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The Judiciary and the Right to Court Protection: Constitutional Law Aspects



Summary

The paper presents the approach of the Constitutional Court of the Russian Federation to the principles of fair trial. An introduction is given to the general context and some historical remarks are made concerning developments in fair trial rights in Russia. The author discusses the constitutional law considerations of the judiciary and the right to court protection, analysing the main constitutional foundations of the organisation and administration of justice in the Russian Federation with particular focus on recent cases dealt by the Constitutional Court.

When the Russian Constitution was adopted in 1993, Russia was not yet a member of the Council of Europe (the ratification of the European Convention took place later, in 1998). However, the Russian legal system was influenced by the universal trend of the constitutionalisation of fundamental procedural guarantees, as obvious in the Basic Law, with almost all main elements of the right to fair trial being discussed in its text.

The basic principles of the administration of justice were enshrined in the Constitution, including the right to judicial protection, the principle of the independence of judges, the right to lawful court hearing, the adversarial principle and equality of arms; and other fundamental propositions and procedural guarantees. Additional

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procedural principles and guarantees were established later in procedural codes or developed by the case law of the Russian Constitutional Court.

Another important factor influencing modern civil procedure in Russia was the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the provisions and interpretation of which by the European Court of Human Rights have become one of the main incentives determining the general philosophy and directions and development of judicial procedures in Russia. Numerous judgments administered on claims against Russia dealt mainly with systemic problems in the judicial system, such as the non-enforcement of final decisions, the review system, which is in conflict with the principle of legal certainty, insufficient publicity, the procedural rights of suspects and accused persons in criminal proceedings, etc.

The adoption and ratification of the European Convention by the Russian Federation in 1998 was one of the crucial acts in reforming the judicial system. It is worth to note that, informally, this fundamental treaty had already had its impacts felt earlier – during the drafting of the Russian Constitution and its adoption in 1993. However, only after the ratification of the European Convention by the Russian Federation did its provisions, together with their interpretation by the European Court of Human Rights, become the main trigger of reforms in all types of proceedings: criminal, civil and administrative.

In accordance with a widely accepted approach, the right to fair trial has two main aspects: an institutional (which implies the independence and impartiality of the court, and its composition according to law) and the procedural (fairness, publicity, equality of arms, reasonable time of proceedings).

Unlike the European Convention, the Russian Constitution provides for the fair trial principles in different articles and different chapters in the Basic Law. Thus, the right to judicial protection is included in Chapter 2 about “Basic Rights and Freedoms of People and Citizens”, whereas the guarantees of judicial independence, adversarial proceedings, publicity of justice are regulated in Chapter 7 on “Judicial Power”.

Article 18 of the Constitution of the Russian Federation states that the rights and freedoms of people and citizens are directly enforceable, they determine the essence, the meaning and implementation of laws, and activities of the legislative and the executive authorities. What is crucial is that these rights are guaranteed by the judiciary. The position of the latter determines the attitude of citizens towards the state, and the level of trust in the system of public authority. It is indisputable that the establishment of the rule of law is inseparable from increase in judicial power, which should be truly independent and effective.

While the judiciary, as such, is one of the most efficient instruments to enforce human rights and fundamental freedoms, access to these rights, in other words, constitutional justice has a unique opportunity, through abolishing legislative provisions which violate human rights, to modify and improve any normative regulation during the consideration of a dispute.

Thus, constitutional justice is the best way to protect human rights and fundamental freedoms by means of the constitutional procedure. The Constitutional Court of

the Russian Federation as a higher-level judicial body which exercises control over the constitutionality of legislation and the competence of government bodies, decides cases by evaluating the literal meaning of a challenged provision and its interpretation during its implementation, and its place in the system of legislation.

According to the Constitution (article 118) the judicial power is exercised by means of constitutional, civil, administrative and criminal proceedings based on common values and principles including the independence of judges, their obligation to be guided solely by the Constitution and federal laws, the irremovability of judges, the immunity of judges, the equality of arms etc. At the same time, the Constitution of the Russian Federation guarantees the right to court protection and the right to fair trial for everyone. The interpretation and determination of the constitutional consequences of these principles have been the main methodological foundation of the Court's activities.

Access to justice is a fundamental guarantee of the enforcement of human rights. Assuming that discretionary powers of the legislature concerning the regulation of the right to access to justice and the right to fair trial, including arbitration, are not absolute and do not include the right of the legislature to limit the constitutional right to court protection, but obliges it to legislate in accordance with the principle of legal certainty, the Constitutional Court specified the meaning of its position¹ by issuing a group of decisions in 2012–2013 devoted to the strengthening of the procedural guarantees of fair trial.

The principles of the rule of law and constitutional legitimacy imply the unified meaning and understanding of law, not only within the various branches of the judicial system (e.g. criminal law courts or magistrate courts), but also in the judiciary as a whole. It is a task of the higher courts to provide a uniform interpretation of law. However, it does not repeal the main obligation to the Constitutional Court's decisions obligatorily applicable to all courts in the country. This is reflected in the Constitutional Court's rulings as well.

During the setting up of the judiciary organisation, the Constitutional Court is primarily guided by the requirements of the Constitution regarding legislature and the standards of regulation by the judicial administration and court procedures. Thus no limitation of human rights and fundamental freedoms can be arbitrary, but must be based on the constitutional principles of justice, equality and proportionality.

Principles and norms of international law and the international treaties of the Russian Federation strongly influence development in the Russian legal system *inter alia* due to the main position of the Constitutional Court on the necessity of employing these instruments at the national level. In this perspective, the correlation between the national legal system and international norms (primarily the European Convention on Human Rights) and mechanisms of constitutional evaluation of acts of conventional control as a ground for reopening cases in domestic jurisdiction was regarded in the case law of the Constitutional Court.

In 2014 we celebrated the 150th anniversary of the Court Charters introduced by the Emperor Alexander II, which were aimed at “the creation of a procedure which

is quick, fair, gracious and equal, in order to put the judiciary on top by granting it independence and to ensure respect for the law, for lack of which social welfare is impossible and which should be the sole guidance for everybody's activities".² The continuing validity of the above and the modern challenges to the state system is obvious. As one of the key factors of this system, the Constitutional Court needs to provide fundamental guarantees of constitutional legitimacy in the Russian Federation.

The Constitution of the Russian Federation guarantees court protection to everyone, and as a basis of other constitutional guarantees, this originates from the unique position of the judiciary resulting from the separation of powers as expressed in its prerogative over the administration of justice.

Clearly, the list of main procedural guarantees in the Russian Constitution textually differs from the traditional perception of the right to fair trial, but in essence it reflects the general elements of the universally recognized consensus about the content of this right: the adversarial process, the right to be heard, judicial independence, right to a lawful judge etc.

This assertion is also confirmed by the cases heard by the Russian Constitutional Court, which paid careful attention to the ensuring of procedural guarantees. It can be said that complaints against violations of the right to judicial protection (and therefore, to fair trial) constitute the major part of the total number of applications to the Constitutional Court of Russia.

Developments in the procedural principles during the cases heard by the Constitutional Court were accompanied by the reception of the general concept of the right to fair trial as enshrined in Article 6 of the European Convention.

The right to judicial protection has a special place among other constitutional rights, since it acts as a guarantee of all other rights and freedoms enshrined in the Constitution. Normally, all the constitutional principles related to fair trial are of universal nature, meaning that they must be applied in all types of proceedings existing in Russia. The Constitutional Court reiterated the universal nature of these principles on numerous occasions regardless of the particular case to be examined by the court (whether civil, criminal or administrative). Some of these principles, however, may have important specificities in different types of proceedings. Thus, the adversarial principle is not the same in civil (commercial) and criminal procedures.

In the Russian legal system the right to judicial protection takes a special place among the legal remedies established by the State, since it is maintained by an independent authority with special rules of composition and functioning. The Constitutional Court highlighted the nature of this right on numerous occasions as one of inalienable human rights and a guarantee and means of ensuring all the others rights and freedoms (Ruling from 11 May 2005 No 5-P). This right is guaranteed to everyone regardless of nationality, citizenship and legal status (individuals or legal entities) (Ruling from 17 February 1998 No 6-P).

During enforcement of the right to judicial protection, the affected person is not entitled to choose the particular means and ways of enforcement at his discretion, these are established by law.

The constitutional principles of judicial protection and other principles, like judicial independence and access to justice, must be understood and interpreted in accordance with the international obligations of Russia in the field of procedural guarantees. Russia's main treaties in this field include the European Convention, the International Covenant on Civil and Political Rights.

One of the main conclusions made by the Constitutional Court, which has affected the understanding and content of procedural guarantees (content of the right to fair trial), was an approach according to which not only the European Convention but also the cases heard of the European Court of Human Rights – in as much as they render an interpretation of the rights and freedoms enshrined by the Convention, including the right of access to judicial and fair justice – are an integral part of the Russian legal system, and must be taken into account both by the legislature and the judiciary in governing respective legal relationships and applying legal provisions (Rulings No 2-P of 5 February 2007 and No 4-P26 February 2010). Hence, the Constitutional Court automatically incorporated the approaches of the ECtHR into the Russian legal system. However, methodologically speaking, the reference regularly made by the Constitutional Court to the cases heard by the ECtHR is no less important, since this is the way of direct incorporation of the European approaches into the Russian legal system.

The independent and impartial judiciary plays a decisive role in the state system of protection of human rights and fundamental freedoms, and it is ultimately the judiciary which decides any legal dispute that predefines the interpretation of court decisions as legal acts issued in the name of the Russian Federation.

Discovering the nature of the right to fair trial, the Constitutional Court has repeatedly stressed its inalienable nature. The relevant constitutional provision is inseparable from the state's obligation to protect human dignity in all areas where human personality is top priority (Rulings of the Constitutional Court of the Russian Federation No. 29-P of 30 November 2012 and No. 14-P of 25 June 2013; Decision of the Constitutional Court of the Russian Federation No. 1336-O of 17 September 2013). During the discussion of the content of the aforementioned state obligation, the Constitutional Court presented its arguments on the fundamental principles of the constitutional order. As under the rule of law, the Russian Federation must provide effective protection of the rights and freedoms of men by such a judicial system which corresponds to all the requirements of justice based on criteria established by the legislature, which in a normative form predetermine a particular court within the court system and procedural norms must be applied in a particular case. This allows the judge or parties and other participants of a process and all the interested to avoid legal uncertainty (Decision of the Constitutional Court of the Russian Federation No. 882-O of 4 June 2013).

Following its previous positions, the Constitutional Court stressed that by guaranteeing the right to fair trial, Article 46 of the Constitution does not establish a precise procedure for the enforcement of the right and does not contain opportunity for a citizen to choose the means and procedures for applications to an arbitration court,

these rules are defined by law.³ Moreover, the characteristic features of certain types of legal relations underlying the subject-matters of cases, their nature, importance and the sanctions and consequences of their application predetermine the establishment of special ways and rules of procedure applicable to the different types of court procedures and various categories of cases (Ruling of the Constitutional Court of the Russian Federation No. 900-O of 4 June 2013).

The Constitutional Court paid particular attention to the afore-mentioned notions in respect of the evaluation of several provisions of the electoral legislation. As a universal means of protecting human rights and freedoms, the constitutional right to fair trial has security and recovery functions in respect of other constitutional rights and freedoms, and in this respect it serves as a fundamental guarantee of electoral rights. Constitutional principles under the rule of law require the establishment of legal regulation to provide civilised forms of dispute settlement in electoral law, which makes the existence of court mechanisms for the protection of electoral rights highly desirable.

Consequently, with a certain freedom of assessment during the creation of procedural instruments for their protection (including the establishment of various forms of enforcement, grounds for application to courts etc.) the federal legislator must take the constitutional features of these instruments into account for the enforcement of the legal requirements originating from electoral relations, and for remedying the violated rights of the participants in electoral relations (Ruling of the Constitutional Court of the Russian Federation No. 8-Pof 22 April 2013).

The Constitutional Court paid due attention to the protection of the rights of crime victims to justice and to be given fair compensation. The state's obligation to protect the rights of crime victims, including the right to defend their interests before a court or tribunal, follows from the constitutional provision on the protection of human dignity and the impermissibility of belittlement. In respect of the victims' dignity it is a *prima facie* state obligation to prevent and punish any crime that could cause harm and sufferings to a person in a way prescribed by law and to provide a victim with the opportunity to defend his/her rights by all means not prohibited by law. Otherwise it would lead to the belittlement of human dignity not only by a perpetrator of a crime but also by the state itself (Decision of the Constitutional Court of the Russian Federation No. 1336-O of 17 September 2013).⁴

As a general principle formulated by the Constitutional Court, courts should balance interests in a way that recognises the equal protection of rights for a person acting as a civil suitor who seeks to protect his/her rights in the case of a crime and another person acting as a defendant who has the right for the compensation of losses suffered as a result of unproven accusation (Decision of the Constitutional Court of the Russian Federation No. 1059 – O of 2 July 2013).

In reality, the enforcement of the fundamental constitutional principles under the rule of law, democracy and separation of powers depends on the efficiency of the national mechanisms put in place for the protection of human rights and freedoms, assuming the use of necessary legal means, including constitutional justice.

The analysis of constitutional complaints and the content of the acts preformed during constitutional review, evidence deficiencies in legal regulation as well as in law enforcement. However, this is the constitutional guarantee for the judicial protection of human rights as an inalienable component of citizens' constitutional status, which allows overcoming the institutional and procedural barriers to the appropriate use of human rights on the grounds of the principle of equality before the law, as one of the foundations of the constitutional order.

The legal positions taken by the Constitutional Court concerning the judicial system and judicial proceedings have assisted the refashioning of the national judicial system. In accordance with decisions of the Constitutional Court the legislation was substantially modified in order to strengthen human rights protection.

However, modifications in the legal regulation of the organisation and functioning of the judiciary is only a prerequisite for a substantial change in the system as a whole. The objective cannot be achieved without the proper interaction of all the components and the timely enforcement of judicial decisions.

In its decisions concerning the judicial system and judicial proceedings, the Constitutional Court was guided by the conviction that law, freedom, and the independent judiciary are inseparable features of the rule of law. Since the court is the ultimately body to decide legal disputes, a truly independent and impartial judiciary must be the most important institutional guarantee for the right to fair trial and, consequently, to the rule of law.

The future development of the judiciary requires adjustment and substantial improvement in the legal regulation of its different aspects, and in setting up approaches to tasks before the national judicial system consistent with the constitutional principles.

NOTES

- ¹ See The Ruling of the Constitutional Court of the Russian Federation from 19 April 2010 No. 8-P.
- ² The Order of Emperor Alexander II to the Senate on the Promulgation of the Establishment of Courts, the Charter of Criminal Procedure, the Charter of Civil Procedure and the Charter of the Penalties Imposed by Magistrates (20 November 1864).
- ³ See Decisions of the Constitutional Court of the Russian Federation, No. 1712-O of 24 September 2012, No. 1912-O of 4 October 2012, No. 1946-O of 18 October 2012, No.2150-O of 24 November 2012 and No. 769-O of 28 May 2013 etc.
- ⁴ See also Ruling of the Constitutional Court of the Russian Federation, No. 7-P of 24 April 2003.