF RUSSIA

Under Article 32 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights is entitled to decide all matters concerning the interpretation and application of the provisions of the Convention and its Protocols. Therefore, the Russian Federation considers itself bound by the legal positions of the European Court as stated in its judgments and decisions when interpreting the provisions of the Convention and its Protocols and the case-law of the European Court.

The growing implementation of the European Court's case-law may serve as proof of the integration of the Russian legal system into the international judicial community.

Russia having officially recognised the jurisdiction of the European Court as regards the interpretation and application of the Convention and its Protocols to be binding, it follows that in their activities Russian courts must take its case-law into account.

While basing its findings on the provisions of the Constitution, the Constitutional Court of the Russian Federation refers at the same time to the European Convention in search of additional arguments to support its legal positions. Using the provisions of the Convention itself and subsequently judgments and decisions of the European Court of Human Rights in its reasoning was regular practice

for the Constitutional Court even before Russia became a party to the Convention. Applying legal positions of the European Court as reasons in support of its own decisions, the Constitutional Court tends to coordinate its position with that of the European Court by rendering decisions which do not simply correspond to, but are guided by, European Court practice. So far, there has been no instance of criticism by the European Court in its judgments and decisions of the practice of the Constitutional Court of the Russian Federation.

Reference by the Constitutional Court to the provisions of the Convention can in some cases result in confirmation of such interpretation of its text as leads to a better protection of a right or a freedom.

While it confirms the constitutionality of a legal provision, removes an outdated one or reveals the constitutional meaning of a norm on the basis of the interpretation of the corresponding Articles of the Constitution, the Constitutional Court refers at the same time to the provisions of the Convention and their interpretation by the European Court as additional reasons. Thereby, the Constitutional Court directs the normative process towards achieving harmony with the modern interpretation of the rights and freedoms enshrined in the Convention and its Protocols.

During the last nine years the Constitutional Court has referred in ninety decisions to the Convention and judgments and decisions of the European Court of Human Rights, which it considers to be a source of law. In particular, it has referred to the positions of the European Court regarding the right of an accused to be given legal assistance as applying to the pre-judicial inquiry and regarding criteria determining the limits of freedom of expression and information during election campaigns. The Constitutional Court has also used the findings of the European Court in its judgment of 7 May 2001 in *Burdov v. Russia*. Examining the constitutionality of legislative provisions on the social protection of citizens who had been exposed to radioactive emissions as a result of the Chernobyl disaster and on compensation of injury to health caused as a result of this disaster, the Constitutional Court referred to the provision of the aforementioned judgment of the European Court according to which the State cannot cite lack of funds as an excuse for not honouring a judgment debt.

In its decisions, the Constitutional Court has repeatedly underlined the significance of the constitutional right, in accordance with the international treaties of Russia, to appeal to international bodies of human rights protection, where all existing domestic remedies have been exhausted. The Constitutional Court would note that constitutional proceedings do not belong to those domestic remedies the exhaustion of which is required before appealing to such bodies. Citing the practice of the European Court, the Constitutional Court considers that the existence of an appellate judgment constitutes sufficient evidence that all domestic remedies have been exhausted. It is the Constitutional Court's opinion, based on the practice of the European Court, that supervisory review is not an obligatory requirement for exercising the right to appeal to these international bodies.

As is well known, under the Convention decisions of the European Court involve an undertaking by Contracting States to take "effective measures to prevent new violations of the Convention similar to those found by the Court's decisions".

In judgment no. 4-P of 2 February 1996, delivered before Russia ratified the Convention, the Constitutional Court stated that decisions of international bodies could lead to a re-examination of specific cases by the superior courts of the Russian Federation. This clears the way for superior courts to use their second-trial power with a view to revising judgments and decisions rendered previously, including those given by superior domestic courts. This legal position has been incorporated into the current Russian legislation on criminal procedure and arbitration proceedings.

Where rights and freedoms protected by the Convention have been violated by the law applied in a particular case, that is if the matter concerns a flaw in the law, then the legislator or the Constitutional Court, acting within the bounds of its jurisdiction, may decide its fate.

Thus, the Constitutional Court relies on the Convention and its interpretation by the European Court of Human Rights as it renders decisions and develops legal positions when reviewing laws and other normative acts.

The European Court of Human Rights' jurisdiction is subsidiary in nature, and mutual relations between the European Court and superior courts of European States are not to be considered as a one-way road. That is why the Constitutional Court of the Russian Federation turns to the European Court's case-law, as well as to the lessons drawn from the ongoing legal dialogue between the European Court and other European Constitutional Courts and the experiences of the latter. As a national judicial body of constitutional control, the Constitutional Court of the Russian Federation may prompt the development of the Russian legal system, its law-making and its law-enforcement practice towards conformity with a modern interpretation of the rights and freedoms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. In this way, the Constitutional Court plays an important role in the making and strengthening of Russian law as an integral part of the common European law landscape based on the Convention.