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PRECEDENT-SETTING VALUE OF RULINGS OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

Report

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1. Cases of Russian courts and the Precedent

A judicial precedent is an issue that is not limited in scope to merely the theory of law and the juridical science. It is a crucial problem for modern law development in terms of both law-making and law enforcement.

Judicial law-making (case-law) is not formally recognised in the legal system of Russia, it's interpretation in doctrine is discrepant, but it actually exists, affecting - through highest courts' instances - the development of law, like it takes place in some other countries of the European continent (Greece, Italy, Netherlands, Federal Republic of Germany, etc.).

In new Russia the Constitution now in force (Articles 126 and 127) does not attach binding nature to guidelines on issues of courts proceedings delivered by the Supreme Court of the Russian Federation and Higher Arbitration Court of the Russian Federation. At the same time the tradition of judicial law enforcement has been seeking to preserve such nature of these guidelines. Rulings and guidelines of supreme judicial bodies in the system of courts of ordinary and arbitration jurisdiction provide substantial influence on subsequent rulings of lower courts and to a certain extent actually assume precedent-setting value, contributing in judicial law enforcement to development of models which are optimum for subsequent courts' rulings in particular cases.

However, according to the Constitution of the Russian Federation (Article 118 as taken together with Articles 120, 125, 126 and 127) courts of ordinary and arbitration jurisdiction, including the Supreme Court and the Higher Arbitration Court, while hearing a specific case shall rule in accordance with a law. A court is obliged to petition the Constitutional Court and stay proceedings, should it arrive at a conclusion that the law it applies is unconstitutional, the degree of jurisdiction notwithstanding.

The Constitutional Court of the Russian Federation delivers a generally binding hence normative interpretation of the Constitution. It may terminate normative acts that it has ruled to be unconstitutional, or it would not permit an act entering into force (*e.g.* a non-ratified international treaty of the Russian Federation acknowledged as being unconstitutional). Occasionally while ruling that a law is in compliance with the Constitution, the Court may clarify its constitutional legal meaning and give its interpretation that would be a *sine qua non* of its constitutionality with a generally binding, and thus normative, meaning for all law-applying bodies, including courts of ordinary jurisdiction.

Rulings of the Constitutional Court resulting in normative acts recognised as unconstitutional, losing legal force have the same operation in time, space and scope of application to persons as decisions of a law-making body. Consequently they have general application which is characteristic of normative acts of which essentially law-applying rulings of the courts of general jurisdiction and courts of arbitration are devoid (judgment of the Constitutional Court of the Russian Federation of 16 June 1998 in the case on the interpretation of certain provisions of Articles 125, 126 and 127 of the Constitution of the Russian Federation).

Thus, the rulings of the Constitutional Court in cases on the constitutionality of laws and certain other normative legal acts of higher level essentially have normative nature (enjoy normative force) and as such acquire precedent-setting significance.

2. The Precedent and Legal Views of the Constitutional Court

Certain essential qualities of rulings of the Constitutional Court and legal views present therein draw them close to precedents. For instance, they are applicable not only to a specific case, but to all similar cases; they also are official in nature which makes them binding nation-wide. What follows from an independent law-making capacity of the Constitutional Court is the recognition of the fact that its rulings acquire a precedent-setting value and turn into sources of law.

The logic of such approach is quite natural for countries that are undertaking radical social, economic and political reforms. Normative regulation in these countries remains constantly in a state of contradictory development often lagging behind, or leaping ahead of reforms currently underway. That defines the need for 'constitutionalisation' of special and regional legislation, that is, its incorporation into a non-contradictory judicial system based upon the supremacy of the Constitution.

The creation of significant precedents within that process plays an important if not guiding role. The precedent-setting value of the rulings of the Constitutional Court is displayed most vividly in the resolution of legal collisions that arise from controversies between national legislation and international law, or between regional and federal laws, or between special and constitutional norms.

The passing of precedent-setting rulings in the course of the exercise of constitutional judicial proceedings makes up for one of the basic tools of legal modernisation. It is here that legal views of the Constitutional Court as reflected in its rulings may be related to *ratio decidendi* in the English law.

Precedents set by the Constitutional Court in their substance become a necessary regulator under the circumstances when radical reforms are underway, resulting in the fundamental changes of the legislation, while securing the stability of law. Here, through the practice of the Constitutional Court, law exercises simultaneously the function of stabilisation (conservative function) and the function of development (dynamics).

Practice has proven that by creating meaningful precedents in the crucial choke-points of reforms the Constitutional Court manages to maintain social stability without being a hindrance to innovations. It is shown most convincingly in the legal views of the Constitutional Court on matters of social protection (complaints on these matters have been a leader among all individual applications filed with the Constitutional Court during the preceding ten years).

Proceeding from provisions of the Constitution the Constitutional Court has formulated and then reaffirmed its legal view according to which an alteration (including by means of interim regulation) of earlier rules shall be exercised in such a way so as to ensure the abidance by the principle of securing the confidence of citizens in the law and actions of state which presumes legal certainty, the maintenance of reasonable stability of legal regulation, inadmissibility of arbitrary modifications in the existing system of norms, and the predictability of legislative policy in the social sphere. This, along with preciseness and specificity of legal norms that underlie the decisions of law-enforcement bodies, including courts, are prerequisites for the parties to respective legal relationships to be able to reasonably predict the consequences of their behaviour and to be assured of invariability of their officially recognised status, of their acquired rights, of effectiveness of their state

protection, in other words, to be confident that a right acquired according to the current legislation will be respected by authorities and will be realised.

It should be underscored that the Constitutional Court performs a stabilising function in the exercise of the principle of social state through its rulings and legal views contained therein, in their totality. At the same time the Court takes into consideration the existing economic capacity of the country and proceeds from the need to find a constitutional balance between competing rights and interests thus making sure that social rights of citizens are adequately protected while avenues for continued reforms, including in the sphere of social policy, are kept open.

Along with their precedent-setting value the legal views of the Constitutional Court carry a prejudicial force for other courts. If a norm of special legislation is acknowledged as unconstitutional, it loses legal force and becomes null. Moreover, not only that norm but norms with similar content embodied in other normative acts may not be applied by courts.

At the same time rulings of the Constitutional Court with legal views expressed there make for neither precedent, nor prejudice in their purity, for the Constitutional Court or for other authorities. Rather, they are normative acts *sui generis* with certain precedent and prejudicial features. Legal views of the Constitutional Court expressed in its rulings are in fact a reflection of its lawmaking.

Rulings of the Constitutional Court containing legal norms being sources of law themselves occupy a particular slot in the overall system of sources of law in Russia. Final rulings of the Constitutional Court are related to the interpretation of the Constitution. The interpretation could be either special (when it is achieved through a dedicated procedure, or interpretation of a particular provision of the Constitution), or casual (incidental) which may occur in other cases decided by the Constitutional Court, including review of constitutionality of laws. The legal force of final rulings of the Constitutional Court exceeds that of any law and amounts to the legal force of the Constitution itself which may not be applied in isolation from those rulings, let alone contrary to them. It might be appropriate to quote a US judge who said that “the Constitution is what judges say it is”. Respectively, any interpretation of the Supreme Law of the land given by the Constitutional Court in its legal views acquires constitutional force.

3. Transformation of Legal Views of the Constitutional Court in the Course of Time

A ruling of the Constitutional Court is final, it may not be appealed and, respectively, may not be reviewed. That notwithstanding, the Constitutional Court is not rigidly constrained by earlier legal views from which it can digress. Life goes on and new developments may prompt the Constitutional Court to set aside its earlier legal views. That happens because the Constitutional Court while applying and interpreting the Constitution ascertains not just the “letter” but also the “spirit” of provisions thereof at each consecutive stage of societal development thus adapting it to changing relations within the society (hence “living law” and “living Constitution”). Such calibration of earlier legal views does not repeal an earlier ruling, neither would it result in an overall review of the Court’s judicial practice. A ruling would remain in force and would not be reviewed. So would the legal view expressed therein. The Constitutional Court will have an opportunity to revisit it in the future when it could meet the demands of time.

The mode of digression from earlier legal views is prescribed by Article 73 of the Federal constitutional law "On the Constitutional Court of the Russian Federation" and by Paragraph 40 of the Rules of the Constitutional Court of the Russian Federation. It should be mentioned that similar procedures exist in other jurisdictions as well. In particular, they may be found in Paragraph 16 of the Law on the Federal Constitutional Court of Germany and in Paragraph 48 of its Rules.

Cases decided by the Constitutional Court in which it reviewed the constitutionality of certain provisions of the Customs Code regarding the admissibility of extra-judicial seizure of property may serve as example of alteration of legal views. On 20 May 1997 a chamber of the Constitutional Court passed a ruling acknowledging the constitutionality of Article 242 (paragraphs 4 and 6) and Article 280 of the Customs Code that entitled customs authorities to seize property as penalty for an offence. The operative part of that ruling contained a legal view which made the constitutionality of the aforesaid provision conditional on the guarantee of a subsequent judicial supervision over the lawfulness and reasonableness of such decision. On 11 March 1998 the plenary session of the Constitutional Court ruled on the constitutionality of Article 266 of the Customs Code and of Article 85 (second paragraph) and Article 222 of the Code of Administrative Violations. The Court ruled that those provisions were unconstitutional since the seizure of property could only be based on a court order. Like in the previous case, that legal view could be found in the operative part of the ruling. It gave an interpretation of the ruling of 20 May 1997 according to which "a court's act shall be the final outcome of a decision to seize a person's property". As a result the valid legal view of the Constitutional Court regarding the seizure of property is now contained in the judgment of the Constitutional Court of 11 March 1998. It is not accidental that the case that resulted in the aforementioned judgment had been initiated by the plenary session of the Constitutional Court, although respective published documents never referred to Article 73 of the Federal constitutional law "On the Constitutional Court of the Russian Federation".

Another departure from earlier legal views occurred when the Constitutional Court decided on the constitutionality of legislation regulating the privatisation of dwellings (also known as a "ruling on communal apartments" of 1998). The European Court of Human Rights, too, made statements on the admissibility of a digression from earlier legal views.

When wording a ruling in a new case the Constitutional Court may apply either a restrictive or an expansive interpretation of earlier legal views.

4. Significance for the Practice of the Constitutional Court of the Russian Federation of Principles and Norms of International Law and of Legal Views Expressed by the European Court of Human Rights

Human and citizen's rights and freedoms shall be recognised and guaranteed according to the generally recognised principles and norms of international law. Such principles and norms, as well as international treaties of Russia make up an integral part of its legal system; an international treaty will prevail, should its rules differ from those stipulated by an applicable domestic law (Article 15 (paragraph 4), Article 17 (paragraph 1) of the Constitution).

For instance, the Convention for the Protection of Human Rights and Fundamental Freedoms is incorporated into the legal system of the Russian Federation.

The Russian Constitution offers instruments which provide for an introduction into the domestic legal system of new principles and norms of international law and of international treaties as they emerge, or for an update of existing ones, as they develop. The Constitution of the Russian Federation does not envisage a complete subordination of the Russian laws to international treaties. Provisions of a national law that do not comply with a treaty would not lose their legal force. Rather, they will not be applied to a particular case. In other words, a treaty would not repeal a national law but would enjoy priority in terms of application of a norm of the former over a norm of the latter.

Neither the Constitution, nor the Federal constitutional law "On the Constitutional Court of the Russian Federation" would oblige the Constitutional Court to apply sources other than the Constitution itself. It might seem that a literal reading of both acts allows for a conclusion that the Court, while analysing questions of law posed before it would refer to the letter of the Constitution and its comprehension of that letter as a single code and measure of law. However, it has been a practice for the Constitutional Court ever since it began hearing cases, to apply the generally recognised principles and norms of international law as another measure with which the exercise of constitutional human rights and freedoms shall be coordinated.

The Constitutional Court would not limit itself to mere references to arguments based on international law to augment its legal views based on the Constitution, but would go further than that and use those arguments to clarify the meaning and significance of the constitutional text.

Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms by Russia created favourable background for the Constitutional Court to make use of the Convention in cases when there is a need to shape up, enrich, or reinforce a legal view on a particular issue thus substantiating a ruling of the Court.

Under Article 32 of the Convention the jurisdiction of the European Court of Human Rights shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto. Respectively, the legal views of the European Court of Human Rights that it may outline in its interpretative rulings would be binding for the Russian Federation.

One may agree with experts' statements to the effect that a growing introduction of elements of precedent law testifies to a more fundamental integration of the Russian judicial system into the international judicial community.

The Russian Federation officially recognised as compulsory the jurisdiction of the European Court of Human Rights in matters concerning the interpretation and application of the Convention and Protocols thereto. It follows that Russian courts are obliged to pay due regard to precedent-setting practice of the European Court of Human Rights.

More than once the Constitutional Court made references to rulings of the European Court of Human Rights in its own ruling (*e.g.* passed on 27 June 2000, 30 July 2001, 12 March 2001), having evaluated the former essentially as sources of law.

On the other hand, what should the Constitutional Court do if Russia is confronted with a necessity to fulfil a ruling of the European Court of Human Rights in a case it has lost?

According to the Convention rulings of the European Court of Human Rights envisage an obligation to undertake effective measures to prevent future violations of the Convention that might be similar to the ones that have been established by the Court's rulings.

An execution of a ruling of the European Court of Human Rights may require a review of domestic judicial decisions that have entered into force earlier. According to a legal view of the Constitutional Court (see judgment of 2 February 1996) decisions of intergovernmental bodies may result in review of particular cases by supreme judicial authorities of the Russian Federation, thus authorising the latter to initiate new hearings with a view of modification of an earlier decision on a case, even if passed by a supreme judicial authority.

That judgment of the Constitutional Court has virtually laid a legal foundation for a judicial review of cases, should such need arise in order to carry out a ruling of the European Court of Human Rights. Though doctrinal disputes about precedent are still going on, in Russia there are no more insurmountable obstacles on the way to execution of such rulings by way of judicial practice. Optimum shaping of instruments for such execution is, however, another matter.

One may imagine the following method of execution of rulings of the European Court of Human Rights. If a ruling resulted from a particular case and its execution does not require any alterations in the legal regulation, then such execution may be referred to the Supreme Court of the Russian Federation or the Higher Arbitration Court of the Russian Federation which would review respective rulings by domestic courts. Alternatively, if rights and freedoms protected by the Convention were violated by the application of a law in a particular case and it is the law that is deemed defective, then that law should be subjected to judicial review by the Constitutional Court.

Thus, the Constitutional Court through its practice, while reviewing laws and other normative acts, will pass rulings and elaborate legal views and in doing so it will lean, among other sources, on the Convention and its interpretation by the European Court of Human Rights.

The Constitutional Court of the Russian Federation as a judicial body of constitutional review guides the development of the Russian legal system, as well as its overall law-making and law-enforcement towards contemporary apprehension of human and citizen's rights and freedoms embodied in the European Convention. Consequently the Constitutional Court is playing a critical role in establishing and fortifying Russian law as a component part of a single European legal space founded on the Convention.

In that regard the Constitutional Court is paying attention to the practices of the constitutional courts of other countries. It is studying their legal views on all issues that fall within judicial constitutional review. That helps to avoid a self-destructive isolation and allows to pass rulings with due account of an enormous experience of foreign constitutional courts, in other words, within the context of a pan-european constitutional review that is exercised by constitutional courts that are destined to be custodians and guarantors of the contemporary constitutional order base on the principles of *Rechtsstaat* and the Rule of Law.