Constitutions in the Epoch of Global Change and the Goals of Constitutional Review

Intervention by Dr Thomas Markert, Director, Secretary of the Venice Commission

First of all, I would like to thank you, Mr President, and the Court for inviting me as a representative of the Venice Commission to address this important event. This invitation reflects the good co-operation between the Venice Commission and the Constitutional Court of the Russian Federation.

The title of this conference refers to global change and constitutional review. Nobody doubts that we live in a period of globalisation. For constitutional experts it is also evident that constitutional review was never as widespread as it is today. But is this parallelism just accidental or is there a link between globalisation and constitutional review?

There is certainly one event, which favoured both globalisation and the expansion of constitutional control: the end of the Soviet system. It permitted the integration of the post-Soviet countries into the world economy and it led to a flourishing of constitutional justice and the creation of a large number of new courts.

It is interesting to note that the idea of constitutional control made its way in the Soviet Union even before the end of the communist system. 30 Years ago, in 1988, the Committee for Constitutional Supervision of the Soviet Union was established by constitutional amendment. This was not a full-fledged constitutional court but it showed that the concept of constitutional control was attractive for those wishing to reform the Soviet system. In the end I think it shows that within Soviet society there was a wish to have the rule of law. Constitutional control only makes sense if one wishes to have the rule of law.

The rule of law is of course also a motor of economic integration and co-operation. Economic relations are much more efficient if they are based on accepted legal rules and there is confidence that these rules will be applied and enforced by the courts. Arbitration can facilitate economic integration but, if you wish to deepen integration, courts are needed, as is shown by the example of the European Union. In parallel with economic globalisation we have also seen a globalisation of legal thinking and practice, especially in the field of human rights, and the development of international courts to protect human rights, first of all the ECtHR.

At the national level the development of constitutional review has not always been a smooth process. Legal cultures develop slowly and the rule of law does not arrive suddenly once a new Constitution is adopted. Constitutional control is particularly difficult to accept for politicians since it binds the parliamentary majority and imposes constraints on those in power. Such constraints are rarely welcome and politicians often oppose their democratic mandate from the people to judgments of constitutional courts.

There is therefore a natural tension between constitutional courts and the political bodies and in each society a *modus vivendi* has to be found, usually going through a number of conflicts, until constitutional control is really accepted. Unfortunately, we have also seen failures, and in some countries judgments by constitutional courts were not implemented and in extreme cases courts were dissolved and judges dismissed or prosecuted. It is particularly worrying that quite recently in a member state of the European Union the government and parliamentary majority have taken control of a hitherto independent and highly regarded constitutional court. In fact, recently the Venice Commission has been increasingly confronted with attempts to bring constitutional courts under the control of the political bodies.

We try to assist courts in such situations and, in general, courts are better able to resist such attempts if they have support from international bodies. International attention can help courts to resist attempts by politicians to control them. The Venice Commission has therefore promoted the networking of constitutional courts including through the establishment of the World Conference on Constitutional Justice. The World Conference brings together courts from more than 110 countries. These courts participate actively and at the last congress of the World Conference close to 100 countries were represented. Unfortunately the Constitutional Court of the Russian Federation was unduly prevented by the authorities of the host country from participating in this important event.

Mr President,
In parallel with the new flourishing of constitutional justice, globalisation and economic integration have led to a bigger role of international courts. Europe is in the forefront in this respect, with the European Court of Human Rights in the field of fundamental rights, the European Court of Justice in Luxembourg as the court of the European Union and the Court of the Eurasian Economic Union.

This development of the international courts has mainly strengthened the role of the national constitutional courts in defending human rights. Not least due to the role of the international courts, politicians have become more used to the fact that courts may overrule political decisions which contradict human rights.

On the other hand, international courts may be perceived as constraints by national courts, especially by constitutional courts. Traditionally no other court could reverse a judgment by a constitutional court. In Germany there used to be a saying that only the blue sky is above the Constitutional Court in Karlsruhe. By contrast, now constitutional courts have to respect the judgments of the European Court of Human Rights and, if members of the EU, the European Court of Justice in the respective fields of competence of these international courts.

This does, however, not mean that there is now a new hierarchy with international courts telling the national constitutional courts what to do. National constitutional courts derive their mandate from the national constitution. In many countries, not only in the Russian Federation, the national Constitution is the supreme legal text prevailing also with respect to international rules. On the other hand, at the international level, non-compliance with

the national Constitution does not absolve a state from the duty to comply with its international obligations.

A solution for this dilemma can be found only through the dialogue among courts. Direct contradictions between the texts of constitutions and international law are extremely rare. If there are conflicts, these arise due to the fact that courts interpret rules in a different manner. Among lawyers different interpretations can never be excluded and internationally, due to differences in legal culture, such differences are even more likely.

Nevertheless, within the Council of Europe, we have a system based on common values. On the basis of such common values, it has to be possible to arrive through dialogue at mutually acceptable solutions. Within this common framework international courts have to accept that there may be national peculiarities and national courts have to accept the role of the international courts of favouring integration through the development of common standards.

As lawyers we may have a preference for clear and tidy solutions with a clear hierarchy of norms. But in this area we have to adopt a flexible approach based on dialogue and on the common interest to promote the rule of law. Only such a flexible approach based on dialogue allows reconciling the legitimate interests of, on the one hand, upholding the national constitution and, on the other hand, allowing the international human rights system to function.

Rigid solutions preventing such reconciliation have to be avoided. On this basis the Venice Commission has been very critical of recent amendments to the Federal Law on the Constitutional Court of the Russian Federation. These amendments empowered the Constitutional Court to declare that no steps to enforce an international judgment may and should be taken if execution raises issues of constitutionality.

The Venice Commission acknowledged the right of the Constitutional Court to declare that a specific measure of execution of a judgment of the European Court of Human Rights raises issues of constitutionality. In this sense we considered perfectly acceptable that the Constitution may limit the manner in which an international judgment is executed. The Commission stressed, however, that this kind of difficulty does not affect – and may not affect - the obligation of the State as a whole to abide by the judgment. This obligation may not be forfeited but a constitutional means to execute the judgment has to be found. The amendments to the law, instead of favouring dialogue, rather risk closing the door and prevent the finding of a solution.

The Venice Commission is pleased to note that in the Anchugov case the Constitutional Court nevertheless managed to suggest a solution in line with the international obligation of the country. This constructive approach is welcome, but – as the YUKOS case shows- not sufficient. The aim should therefore remain to amend the law to leave room for dialogue between Russia and the Council of Europe.

Mr President,

I have mentioned this case not only since it concerns the Russian Federation but also since it is a case, which shows that, while globalisation and the extension of constitutional review are parallel processes, there can be conflicts between both developments. The solution can only lie in dialogue and a main aim of the Venice Commission is favouring such dialogue. Conferences such as this one contribute to dialogue and are therefore particularly welcome and important.

Thank you very much for your attention.