RIGHT TO HEALTH AND SUSTAINABLE DEVELOPMENT

THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION IN THE NATIONAL AND SUPRANATIONAL SYSTEMS OF JURISDICTIONAL BODIES: COOPERATION AND COMPETITION[1]

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Abstract

The article considers some problems of cooperation between the Constitutional Court of the Russian Federation and other jurisdictional bodies at both national and supranational levels in the

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context of the author's understanding of judicial constitutionalism. The author enunciates constitutional paradoxes of constitutional justice that bring to light the place and role of the Constitutional Court in the system of judicial bodies, the legal nature of the Court's decisions, and the character of its influence over practical jurisprudence. Offering to assess modern European unifying trends in the context of national-constitutional integration, the author rests his idea on the fact that the grounds and framework of implementation of European Cconventional requirements must be determined with due regard to the unity of axiological (value) principles of a national legal system associated with the constitutional polyphony of a Conventional legal system that monitoring mechanisms must be not only of subsidiary character but also of consensual one. In view of that, the paper analyzes processes of implementation of the ratio decidendi (rationale for the decision) of the European Court of Human Rights into the judicial practice of the Constitutional Court of the Russian Federation and the ways of overcoming conflicts that emerge between them.

Key words and phrases

Judiciary; Constitutional Court; general jurisdiction; interaction between national and international legal systems; European constitutionalism; conflicts between the constitutional jurisdiction and jurisdiction under the European Convention

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I. INTRODUCTION

The issue of interaction of constitutional review authorities with other courts (both of national and supranational jurisdictions) is relevant to all modern democracies, especially to those that acknowledge a specialized institution of constitutional review. As to particular solutions of this problem, some approaches are possible: overall ones that have international legal significance and those that are significant at the national level and are connected with the specificity of formation and functioning of a national judicial system and its constitutionality review authorities, as well as with historical and socio-cultural peculiarities of legal systems of states. This also concerns the Russian Federation to the full extent.

II. A NEW CONSTITUTIONAL IMAGE OF THE RUSSIAN JUDICIARY

While analyzing specific issues of interaction of the Constitutional Court of the Russian Federation (hereafter the RF CC) as a body of constitutionality review with other bodies of the national justice system and with supranational jurisdictional bodies, it appears to be important to take into account fundamental constitutional characteristics of the judiciary, as well as those changes in the Russian judicial system that have occurred lately. In particular, changes that affected fundamentals of an organizational structure of the judicial system were implemented under the amendments to the Constitution of the RF dated February 5, 2014[3] and other federal laws passed for the further development of changes. As a result of the reform, the new Supreme Court of the Russian Federation was created as a uniform and sole highest judicial body that is empowered to exercise judicial review over federal courts in procedural forms permitted by the relevant federal law and to expound on matters of judicial practice.

The main aims of the reform were to strengthen the unity of the judicial system of the RF, to ensure the uniformity of approaches in the

[3] Ref.: The RF Law on the amendment to the Constitution of the RF dated February 5, 2014 No. 2-FKZ "On the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation" // SZ RF. 2014. No. 6. Art. 548.

process of administration of justice regarding citizens and legal entities, to exclude any possibility of refusal to provide judicial protection if there is a dispute over the case jurisdiction, to establish general rules of organizing the judicature and to achieve uniformity in judicial practice. In this regard, the reform of the organizational structure of the judicial system in Russia is connected with a serious renewal of procedural law, harmonization of juridical procedural mechanisms that are aimed at ensuring uniform approaches to implementation of all types of jurisdiction in law enforcement practice of courts including decisions of intergovernmental bodies that protect human rights and fundamental freedoms, and of other supranational legal authorities.

Taking into consideration the fact that in the course of reforms, taking place in the judicial system of the RF, different opinions were voiced, including rather critical ones; it can be relevant to raise the question of constitutionality of accomplished judicial reforms and the possibility to raise such a question in the CC of the RF. Once the Deputies of the State Duma of the RF (acting on behalf of Opposition parties) put such a question to the CC of the RF demanding to check the constitutionality of corresponding amendments to the Constitution of the RF. Following the results of this case, the CC of the RF came to the conclusion that constitutionality review of amendments that had already been incorporated into the text of the Constitution were inadmissible because that would have amounted to constitutionality review of the Constitution provisions as such.[4] But, at the same time, the RF CC stated that checking amendments to the Constitution before they come into force is not excluded, i.e. before the moment when amendments become an integral part of the RF Constitution. However, the law-maker must provide such a possibility by expanding authority of the RF CC to introduce amendments to the Federal Constitutional Law (FCL) "On the Constitutional Court of the Russian Federation" or to the Constitution

[4] The question — whether the review of constitutionality of other provisions of the Constitution is possible, in particular for their compliance with the requirements of Chapter 1 of the RF Constitution — was answered by the RF CC in a negative way as far back as in 1995 (Decision of the CC of the RF dated December 28, 1995 No. 137-O).

itself.[5] It should be also noted that lately some important alterations have been made to the FCL "On the Constitutional Court of the RF"[6] (some of them are directly connected with the problems discussed).

Nowadays *in Russia the judiciary exists as the most crucial and essentially uniform sphere of national constitutionalism*. At the same time *the constitutional law concept of the judiciary* can be presented as a special state power function fulfilled to resolve conflicts and disputes with regard to law in statutory procedural forms performed solely by judicial bodies, and its aim is to protect and restore rights, freedoms and legitimate interests of individuals, the society, and the state.[7] As such, it is most concentratedly and directly aimed both at the protection and development of the whole system of constitutionalism.

The constitutional judiciary recognition and assertion as an independent branch has sophisticated and controversial history. In Russia, unlike many other states including those that are considered to be democratic legal states now, even if at the first sight it seems unexpected, the court rather early began to play an active role in the general system of statehood, influence other state institutions including the legal status of individuals. In confirmation of this thesis different arguments could be made, including historical ones that refer, above all, to the Senate that was established by Peter the Great in 1711. This body was initially conceived as the highest governmental institution, hence,

[5] Ref.: The Decision dated July 17, 2014 N 1567-O // OG (Official gazette) RF. 2014. No 30 (Part II). Art. 4397.

[6] Ref.: Federal Constitutional Laws "On making amendments to the Federal Constitutional law "On the Constitutional Court of the Russian Federation": 1) dated June 4, 2014 No. 9-FCL // OG RF. 2014. No. 23. Art. 2922; 2) dated June 8, 2015 No. 5-FCL // OG RF. 2015. No. 24. Art. 3362; 3) dated December 14, 2015 No. 7-FCL // OG RF. 2015. No. 51 (Part 1). Art. 7229.

[7] Offering the concept of the judiciary, the author took into account the fact that both in the national legal science and foreign one the understanding of such notions as 'the judiciary', 'justice', 'judicature' are rather complex. Ref: e.g.: Rzhevskiy V.A., Chepurnova N.M. The judiciary in the Russian Federation: constitutional framework and activity. M.,1998; The judiciary and justice in the Russian Federation. Ed. by V.V. Ershov. M.: RAJ, 2011; Justice in the modern world. Ed. by V.M. Lebedev, T.Ya. Habrieva. M.: Norma, 2013.

its name — Pravitelstvuyushchiy Senat (the Governing Senate). At that time the Russian verb *'pravitelstvovat'* meant *'govern, officially control'*, i.e. the establishment of the Senate initially meant assistance to the monarch in affairs of a court, legislation, and administration, but — that is very important in this case — judicial work was initially of top priority for the Senate. At the same time, since the Senate creation there were "syncretism and inseparability" in its functions "as well as in the activity of an autocratic monarch himself." In this sense "at the moment of its appearance the Senate looked like some Europeanized continuation of the Boyar Duma that also made rules and regulations by issuing "new-edict articles" with regard to certain cases (both *per se* litigious and administrative).[8] As is known, later the judicial function of the Senate was set apart, then its reinforcement followed and the Senate became the highest judicial body of the Russian Empire. Although the Senate had never belonged to the system of common (case) law, it always possessed (and it evinced particularly after the Judicial Reform of 1864), *inter alia,* powers of judicial rule-making. By this token, it was not fortuitous that the research of judicial law was rather evolved in Russian jurisprudence before the Revolution.[9] It seems that, to a large extent, those particular circumstances connected with an active judicial rule-making procedure allow us to make a conclusion that "the Russian specificity" means that "in Russia democratic judicial bodies essentially outgrew parliamentary and law-advisory institutions in their development, created a social and political atmosphere necessary for the emergence of genuine representative authority", and the Judicial Reform of 1864 had a great influence on the whole system of political organization of the society and state.[10] Moreover, it seems reasonable to conclude that following the results of the Judicial Reform

[8] Vereshchagin A.N. On the forms of judicial rule-making in the Russian Empire // Bulletin of Economic Justice in the Russian Federation. 2014. No. 11. P. 6.

[9] Ref., e.g.: Mikhailovskiy I.V. Judicial law as an independent legal science (On the question of the system of legal sciences) // Law. 1908. No. 32. Pp. 1733–1741.

[10] Shahray S.M. The Influence of the Judicial Reform of 1864 on the political system of modern Russia // The Juridical World. 2014. December. No. 12. Pp. 39, 40.

of 1864 Russia made a choice in favor of the Romano-Germanic law system. Deep historical roots of current processes taking place in the state and law systems are manifested in that choice, including those that are connected with the active role the judicial power plaid in the development of the Russian constitutionalism and formation of legal institutions of the judicial constitutionalism.[11]

To this end, the Constitutional Court of the Russian Federation as an institution that forms one of the key attributive features of modern constitutionalism and, simultaneously, one of the means of securing fundamental values of constitutionalism, acts as a distinctive element of an inherently uniform system of the judiciary.

III. CONSTITUTIONAL PARADOXES OF CONSTITUTIONAL JUSTICE: THE RF CC IN THE NATIONAL SYSTEM OF JUDICIAL BODIES

The institution of constitutional justice takes a unique place in the system of modern constitutionalism, the place that has not been finally defined yet (not only in Russia) by means of actual practice of constitutional development in modern democracies. The proof of this fact is in a continuous search for the best ways of resolving problems that are not, by any means, secondary for constitutional justice and that are pertinent to the interaction of the Constitutional Court with other national courts:

the place of this body in the system of separation of powers in terms of the character of relations, liability for non-compliance with the decisions of the RF CC along with both the legislative executive powers, and with the bodies of the judiciary itself;

the degree of bindingness of some types of the RF Constitutional Court decisions, in particular, court holdings with a so-called positive content, as well as rulings containing conclusions, as compared with

[11] Ref.: Bondar N.S. Judicial constitutionalism: a doctrine and practice. 2nd revised edition. M.: Norma, 2015.

the current jurisprudence, contrary to the constitutional interpretation of the legal norms in question;

the limits of obvious (in particular, in Russia) tendencies of unification of overall principles of the judiciary and judicature, the status of a judge and, in this regard, determination of "a measure," of limits of relevant requirements spreading over constitutional justice;

not only legislative, but also initiative (based on an independent legal stance of the RF CC) searches for the best model of norm-controlling and other powers, which typically has rather indefinite, somehow contradicting motion vectors — both in the direction of powers expansion (especially, with regard to initiative ways of development) and their narrowing, contraction;

the problem of separation of norm-controlling powers of the RF CC and judicial bodies of general jurisdiction with regard to such regulatory acts as laws of territorial entities of the RF, regulations of the RF Government, as well as resolving constitutionally significant questions in the sphere of the election process, constitutionality of political parties, etc. by the RF CC.

However, it is not only (and, perhaps, not so much) about insufficiently verified decisions of law-makers — what experts, especially in connection with recent status changes of the Constitutional Court of the Russian Federation, sometimes pay attention to[12] — but, first of all, the issue concerns the nature of this institution, objective difficulties of assessment of its legal features containing a kind of inner contradictions of political and legal character, that are not accidental or caused by erroneous decisions of law-makers, but rather reflect the underlying intrinsic and sometimes internally contradictory characteristics of this institution. They can be defined as *constitutional paradoxes of constitutional justice;* from three to seven paradoxes can be singled out by analogy with the known seven deadly sins or with the anthropomorphic Trinity. We restrict ourselves to the analysis of some of them.[13]

[12] Ref., e.g.: Kryazhkov V.A. The legislation on the Constitutional Court of the RF: novelties of 2014 // The State and Law. 2014. No. 12.

[13] Ref. for more detailed information: Bondar N.S. Judicial constitutionalism: a doctrine and practice. M.: Norma, 2015. P. 8–91, 101–112, 127–138 and others.

3.1. The first constitutional paradox: "the Constitutional Court is more than a court." Eventually, this thesis turns to the question *of whether the body of constitutional review is a fully-fledged judicial body,* which assumes understanding of principal status features of the RF CC, its place and role in the national system of separation of powers. All subsequent characteristics of the constitutional justice are connected with this, including the scope of powers, the legal nature of its acts as the final legal form of constitutional review, the level of bindingness of such acts for other bodies, the balance between the acts of national constitutional norms review and the acts of transnational jurisdiction, etc.

The main doubts as to the RF CC functioning as a fully-fledged judicial body and attempts to present it as a "quasi-court" are connected with the peculiarities of constitutional norms review as the main function of the RF CC. Thus, some distinctive characteristics of a constitutional norms review activity as a "quasi-judicial" activity — in comparison with ordinary judicature — can be named: (1) the absence of dispute about law; (2) "the loss of the substantive content" of the adversarial principle and the principle of equality of the parties; (3) impossibility to establish legal facts and other facts.

Indeed, constitutional justice has some specificity, sometimes substantial, that, however, does not "abrogate" the status of this body as a judicial one. As for the statement that *"there is no dispute about law"* in the constitutional norms review, it does not comply with the aim and the logic of constitutional proceedings associated with resolving *constitutional law disputes*. Constitutional litigation, as a general rule, emerges only in terms of conflicts of interests and opinions (legal opinions) and provides a relevant conflict resolution in the procedure, where each participant strives to persuade the CC of the validity of her own point of view concerning the issue in question. To this end, the constitutional norms review is traditionally considered as the mechanism, form or means of resolving public law disputes, the brightest manifestation form involves disputes over the constitutionality of regulatory acts, including cases when such acts infringe constitutional civil rights and liberties. In the brightest way, the "controversial" nature of the constitutional norms review is manifested as part of a certain

constitutionality review, when a citizen (a group of citizens) disputes with the state represented by the law-maker.

By the same token, we need to take into account the whole specificity of implementation of *the adversarial principle and the principle of equality of parties in constitutional proceedings* (P. 1 and 2 Art. 19 and P. 3 Art. 123 of the RF Constitution) and their significance as principles of constitutional norms review (Art. 5, 35 and 53 of the FCL on the Constitutional Court of the RF). This involves proceedings both in oral and written forms in the order that is determined by Article 47.1 of the amended FCL on the Constitutional Court of the RF (dated June 4, 2014 No. 9-FCL), where special requirements are focused on securing *the principle of adversarial proceedings and equality of parties in constitutional proceedings* held without hearings. As for the *fact-finding carried out by a body of the constitutional review,* under Art. 3 of the FCL on the Constitutional Court of the RF, the CC refrains from fact-finding and their examination, however, not in all cases, but only when "it is within the competence of other courts or bodies."In view of this, the named FCL introduces a witness as a party to a proceeding who can be summoned to appear before the court "when it is necessary to examine factual circumstances ascertaining of which is assigned to the Constitutional Court jurisdiction," (Art. 64) and provides for a possibility of disclosure and examination of documents (Art. 65) before the court in session, as well as allows including of "factual and other circumstances established by the Court" into the structure of the decision of the CC (par. 7 P. 1 Art. 75).

To this end, however, it should be taken into account that recognition of the CC as the body that is "more than a court" not only simplifies the position of this judicial body in the system of separation of powers, including interaction with other courts of Russia, but, on the contrary, substantially foregrounds the problems associated with providing their effective cooperation. It is obvious, because *the CC is inherently the court above power*. This involves constitutional assessment of the results of the state power activity that is manifested in rule-making and in the process of law enforcement. Along with the constitutional norm review, an important function of the CC of the RF acting as the court above power involves resolution of disputes with regard to jurisdiction:

a) of federal government bodies; b) of the RF government bodies and government bodies of territorial entities of the RF; c) of the highest government bodies of the RF territorial entities (P. 3 Art. 125 of the Constitution of the RF). It is obvious that the CC has to resolve critical problems that concern jurisdiction and other status interests of the highest government bodies.

The character of a constitutional justice impact on a law-making process must be assessed in the context of the global constitutional practice. The RF CC plays a significant role in the process of establishment and development of modern Russian constitutionalism, the Constitution, constitutional legislation, and, thereby, legislation of branches of law. By recognizing a norm unconstitutional, the Court denies its validity (Art. 79 of the FCL "On the Constitutional Court of the RF"), i.e. overrules it. Thereby, being institutionally formed as a law-enforcement authority, the RF CC due to the nature of its activity and peculiarities of legal force of passed decisions increasingly *approaches a rule-creating legal practice, i.e. law-making*. A rather high level of political initiations in this form of the state-power activity is predetermined, to a large extent, by peculiarities of the legal nature of constitutional justice. The next paradox of constitutional justice is connected with what was said above.

3.2. The second constitutional paradox of constitutional justice: being between law and politics, the RF CC decides only on matters of law.

The political significance of the activity of constitutional justice bodies, the influence of their decisions on political and legal spheres of the state life is evident. Does it prove that the CC activity is politicized or that some other, deeper reasons that reflect inherent characteristics of such a form of jurisdictional activity hide behind its politically significant decisions?

While searching for an impartial answer to this question, we need to take into account both objective, definite historical conditions and subjective factors that influence (and, sometimes, rather substantially) the level of constitutional justice politicization. By taking into account peculiarities of maturity of democratic principles of national

constitutional and legal systems, the level of constitutional and legal culture in the society and the state, these circumstances, including subjective factors, can be manifested in different ways with different levels of obviousness. But, eventually, they always demonstrate how independent a constitutional justice body is, its independence in the national system of separation of powers. In this regard, a constitutional analysis of the balance between constitutional justice and politics is not confined by formal legal aspects. The access to socio-political, socio-cultural, definite-historical, national- specific and other aspects regulated by the Constitution and other laws regulating the functioning of bodies of constitutional justice is inevitable and absolutely necessary, which, as a rule, is inaccessible for the courts of other jurisdictions. This makes us to somehow formulate *the constitutional legal maxim* that finally conveys the content of the stated constitutional paradox: *constitutionalization of politics* by means of constitutional justice, its subordination to the Constitution rather than *subordination of the constitutional justice to politics and politicization of constitutional legal sphere* must be the cornerstones of interaction of constitutional justice and politics. Technical principles of this maxim that simultaneously reflect regulatory aspects of interaction of constitutional justice and politics are determined: *the RF CC decides only on legal matters*. However, there are some objective prerequisites of constitutional justice penetration into the sphere of politics that are rooted in the system of public relations that constitute both the subject of constitutional legal regulation, and the domain of constitutional justice implementation. There is no doubt that political contents are intrinsically represented in the system of relations that constitute the subject of constitutional law that can be more concisely described as the trinity of power, freedom and property.

At the same time, it is obvious that constitutional justice needs special safeguards focused on its protection from the political influence, as well as from unreasonable exposure of constitutional justice to the political sphere. Moreover, certain mechanisms, means that secure inadmissibility of constitutional justice politicization can be elaborated by the bodies of constitutional justice themselves (e.g., in the practice of

the CC of the RF, the principle of reasonable restraint,[14] inadmissibility of interpretation of the Constitution with regard to the matter that is being subjected to the legislative process,[15] inadmissibility of evaluation of election legislation rules in the process of electoral campaign,[16] self-restraint of the CC of the RF with regard to its assessment of constitutionality of legal gaps,[17] etc.).

Such characteristics of constitutional justice, its active impact on formation and implementation of the constitutional policy allow the RF CC to perform not only the function of a judicial guardian, but also the function of a generator of institutions of modern "living" Russian constitutionalism, to spread its influence on all main spheres of practical jurisprudence. In the formal legal context, it finds its representation in the peculiarities of the legal nature of constitutional justice acts as the sources of a specific law with which the next constitutional paradox of constitutional justice is finally connected.

3.3. The third constitutional paradox of the constitutional justice concerns the legal nature of the RF CC decisions: the decisions of the RF CC do not amount to the law, but, according to their legal force and doctrine significance, they are above the law.

Both in our country and in other states of the civil law system, in recent years a new tendency to recognize judicial practice as a source of law has been revealed; primarily, decisions of constitutional courts are dealt with as such a source of law; however, the legal nature of the latter in the context of their correlation with a judicial precedent, is defined by authors in different ways.[18]

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[14] Ref.:Ruling of the CC of the RF dated February 5, 2007 No. 2-P, dated December 20, 2011 No. 29-P, dated May 14, 2012 No. 11-P.

[15] Ref., e.g., Holdings of the CC of the RF dated June 11, 1999 No. 104-O, dated by April 8, 2004 No. 128-O, dated by October 4, 2005 No. 396-O.

[16] Ref., e.g., Holdings of the CC of the RF dated November 20, 1995 No. 77-O.

[17] Ref., e.g., Rulings of the CC of the RF dated November 14, 2005 No. 10-P, dated March 2, 2010 No. 5-P.

[18] Ref., e.g.: *Zorkin V. D.* The precedent character of the decisions of the Constitutional Court of the RF // The Russian Law Journal. 2004. No. 12. Pp. 4–7; *of the same author*: The modern world, law and the Constitution. M., 2010. P. 159–171; Gadjiev G.A. Methodological problems of "the precedent revolution" in Russia // The Journal of Constitutional Justice. 2013. No. 4 (34). P. 5–8; Vereshchagin A.N. Some myths about the precedent law in Russia // Ibid. Pp. 15–18.

Not denying the existence of some comparable characteristics in the legal nature of decisions of all higher judicial bodies, we should admit the fact that the acts of constitutional justice possess some special, rather specific features of sources of law due to immanent legal characteristics of constitutional nature of constitutional acts. The point is that eventually the CC decisions do not amount to ordinary acts of judicial practice; to some extent, they adjoin the Constitution forming together with the Constitution *a specific type of constitutional sources of law* that exist *along with* laws, bylaws, judicial practice and other types of sources of law.

The specificity of the norm creating energy of the CC decisions means that it has regulatory values of the highest, abstract level — the overall law principles, constitutional values and principles that are realized in all branches of the current law system — as the subject (sphere) of its influence. By means of a constitutional review activity, the so-called *increment and actualization of regulatory content of relevant principles* and their balanced interaction take place. As the result of this activity of the RF CC, a special type of regulatory foundations — constitutional *court norm settings* that critically differ from ordinary legal rules both in ontological content-related aspects and technical aspects — *are* established. Supposedly, the main distinctive feature of constitutional court norm-settings is that they combine normatively with doctrinal origins; thereupon, some new, integrated feature of the CC acts as specific sources of law emerges — their regulatory-doctrinal nature.

The regulatory doctrinal nature of the CC decisions is also predetermined by their *dual purpose in the system of sources of law*.

The RF CC decisions form *the source of constitutional law*, and, as such, they *always* contain norm-creating energy (either of negative or positive character) focused on the sphere of constitutional regulation. In this sense, the RF CC decisions possess a constitutional nature by virtue of their inherent characteristics regardless of the subject of constitutional review and as such they are always — in the unity with the Constitution as the Fundamental Law — *constitutional sources of law*. At the same time, due to the subject matter of particular cases, *decisions of the RF CC are sources for other branches of law* that provide

"coupling" of constitutional norms *per se* and legal norms of branches of law, create the normative unity based on the objective interconnection detected in the process of a case hearing and entwinements of relations regulated by constitutional law and other branches of law. On this basis it becomes possible for the RF CC decisions to influence all spheres of its jurisdictional activity, including administrative law, civil law and criminal law.

A constitutionally significant regulatory and doctrinal character of the RF CC decisions is manifested by means of assigning to them the legal force that exceeds the legal force of regulatory acts that are subject to constitutional review, and the casual interpretation of the provisions of the RF Constitution carried out during constitutional proceedings based on constitutional provisions by its force exceeds any of its interpretations by any other authority.[19]

Taking into consideration the peculiarities of the constitutional justice that are expressed in constitutional paradoxes and its decisions, we can also speak about cooperation of the RF CC with judicial bodies of other jurisdictions.

IV. SOME PRACTICAL JURISDICTIONAL ASPECTS OF COOPERATION OF THE RF CC WITH THE BODIES OF NATIONAL JUDICIARY

It is important to keep in mind that, despite the "peculiarity" and uniqueness of the RF CC status characteristics, there is not any hierarchy between the RF CC and other judicial bodies: they have different relations determined by constitutional law that are based on the legal force of the RF CC decisions, rather than on administrative power of any — including constitutional — judicial body. In this regard, the fact that *all the other judicial bodies*, including Justices of the Peace, *can act as a kind of "associates" of the constitutional judicature* is of an undoubted interest.

[19] Such approaches also gained acceptance in the decisions of the RF CC. Ref., e.g.: The judgment dated November 8, 2012 No. 25-P, the Ruling dated July 8, 2014 No. 1562-O.

The point is that, under Article 125 (P. 4) of the Constitution, *the Constitutional Court of the RF has the right to review constitutionality of laws, inter alia, upon court requests*. Such a request is permitted if the law is subject to application by the court in a definite case that is tried by this court. The CC practice has specified this admissibility criterion by pointing out that a court request is an obligation for a court of general jurisdiction that arises from the court belief that the law to be applied contradicts the Constitution provisions, including impossibility to apply this law in such a way that will not lead to infringing rights and freedoms of the participants of a case in question (Ruling dated June 16, 1998 No. 19-P, Holding dated December 1, 2009 No. 1485-O-O).

The judicial practice analysis shows that courts rather actively honor this obligation. Thus, *93 court requests* have been submitted to the RF CC for last 5 years (2011 — May 2016). These requests were submitted from almost all levels of the judicial system; however, the first-instance courts (of the key level) are the most active: district courts that filed 44 requests and arbitrazh courts of territorial entities of the RF filed 12 requests. The highest courts also addressed a number of requests: the Supreme Court of the RF filed 5 requests; the Supreme Arbitrazh Court of the RF, which had functioned till 2014, filed 2 requests. The year 2015 set a record with 33 requests submitted to the CC (for comparison: 2014 — 14 requests, 2013 — 22, 2012 — 19, 2011— 3). Such figures indicate the increase of interest of the first-instance courts in the ability of the CC to protect human rights, as well as in a responsible attitude to the application of constitutionally relevant legal regulations.

Simultaneously, *the practice of reopening cases of participants of constitutional judicature is an important indicator of cooperation of the RF CC with other bodies of the national judicial system*. Specifically, in 1995–2016 the RF CC by its decisions (48 rulings and 24 Court holdings) recognized the right to the revival of criminal case proceedings (aimed at the judicial review of rendered law-enforcement decisions) regarding 242 applicants. According to the available data, decisions of the RF CC were enforced in cases of 124 applicants (51,23 %); decisions of the CC for the rest 118 cases (48,76 %) stay unenforced up to the present moment, and, what is more, in cases of 8 applicants (3,03 %) decisions

were rendered that contradict the essence of the legal opinion of the Court.

To this end, courts resorted to different procedural forms for the judicial review of applicants' cases. Thus, the revival of case proceedings in view of new facts that is prescribed by P. 5 Art. 415 of the Criminal Procedure Code of the RF (the CPC) and exercised by the Presidium of the Supreme Court of the RF, was used only in 26 cases (29,96 % of the total number of cases revived). In other cases the judicial review of decisions was performed in other procedural forms, as a rule, at the stage that follows the stage at which the judicial decision was rendered, the judicial review of which is necessary to restore constitutional rights of an applicant, including review proceedings and cassational proceedings in the Supreme Court of the RF and in courts of territorial entities of the RF. The RF CC practice in the sphere of civil jurisdiction is not less extensive, as well as the practice of civil proceedings reopening aimed at the review of rendered judicial decisions (for the stated period 44 decisions that provide a possibility of reopening civil cases in regard to 88 persons were rendered). However, the level of persons' interest in reopening such cases in comparison with the sphere of penal justice is substantially lower: 45 people sought a revival (a little more than 50 %); and in only 27 of them the decision was rendered that met the legal opinion of the CC; 18 persons obtained a decision that does not satisfy, in our opinion, the legal opinion of the RF CC.

By and large, giving a positive assessment to the RF CC practice of cooperation with the courts of general and arbitral jurisdictions, it should be noticed that relations, when it comes to the perception by the courts of general jurisdiction the CC decisions as the sources of law, stay tense. In particular, it is also manifested in the fact that courts are not always ready to follow the legal opinions of the RF CC in respect to the persons that were not the participants of the constitutional judicature, or, while the application of the norms and regulations that are similar in their character to the norms that were subjected to constitutional review, but that are contained in other legislative provisions that officially were not included into different legal provisions; in many cases courts deny reopening cases of the applicants whose appeals were dealt with by

means of a holding revealing the constitutional meaning of the norm in question, rather than by means of a ruling. Definite perspectives of overcoming this situation were laid as the part of introducing into the practice written proceedings that allow the CC to make decisions concerning unconstitutionality of some legislative provisions rest upon earlier declared legal opinions. However, judging by the analysis of the evolving judicial practice, the questions concerning legal consequences of the RF CC decisions where constitutional sense of the contested rule, while retaining their legal force, remain unanswered.

Courts sometimes demonstrate striving for following technical (literal) interpretation of law, rather than interpretation that was earlier given by the RF CC. Constitutional complaints concerning the provisions of Chapter 49 of the CPC of the RF (the revival of criminal proceedings in view of new and newly discovered facts) are typical in this regard, because applicants suppose that these rules contain uncertainty in relation to a possibility of distribution of legal opinions of the CC in their cases that were formulated before the hearing, i.e., in fact, the issue entails corrections of improper application of either substantive law or procedural law by courts. Legal claims that have been recently submitted to the CC also prove that judicial bodies, as a rule, refuse to satisfy petitions with regard to the competent court recourse to the CC of the RF because of detected uncertainty concerning the compliance of the norms in question with the Constitution because they believe that applicants themselves are not deprived of the possibility to resort to the RF CC. It is evident, however, that the denial of the Court to satisfy such petitions may be grounded by the court belief that the norms to be applied in a certain case do not contain any uncertainty with regard to their compliance with the RF Constitution (also with regard to legal opinions of the CC of the RF given before the hearing).

The place and role of constitutional justice in the mechanism of a modern state, the legal nature of its acts in the legal system predetermine peculiarities of the RF CC cooperation with other jurisdictional bodies, both at the national and supranational levels.

V. CONSTITUTIONAL JUSTICE IN RELATION TO SUPRANATIONAL JURISDICTION: THE SEARCH FOR COMPROMISES OR REINFORCEMENT OF COMPETITION?

Nowadays the problems of interrelations between constitutional justice and the bodies of supranational jurisdiction have gained substantial urgency and relevance, which assumes the necessity of their independent and complex study. This paper allows us to deal with some certain aspects of the problems that have crucial significance.

5.1. "Law Globalization" or national constitutional integration?

Common regularities of the modern legal progress, which are in a contradictory unity, are rather evidently manifested in the constitutional development of European states, and they are associated, on the one hand, with the evolving processes of legal globalization (including not only the reinforcement of interpenetration of legal systems, but also the competition and rivalry between them), and, on the other hand, with tendencies of constitutional sovereignization that are determined by the awareness of the necessity to protect sovereign rights, their enumeration, preservation of socio-cultural peculiarities of national constitutional systems.

It creates problems that are connected not only with cooperation and interrelation of national legal systems (including their cooperation and interaction with international jurisdictions), but also with inevitable conflicts. Meanwhile, the processes of legal integration are in need of constitutional evaluation. European institutions of public international law and national institutions of constitutional law become the main spheres of regulatory integrative interrelationship that emerges in this context on the European Continent. On this basis, the emergence of a substantially new transnational legal phenomenon connected with the formation of *the European constitutionalism* becomes possible.

Meanwhile, it is important to take into consideration the fact that the movement to the European constitutionalism does not amount to "law globalism" on a European scale. It is a fundamentally new philosophical and ideological category that is destined to reflect *national*

constitutional integration of European state legal systems on the basis of their mutual enrichment while preserving legal sovereignty of the legal systems, rather than supranational legal universalization.

It means that constitutionalism in general and European constitutionalism in particular can be represented as an interconnected complex of different elements: its doctrinal element as a special philosophical and legal theory of constitutionalization of economic, political, legal spheres of Europe; a regulatory component that represents a specific hierarchical European legal field; an ontological component that embodies the practice of formation and development of European constitutionalism including Conventional (European) jurisdictional and national constitutional practice of implementing European constitutional values; and, finally, it is one of the forms of manifestation of public conscience that acts as a prerequisite, condition of formation, and, to a certain extent, as a manifestation of a specific type (different from, for example, Anglo-Saxon, Asian, etc.) of legal understanding of the world — the European constitutional ideology.

At this conjuncture, a complex regulatory system that embodies the total unity of international law, European elements and national constitutional institutions forms *the regulatory basis for the formation of European constitutionalism*. In relation to the member-states of the Council of Europe it takes the form of a regulatory complex that is based on: a) the Convention regulation referring to the ECHR and the precedent practice of its interpretation by the European Court, and also some other international legal regulations based on treaties (European); b) the national constitutional regulation including the practice of national bodies of constitutional jurisdiction that are organically and efficiently incorporated into the system of protection and implementation of European democratic values that gain constitutional significance.

Consistent interaction and interpenetration of relevant regulatory elements and application of implementation mechanisms remain crucial. These problems are manifested more prominently in cases where specialized jurisdictional control bodies are represented as a constitutional guide and integrator of international legal norms for national legal systems.

With regard to the implementation of the ECHR, the issue about the nature, place and role of the Convention in the national legal systems is important. It should be recognized that the Convention regulates the issues of constitutional significance that are universal for the member-states of the Council of Europe. This fact itself can be classified as a kind of *a quasi-constitutional act* in the context of emerging European constitutionalism. Along with that, the Convention cannot be considered as a part of a national constitutional system at least until a constitutional system itself (as, for example, in Austria) recognizes its validity. But another aspect is equally important: even for countries that do not give priority over national laws to the Convention (for example, Hungary[20]), *the constitutional importance of this act* is evident, first of all, from the point of view of the regularities of a common European constitutional space formation.

5.2. The unity of value foundations of the national legal order in correlation with the polyphony of the Conventional legal order: methodological aspects of grounds and limits of the national implementation of the European Court of Human Rights requirements by means of constitutional justice.

The recognition of the fundamental identity of the legal nature of Conventional and supranational rights is the basis of the value implementation approach of the CC of the RF to the application of the European Convention of Human Rights. The RF CC made this exact conclusion of methodological importance: such recognition results not only in admitting the significance of the Convention for the administration of national constitutional norm review (what by itself is also important), but an *actual recognition of the constitutional nature of Conventional rights and freedoms* in their correlation with the national institution of human rights. Perhaps, it is the first time when a national body of European constitutional justice (represented by the RF CC) made such a definite conclusion concerning the legal nature

[20] In this regard, it is relevant to turn to the informative article of the Judge of the Constitutional Court of Hungary Andrasha Bragov: Bragov A. The right of interpretation: constitutional courts and Conventions about the protection of human rights and fundamental freedoms (as exemplified by Hungary) // The Comparative Constitutional Review. 2011. No. 2. P. 83–95.

of the Conventional rights and freedoms: "...Rights and freedoms of a man and a citizen enshrined in the Convention of Human Rights and Fundamental Freedoms are inherently the same rights and freedoms that are entrenched in the Constitution of the Russian Federation."[21] Due to this the RF CC recognizes *the similarity between the nature of the European Court of Human Rights and the nature of the national body of constitutional justice on the ground of their function of human rights protection* and possibility to use *a single institutional mechanism for enforcement of decisions* of these bodies.

Thus, we can see a confirmation of the fact that international (European) institutions of human rights protection not only extend their influence over national constitutional systems, but, *that constitutionalization of universally recognized principles and norms of international law* is taking place, and, due to this, domestic juridical legal (constitutional) principles penetrate into the sphere of international relations.

Meanwhile, we should take into consideration not only overall, but also specific features analyzing the interaction between national Constitutional and Conventional jurisdictional activities. The character and limits of the influence of these bodies on value and jurisdictional matters have differences that are sometimes rather substantial. Thus, there are some reasons for the existence of such differences and, therefore, it is necessary to assess them not from confrontational positions, but within the frames of achieving a compromise and a balance of interests and values.

Perhaps, the crucial point is that *the RF CC as the body of the constitutional review* is assigned with the task to ensure *the essential unity and inviolability of fundamental value principles of constitutional law, which is* accomplished by ensuring the unity of interpretation and application of the Constitution, and also by the unity of constitutional law interpretation of legislation and the whole judicial law-enforcement practice.

[21] Ref.: Judgment of the CC of the RF dated February 6, 2010 No. 4-P, subparagraph 3.3 of the statement of reasons.

As for the jurisdiction under the European Conventional, *a rather high level of restraint in relation to the requirements of the uniformity of value approaches to different national legal systems is assumed by virtue of a subsidiary nature of the European Court of Human Rights*. This is proved, at its core, by the practice of the ECHR (although, to be fair, we should admit that such approaches are not always consistently applied). To some extent, this manifests the *polyphony of modern European constitutionalism*, or, for example, as Bulgarian Constitutional Court Judge Tanchev calls it, "multilevel constitutionalism"[22] on the European continent. This is understandable: in the present context of legal integration achieved, in particular, by the member-states of the Council of Europe (the Russian Federation also belongs to them), there is no reason to speak about a uniform constitutional law space.

A subsidiary character of the European Convention control, high requirements that are applicable to its restraint while evaluating the matters related to the essence of national constitutional legal order and inadmissibility of imposing value uniformity in approaches are determined, to a large extent, by the peculiarities of European constitutionalism. The recognition of some kind of *pluralism of constitutional values* by the ECHR is fundamentally important with regard to both a regulatory space and a law enforcement sphere.

It cannot, however, be denied that there are some decisions of the ECHR that unambiguously demonstrate double standards and a lack of polyphony of European constitutionalism. In this regard, along with other questions, the question of whether any hierarchy concerning national constitutional values and Conventional values exists.

It is deemed to be well grounded to presume that *there are no hierarchically subordinated relations between the Conventional and national constitutional values and principles, but, first of all, coordinating relations*. At the same time, the level of coordinating relations can be different, that is proved, inter alia, by the practice of the RF CC. Eventually, this problem concerns the balance between the European consensus and the national constitutional identity, meaning

[22] Ref.: Tanchev E. The emerging supranational constitutionalism and modern systems of the constitutional control // The Comparative Constitutional Review. 2007. No. 4. P. 61.

that the concept of "European consensus" is sometimes used to the detriment of constitutional pluralism and "constitutional polyphony" as the part of a European constitutional area.

While elaborating the mechanisms of resolving conflicts between national jurisdictional bodies and the ECHR, it is necessary to take into account that *conflicts per se including those that arise as a result of correlation and confrontation between national and supranational law have constitutional significance*. And all disputes that are constitutional due to their legal nature, character and consequences are subject to settlement by means of constitutional procedures. To this end, it is also necessary to consider the CC Ruling dated July 14, 2015 No. 21-P that offered a mechanism of resolving relevant conflicts. The reasoning of the RF CC Ruling is that due to the primacy of the Constitution, international law provisions shall be interpreted as specification of the Constitutional provisions, but they cannot be applied if they go beyond the scope of the legal sense that is enshrined in the Constitution.[23]

For the sake of fairness, we should admit that the conflicts that arise due to the correlation between conventional and national constitutional jurisdictions have an inherently exceptional character. In this regard, the attitude of different legal systems to the institution of same-sex marriages and to promotion of homosexual relations in comparison with European Convention approach can serve as an example. The ECHR main approaches to this issue are known, as well as the attitude of some Westen states. It is obvious that sexual freedom is such an aspect of self-expression of a person that cannot be interpreted in isolation from the general system of social regulation established in a definite culture, including moral and religious norms, national traditions, etc. Our approach to these issues was demonstrated in the RF CC Ruling dated September 23, 2014 No. 24-P. On the one hand, in its decision the RF Constitutional Court gave a constitutional interpretation of the norms at issue, pointing out at inadmissibility of interference in the sphere of sexual self-determination of a person. On the other hand, the Court did not find the grounds to follow the "standards" that are, in

[23] Ref.: Zorkin V.D. The law of force and the force of law // The Journal of Constitutional Justice. 2015. No. 5. P. 6.

fact, aimed at reviewing classical ideas of equality and freedom when the fight against discrimination and inequality is, in fact, substituted by the demand for exclusive rights for sexual minorities.

The ECHR Decision dated July 4, 2013 in *Anchugov and Gladkov vs. the Russian Federation,* in compliance with which the ECHR, in fact, challenged one of the provisions of the Constitution of the RF (Part 3 Art. 32), became a serious manifestation of value conflicts that emerge due to the interaction between the jurisdiction under the European Convention and the Russian national constitutional system. At the same time, in the RF CC Ruling dated April 19, 2016 No. 12-P the Court, dealing with the question concerning the possibility of execution of the ECHR decision, evinced a flexible, constructive approach indicating existing options for implementation of the act of the jurisdiction under the European Convention that are consistent with the Constitution of the RF.

It is evident that the character of relations between the Constitutional Court of the Russian Federation and the European Court of Human Rights are not defined, by any means, by conflicts that emerge between the jurisdiction under the Convention and the national constitutional jurisdiction.

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