National and international courts: challenges of cooperation

The paper gives a brief overview of the issue of cooperation between national and international judicial bodies providing comparative study of a supranational perspective to the topic on the example of the European Court of Human Rights case law and a national perspective of the Constitutional Court of the Russian Federation. The paper consists of two main parts with the first one making an introduction to the topic with examples from the interaction of European jurisdictions with regional judicial bodies and the second part discussing in a detail relations between Russian Constitutional Court and the European Court of Human Rights.

I. The interaction of the highest national courts and supranational jurisdictional bodies: the comparative legal aspect

1. The issue

International judicial bodies are currently acquiring the functions of the quasi-constitutional courts of world regions or the integration entities, as the case of the European Court of Human Rights or the Court of Justice of the European Union. However, the ways by which such bodies come to take over such controversial role, are different. Firstly, the activity of supranational associations of states, whether it is Council of Europe or the World Trade Organisation, is growing from year to year, that logically leads to an increase of legislative activity workload of supranational organisations, and, therefore, it generates the need to verify the conditional "constitutionality" of such legislative activity, which is particularly evident in the activities of the EU bodies. Secondly, the deepening ties and the expansion of the sovereign states participation spheres in the supranational associations create greater opportunities for potential conflicts of national law with supranational legal acts and with interpretation acts of the latter. Accordingly, two fundamental problems can be identified: 1- the creative interpretation by the competent supranational judicial bodies of the international acts and 2 – the conflict of such creative interpretation and national acts (and even the constitutional acts) with international acts in the sense, given them by the international courts.

International judicial bodies received their authorities to interpret the supranational acts in different ways. The first option – a special indication of the jurisdiction of the court in the statues of the judicial body or supranational association, for example, to settle the disputes between states (The International Court of Justice UN). The second option – is the pressure of states, in particular as the national

judicial bodies in order to create in the supranational association's structure an additional deterrent element which is able to control the legality of the rule-making bodies of the association. The third option– empowering a supranational judicial body to verify compliance with international obligations by states (the European Court of Human Rights, the Inter-American Court of Human Rights). The fourth option – the activism of the judges of the supranational judicial body who have developed the jurisprudence of relatively higher legal power of the supranational judicial decisions (this concept can be partly applicable also to the European Court of Human Rights).

Obviously, in most cases activities of the international judicial bodies do not cause contradictions and dissatisfactions among states. However, the emergence of the supranational judicial control institution has led to an important consequence which provokes periodically the conflicts of two systems – "violation of the monopoly of the national judicial bodies on the definition of the meaning and role of the international law in the national legal system".[1] And that in turn creates a dilemma for the highest national judicial bodies – whether to consider national constitutional order in subordinate position to the norms of international law or not. This question is not a simple choice between monistic and dualistic systems of international law. An answer to this question is motivated by the national attitude to the law, traditions and the role of judicial constitutional review, which has developed historically. At the same time, such an answer for most states is quite obvious – the national constitutional law, in the form that it is interpreted by the national constitutional court, have precedence over the national judicial authorities, confronted with such a conflict, come to it, - it depends on each specific country and on each specific situation, making it impossible to have a single universal recipe.

2. The cooperation of the high courts of the EU countries and the Court of Justice of the European Union

An indicative example is cooperation between the national constitutional justice and the judicial bodies of supranational entities, primarily of the European Union. For example, the German law directly banned women from military posts involving the use of arms. The applicant, who was denied such a position, appealed the decision of the national authorities to the Court of Justice of the European Union.[2] The responded State as well as Italy and the United Kingdom participated as the third party argued that it is the matter in the exclusive competence of the member-states of the European Union. The Court of Justice disagreed with this approach and held that such a regulation violated the Directive of European

[1] Karen J. Alter. National Perspective on International Constitutional Review: Diverging Optics. iCourts Working Paper Series No. 92, 2017.
[2] *Tanja Kreil v Bundesrepublik Deutschland* Case C-285/98, Reports of Cases 2000 I-00069.

Commissions on equality. As the result of the decision, the text of the Basic law was changed, but, as the commentators noted, it was important in this situation that the national authorities and the society wanted to change it. Accordingly, the decision of the Court of Justice served only as an impetus for the national constitutional legislator.

The decision on the case of the service of women in the armed forces is rather a "happy" coincidence of circumstances. At the same time the German Constitutional Court has the doctrinal approach, applied the first time in the case Solange I, according to which the Constitutional Court in exceptional cases may recognise norms of European law not applicable in the Federal Republic. In particular, the approach was confirmed in the case on the verification of the constitutionality of the Maastricht Treaty, when the Court found that it retains the right to "verify the constitutionality of the legal expansion of the power of the European Union through the case law of the Court of Justice".

Germany is not the only country which, at the doctrinal level, tried to justify the possibility of disagreement with the decisions of a supranational jurisdictional body. An interesting example comes from Italy. In the *Tarricco* case, the national court, who had referred to the Italian Constitutional Court the issue of the applicability of the European law interpreted by the Court of Justice, requested the Constitutional Court to assess not the compliance of the national law with EU law, but whether the Union laws complies *with the Italian Constitution.* The decision of the Grand Chamber of the Court of Justice of September 8, 2015 was submitted for consideration to the Constitutional Court. The merits of the case in the light of the considered issue are not of great importance, but it should be noted that one of the issues raised is a various interpretation of the category of statute of limitations period. In Italian law, they are part of the principle of legality in criminal law and "are considered as part of substantive law," while in the law of most EU states and in the practice of the Court of Justice they "refer to the procedural issues in its pure form".[3]

The Constitutional Court's arguments were based on the following grounds. Firstly, this principle is one of the highest constitutional principles which has greater legal force than EU norms. The Court names it both "the fundamental principle of the rule of law" and "an inalienable human right". These principles form the basis of the constitutional order and cannot be changed under the influence of European Union law. Secondly, the Constitutional Court proceeds from the principle of the separation of powers, arguing that only the legislative power has the right to set limits on the statute of limitations, and judges cannot do this on their own. Thirdly, the Constitutional Court argues, justifying its disagreement with the position of the supranational body, that national constitutional identity was not taken into account by the Court of Justice, and in

[3] Davide Paris. Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco. QIL, Zoom-in 37 (2017), 5-20.

accordance with the Treaty on European Union, the Court of Justice of the EU, when making decisions, must ensure that the identity of any member-state is not violated. And the last thing that the Constitutional Court paid attention, acting in the frame of *Solange* case of the German Constitutional Court – the states have an exceptional opportunity to apply the doctrine of "counter-limits" in some cases or, as this doctrine is called by other bodies of constitutional control: "control of the exercising the fundamental rights", "control *ultra vires*", "control in terms of constitutional identity".

In December 2017, the EU Court of Justice considered the case of *Tarrico* II and took a more conciliatory position, pointed out that its previous conclusions from the decision of 2015 cannot be extrapolated to the facts that existed before the decision was taken, that "the principle of legality is part of the common constitutional tradition of the Member States", and most importantly, that the national courts themselves are free to decide in which cases the application of the rules of the Court of Justice, established in the decision of 2015, would lead to the violation of the principle of legal certainty. In its second decision of 2018 on the given issue the Constitutional Court of Italy confirmed the conclusions of the Court of Justice.

The example of the Constitutional Court of Hungary is also important. In Decision 22/2016 (XII.5), it held that it has the power to exercise control *ultra vires* if the issue concerns national sovereignty and the constitutional identity of the country. The decision was made in the context of the appeal of the Commissioner for Human Rights, who appealed the decision of the EU Council of Ministers on the accommodation of 1,294 additional refugees in Hungary in accordance with the commitments made under the Dublin Agreement. The applicant claimed that such a decision of the Council of Ministers would violate the fundamental human right protected by the Basic Law – prohibition of collective expulsion (sic!). Although the Constitutional Court did not satisfy the appeal of the Commissioner, he confirmed his competence to consider such a question in the future.

The Above mentioned approach of the Federal Constitutional Court of Germany or the Constitutional Court of Italy seems quite reasonable. The text of the Constitution in any case retains its the highest methodological significance in the interpretation of the regulations affecting or restricting human rights, but at the same time there remains the opportunity for a constructive dialogue between national high courts and supranational jurisdictional bodies, since it is obvious that direct confrontation cannot be between the text of the constitution or the basic law and the text of the international agreement binding for a particular state. In this regard, of course, one can bring a counter-argument, for example, in connection with the *Anchugov and Gladkov* case, concerning voting rights of prisoners, but even in this exceptional case there was no contradiction between the texts of the Russian Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms as such – the practice of the European Court which,

naturally, may have the right to interpret the Convention in a certain way, being authorised by the Convention itself, went against the constitutional norms, but at the same time Russia, as one of the sources of such authority, has the legal and the sovereign right to disagree with this interpretation, which went beyond the limits prescribed by the Convention.

3. Interaction between judicial court bodies and the European Court of Human Rights

On numerous occasions it was noted that the Constitutional Courts are the most important proponents for implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms.[4] These Constitutional Courts are also better placed among the national judiciary to implement certain positions of the ECtHR, thereby supporting its legitimacy in the eyes of the national bodies and the population.

Nevertheless, the role of Constitutional Courts in the Convention implementation is not that simple and clear. Firstly, Constitutional Courts are not the only, and not even the senior bodies empowered to implement the Convention and the ECtHR judgments (e.g. in the Russian context such a main body is the Ministry of Justice). Secondly, due to the national legal provisions of the highest legal power Constitutional Courts have certain discretionary powers, or freedom of choice, in interpretation of the ECtHR positions (this will be in more detail covered in the second part of the present document).

Normally, constitutional justice bodies do not keep statistics reflecting the number of quotes of foreign judicial bodies. Among the judiciary of the countries examined below such reports are available e.g. for Estonia and Turkey. There is nevertheless a plethora of works (scientific articles, overviews and other publications) dedicated to embracement by Constitutional Courts of the practice of their foreign colleagues. From the sources examined it could be deduced that it is the Constitutional Courts who are the most open to embrace comparative information, to use foreign court practice (both of national and supranational judiciary) to motivate their decisions. Naturally, there is a number of reasons affecting perception of foreign practice: linguistic affinity, similar legal systems, common historical roots. As regards the ECtHR practice most Constitutional (Supreme) Courts of the Council of Europe member States demonstrate a similar attitude. The Strasbourg Court practice is taken into account by *all* the States and is quoted in domestic decisions of *most* of them. All the constitutional justice bodies of the States considered further quote the ECtHR practice in the reasoning of their judgments.

[4] Petrov, J. (2018). Unpacking the partnership: Typology of constitutional courts' roles in implementation of the European Court of Human Rights' case law. European Constitutional Law Review, 14(3), 499-531. doi:10.1017/S1574019618000299

United Kingdom

International law has become increasingly used in the judgments of the Supreme Court (before 2009 – the House of Lords) since the State accession to the European Union. After adoption of the Human Rights Act (1998) and its coming into force, when the European Convention provisions were incorporated to the UK law, both the Convention and the ECtHR positions references became ordinary for reasoning of the Law Lords decisions. In the majority of cases related to human rights and private law litigations the Lords are referring to the ECtHR practice "attempting to seek guidance for interpretation of the European Convention provisions". This occurred, for example, in cases *Rabone and another (Appellants) v Pennine Care NHS Foundation Trust (Respondent)* (2012), *R v Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division)* (2010), *Alumba Lumba (previously referred to as WL) (Congo) 1 and 2 (Appellant) v Secretary of State for the Home Department (Respondent)* (2011), *Kadian Mighty (previously referred to as KM) (Jamaica) (Appellant) v Secretary of State for the Home Department (Respondent)* (2011). It is noteworthy that the UK Supreme Court analysis can be used by the ECtHR itself to shape its own practice. Such situation has taken place, for example, in the case *S., V. and A. v. Denmark*, nos. 35553/12, 36678/12 and 36711/12 in examination of the issue of compatibility with the Convention of preventive detention practice aimed at prevention of a possible offence.

Federal Republic of Germany

The structure of the first chapter of the German Basic Law (articles 1 – 19) resembles that of the European Convention. As it was noted by C. Tomushat, both documents are inspired by the same ideas, have the same goals and ways of interpretation, therefore the guarantees and standards set by both documents are equal and the issues of differences or contradicting wording are very rare[5]. When considering individual complaints the Constitutional Court of Germany not only refers to the ECtHR decisions, but also interprets them extensively, e.g. in the case 1BvR 420/09 the Court interpreted the ECtHR positions expressed in the judgment *Zaunegger v Germany.* In the case 2BvR 1481/04 or series of *Von Hannover* judgments a dialogue between the Constitutional Court and the ECtHR can be seen, the Constitutional Court examining the cases in the light of Strasbourg judgments delivered on the same theme or similar issues.

France

[5] Christian Tomushat, The effects of the Judgments of the European Court of Human Tights According to the German Constitutional Court, German Law Journal, Vol. 11 No. 05, 2010.

In France, the Constitutional Council is not a full-fledged body of the constitutional justice, therefore reference to or analysis of the ECtHR practice are infrequent. Nevertheless, since 2010, after the introduction of *La question prioritaire de constitutionnalité* procedure which warranted *a posteriori* constitutional supervision in France, number of references to the ECtHR practice in the Council has increased. For example such references were made in decisions n° 2012-248 QPC du 16 mai 2012, n° 2012-268 QPC du 27 juillet 2012.

Czech Republic

The ECtHR case law is considered in the Czech Republic as «*ratio decidenti* for the Constitutional Court which uses them in day to day work». No precise numbers for reference to the ECtHR decisions is provided, but analysis of English translations of the decisions, published on the Court official website leads to a conclusion that almost all decisions concerning human rights contain some reference to the ECtHR decisions. For example, in its decision no. IV.US 23/05 #2 related to human dignity and freedom of speech the Constitutional Court made a reference *Pedersen and Baadsgaard v Denmark* judgment of the ECtHR, in decision no. II. US 586/06 related to interpretation of "family life" notion, the Court made a reference to ECHR judgment in *Kroon and others v the Netherlands.*[6]

Estonia

In the hierarchy of sources of law, the European Convention is placed between the Constitution and ordinary laws. First reference to the ECtHR case-law was made by the Constitutional Justice Chamber of the Supreme Court of Estonia in 1996, the reference was made to the case *Malone v The United Kingdom*. The Convention came into force for Estonia from 16 April 1996. By the end of 2011 the European Court and its practice was mentioned (quoted) 173 times in the decisions of the Supreme Court. References are mostly made in criminal cases (21 ECtHR judgment on criminal matters is quoted from 2009 to 2011). The Supreme Court uses ECtHR practice both to interpret the Constitution and the laws and as *obiter dictum*. Most references were made by the Court to the following cases: *Pélissier and Sassi v France* (8 times), *Kudła v Poland* (6 times), *Konashevskaya and others v Russia* (5 times), *Reinhardt and Slimane-Kaïd v France* (4 times),

[6] Marian Kokeš, Comparing Constitutional Adjudication: The "dialogue of judges" and the mutual influence of constitutional concepts in Europe: How the interpretation of national fundamental rights is influenced by the fundamental rights of the ECHR and the EC general principles as well as by a horizontal exchange of ideas of national constitutional Courts? Examples from the Czech Republic, 2009.

Kangasluoma v Finland (4 times), *Sunday Times v the United Kingdom (No 1)* (4 times).[7]

Serbia

Since 2006 the Constitution of Serbia allows to lodge an individual complaint with the Constitutional Court. The Constitutional Court began to refer to the ECtHR case-law from the first cases of this type. For example, in the decision Uz 227/2008 of 9 July 2009 regarding the presumption of innocence the Constitutional Court referred to the case-law of the ECtHR and pointed out that the presumption of innocence is violated when the judicial decision and the official person statement contain assertions of a person's guilt before the guilty sentence has come into force. Presently in most cases initiated by individual constitutional complaints the Constitutional Court of Serbia refers to the legal positions of the ECtHR.

Russian Federation

The Constitutional Court of the Russian Federation quite frequently makes references in its decisions (both Judgments and Rulings) to the European Court judgments. For the last five years (since 2014) such references were made in more than 40 Rulings and 120 Decisions. During the same period the European Court referred to the Constitutional Court case-law in more than 120 judgments and almost in 30 decisions.

As the constitutional provisions are mostly close to the European Convention provisions (often extending and enriching them), the Constitutional Court refers to the Convention provisions in order to make a more complete interpretation of the rights enshrined in the Constitution of the Russian Federation. In order to better understand the Convention, it is necessary to recourse to the European Court case-law, for the ECtHR is the Convention body created also to interpret its provisions. Therefore, the Constitutional Court performs several important functions. By disclosing the meaning of the Constitution provisions, it also implements universal principles and approaches to human right protection on the national level. Moreover, the Constitutional Court also provides an example of good practice for the Russian courts, by demonstrating that the Convention and its interpretation are inseparable part of the Russian law, that is applicable directly.

All in all, the role that a Constitutional Court can play it the implementation of the ECtHR practice is multi-faceted. As regards the Constitutional Court of Russia,

[7] Eerik Kergandberg, justice of the Supreme Court, European Court of the Human Rights – Court of fourth instance in Estonia? Riga, 2012.

four types of relevant models can be separated: ECtHR can directly controvert with the Constitutional Court, as was partly seen in the *Konstantin Markin* case and resulted in the Constitutional Court Judgment 27-P of 6 December 2013. The Court can also become a conductor of changes, as the Constitutional Court had done in dozens of cases relating, for example, to criminal procedure standards. The Constitutional Court can also initiate the necessary legislative changes in the light of the European Court practice regarding the HIV-positive citizens or stateless person Mskhiladze. At the same time the Constitutional Court verifies the constitutionality of legislative reforms aimed at execution of the ECtHR judgments.

II. Constitutional Court of the Russian Federation and the Legal positions of the European Court of Human Rights

1. Specifics of individual complaints' consideration

As noted by the Constitutional Court of the Russian Federation in its Judgment of 26 February 2010 No 4-П, the rights and freedoms recognised by the European Convention are essentially the same rights that are enshrined in the Constitution of the Russian Federation; the European Court of Human Rights and the Constitutional Court of the Russian Federation identifying violations of the relevant rights have common nature of their legal status and purpose. Thus, the Constitutional Court of the Russian Federation takes into account the applicable case-law of the European Court upon verification of normative legal acts constitutionality and identification of citizens' rights violations by these acts, but the Constitutional Court it is not hierarchically bound by the ECtHR's legal positions and conclusions, acting, as per Article 120 of the Constitution on the basis only of the Constitution and the law.

Recourse to constitutional proceedings in the Russian legal system (provided that all the prescribed admissibility criteria had been met) means that the rights of a person were not protected by the national courts and law-enforcement bodies, and that defect of the law or its practical interpretation lies at the heart of the violation. In other words, the Constitutional Court, unlike the European Court, examines not the interference with the rights itself, but the legislative provisions on which such interference is based.

In many cases competence of the Constitutional Court allows to eliminate the legislative shortcomings found directly – including by way of constitutional interpretation of the impugned norms or by obliging the federal legislator or the Government to amend the legal regulations, as well as by identifying interim order

of the Constitutional Court judgments execution before the relevant legislative changes are made.

The European Court identifies the violation or non-violation of the Convention provisions, that occurred because of certain actions (omission) of the authorities, and seldom gives recommendations as regards the type of measures required to put an end to violations committed. In such situation the ECtHR may recommend both to take *general measures* (often formulated in a rather summary fashion), and *individual measures* – including those aimed at judicial decision review (see, e.g. judgments *Yegorychev v Russia*,[8] *Nikotin v Russia*[9] etc.). In some cases the ECtHR deems it necessary to indicate the possibility of judicial review (which is an ordinary way of the ECtHR judgments in Russia), but in other cases no such indication is made while the measure itself appears appropriate (see e.g. *Fefilov v Russia*[10]). In any event, the issue of execution of the ECtHR judgments is ultimately within the competence of the Committee of Ministers of the Council of Europe, which may use different approaches in different cases.

Different scope of competence of the Constitutional Court of the Russian Federation and the European Court of Human Rights predetermines different nature of complaints dealt with by these courts. It follows from the 2018 Annual Report of the ECtHR that large number of violations in cases against Russia is closely linked to the factual circumstances of the case: inhuman treatment, violation of the right to liberty and security (primarily due to unreasonably log pre-trial detention). It is apparent, that such complaints cannot be subject of consideration of the Constitutional Court. At the same time the Constitutional Court has developed legal positions contributing to protection of citizens' rights in the above spheres (Judgments of 29 June 2002 № 6-П, of 16 July 2015 № 23-П etc.).

Situations are possible when the Constitutional Court and the European Court while guided essentially by the same principles arrive to different conclusions as regards violation or non-violation of the Constitution of the Russian Federation and the Convention for the Protection of Human Rights and Fundamental Freedoms respectively. This, again, is connected to the different competence (as regards the scope of revision) of the two judicial bodies.

For example in its Decision of 3 July 2014 № 1561-O upon application of A.V.Cherepanov the Constitutional Court held that temporary restriction for the debtor leaving the Russian Federation cannot be arbitrarily imposed by the bailiff without due regard of the real possibility for the applicant to voluntarily fulfil the obligation according to the writ of execution.

[8] *Yegorychev v. Russia*, no. 8026/04, ECHR, 17 May 2016, § 78.
[9] *Nikotin v. Russia*, no. 80251/13, ECHR, 8 January 2019, § 30.
[10] *Fefilov v. Russia*, no. 6587/07, ECHR, 17 July 2018.

Nevertheless, national courts refused to recognise as unlawful the relevant decision of the bailiff despite imposition of the restriction long before the applicant had an opportunity to read the writ of execution. As the result the ECtHR found a violation by the Russian authorities of Article 2 of the Protocol № 4 to the Convention (freedom of movement)[11].

The example above illustrates how failure to execute the Constitutional Court decision led to establishment of a Convention provisions violation by the Russian Federation.

Not infrequently the applicants apply to the Constitutional Court of the Russian Federation after delivery of the European Court judgment. Such application may be conditioned by the applicants' disagreement with the results of judicial review of their cases in connection with the ECtHR judgments, or refusal to conduct such a review (e.g. Decisions of 25 May 2017 № 1095-O, of 20 December 2018 № 3404-O).

Nevertheless, the Russian law provisions, the legal positions of the Constitutional Court and the approaches of the Supreme Court of the Russian Federation do not warrant an automatic review of a judicial decision after delivery of the ECtHR judgment. For example, as regards criminal proceedings the Constitutional Court has held in its Decision if 14 January 2016 № 14-O that execution of the ECtHR judgments in the framework of criminal judicial proceedings must allow to determine whether there was a connection between the Convention violation established and the results of judicial proceedings, as well as to identify whether there is a need to review the criminal sentence in force, delivered in respect of the citizen who applied to the European Court.

It is also clear from the legal point of view that reopening of the proceedings upon the new circumstances does not imply that in all cases a new judicial decision will be in conformity with the applicants' expectations. It follows from the Committee of Ministers of the Council of Europe practice related to supervision over execution of judgments that the fact of reopening or review is often enough to consider a judgment of the ECtHR successfully executed. At the same time in each case it should be analysed to what extent the fact of review itself is enough to eliminate a violation that occurred in respect of the applicant.

The joint efforts of the Constitutional Court and the European Court may result in lack of necessity to review certain judicial acts. For example, the courts have adopted similar approaches as regards protection of family life of persons sentenced to life imprisonment. The ECtHR in its *Khoroshenko* judgment found a violation of Article 8 of the Convention due to violation of the right to family life of the applicant because excessively severe conditions of his detention (related to prohibition of visits and other contacts with relatives) in a correctional colony of

[11] *Cherepanov v. Russia*, no. 43614/14, ECHR, 6 December 2016 § 45.

special regime. The Constitutional Court Judgment of 15 November 2016 № 24-П upon the complaints of applicants, one of which also was sentenced to life imprisonment, recognised as unconstitutional the provisions of the Code of Execution of Criminal Penalties (*UIK RF*) that would not allow long-term visits to persons sentenced to life imprisonment, during the first 10 years of their imprisonment. The Constitutional Court had also indicated an interim order of execution of the judgment before the introduction of legislative amendments, thereby eliminating the need to review judicial acts, including those in respect of Mr Khoroshenko. The amendments corresponding to the legal positions of the Constitutional Court and the ECtHR were subsequently introduced to the UIK RF (Federal law of 16 October 2017 № 292-ФЗ).

In sum, such a positive dialogue between the courts applying national and universal norms, principles and values, can be seen as an effective way of protection of citizens' rights.

2. Optimisation of procedure: national approach and international justice

The high reputation of the Constitutional Court and the European Court, and the degree of trust put in them by individuals determine large number of applications lodged with them annually. In 2018, the Constitutional Court of the Russian Federation received more than 15 000 applications; more than 12 000 applications against the Russian Federation were allocated to the ECtHR judges. Thus, both courts have encountered a similar problem – the need to enhance their procedures in view of constantly growing number of applications.

Bearing this in mind, the Federal Constitutional Law of 3 November 2010 no. 7-ФКЗ introduced a possibility for the Constitutional Court to consider cases without a hearing (Article 47^1 of the Constitutional Court Act). The law retains guarantees of the applicants' rights if this procedure is invoked, in particular the applicant can still submit observations to the positions of the competent State bodies. The reasoning of such judgments does not differ from the judgments delivered after a public hearing. The new procedure became widely used immediately after its introduction. In 2018, out of 47 Judgments of the Constitutional Court 37 were delivered under this procedure.

For the ECtHR the written procedure without a public hearing was a basic procedure from the beginning. A decision to hold public hearing is taken on rare occasions (in 2016 only 16 such hearings took place), with due regard to relevant requests from the parties, special public interest, the need to hear witnesses etc.

At the same time the Protocol No 14 to the Convention had foreseen the possibility to consider the admissibility issue by a single judge (with participation of the Secretariat of the ECtHR), and extended the scope of competence of Committees

comprising three judges, allowing them to consider the merits of so-called "well-established case-law" (WECL) cases. The decisions on the latter come into force immediately after their delivery and cannot be subject to appeal (i.e. request to transfer the case to the Grand Chamber). These changes allowed to speed up the applications consideration, but this was achieved partially at the price of some lowering of procedural guarantees afforded to the applicants – in practice, the applicant sometimes received a written notification from the ECtHR Secretariat on the inadmissibility decision taken by a single judge, without the text of decision or even the judges' signature. This situation led to additional complaints from the applicants, addressed to the ECtHR Secretariat and to the Committee of Ministers, and sometimes even to the national authorities. As the result it was decided to deliver short motivated decisions, which are send to the parties[12].

It should be noted that the guarantees afforded to the applicant at the stage of admissibility examination by the Constitutional Court of the Russian Federation are at the outset more significant: the applicant has an opportunity to have his complaint examined by the Court if he disagrees with the Secretariat on the admissibility issue, in this case (if the judges of the Court agree with its Secretariat) a judgment of the Constitutional Court is rendered in the form of Decision[13]. The formation of the Constitutional Court also does not change – it consists of all the judges present.

The work of the ECtHR's three judges Committees sometimes causes the Member States objections, related partly to the fact that the ECtHR itself determines that types of cases that fall under the "well-established" category, and only informs the States about its conclusions, at the same time such judgments themselves contain only the minimum reasoning – i.e. the reference to a "well-established case-law". Such an approach may cause objections, for example when the case implies analysis of reasonable time for pre-trial detention in certain circumstances, or of complex geopolitical issues.

Hence, both the Constitutional Court of the Russian Federation and the European Court of Human Rights have encountered similar problems – the need to optimise their procedures in view of growing number of applications. In a way, the answer to these problems may be seen as similar (special procedures to consider the cases were "well-established" case-law is applicable). In search for balance between securing procedural rights of the applicants and enhancing their own procedures the courts have adopted somewhat different approach – the Constitutional Court aims for maximum securing of procedural guarantees, and the European Court made more emphasis at the speeding up and simplifying the procedure of judgments delivery. More recently these approaches became apparently closer to each other, as the ECtHR introduced motivated single judge inadmissibility

[12] Opening speech of the President of the European Court of Human Rights Guido Raimondi at the opening of the judicial year in Strasbourg, 26 January 2018.
[13] Article 40 of the Constitutional Court Act.

decisions and somewhat expanded the reasoning of the Committee judgments (for example in part presenting the information about the applicants, the nature of their complaints and the violations committed).

3. Universal standards in the ECtHR judgments and the balancing exercise of the Constitutional Court of the Russian Federation

A separate issue as regards the execution of the ECtHR judgments arises in respect of the most problematic and controversial judgments of this Court. In this regard two judgments of the Constitutional Court of the Russian Federation should be mentioned: of 6 December 2013 № 27-П and of 14 July 2015 № 21-П.

In the first of these judgments the Constitutional Court made the following statements as regards the dialogue with the ECtHR:

- the fact that earlier the Constitutional Court of the Russian Federation recognised a citizen's complaint as inadmissible in connection with absence of violation of his constitutional rights by legislative provisions applied in his concrete case may not serve as obstacle for admission by it for consideration of a request of court of general jurisdiction, which upon application of the same citizen in the procedure of Item 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation carries out reconsideration of a judicial decision having entered into legal force, based on these legislative provisions, which the European Court of Human Rights gave appraisal of as entailing breach of the Convention for the Protection of Human Rights and Fundamental Freedoms. At this, if in the course of constitutional judicial proceedings legislative provisions under consideration will be recognised as not contradicting the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation – bearing in mind that for court of general jurisdiction refusal from reconsideration of a judicial decision having entered into legal force as a procedural stage conditioned, in particular, by passing of a judgment of the European Court of Human Rights is excluded in any event, – within the framework of its competence determines possible constitutional means of realisation of the judgment of the European Court of Human Rights.

- Item 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation in the interconnection with Sections 1 and 4 of its Article 11 does not contradict the Constitution of the Russian Federation, in so far as within its constitutional-law meaning in the system of operating legal regulation these legislative provisions do not hinder court of general jurisdiction to begin, upon application of a citizen, whose complaint to the Constitutional Court of the Russian Federation against violation of his constitutional rights and freedoms was earlier recognized as not answering the criterion of admissibility, proceeding on reconsideration on new circumstances of a judicial decision having entered into legal force in connection with establishment by the European Court of Human

Rights of breach of provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms in relation to this citizen in the course of consideration of respective civil case by court of general jurisdiction.

In its judgment no. 21-П of 14 July 2015 the Constitutional Court of the Russian Federation held as follows:

- as follows from the Constitution of the Russian Federation, its Articles 4 (Section 1), 15 (Section 1) and 79 enshrining Russia's sovereignty, supremacy and the highest legal force of the Constitution of the Russian Federation, and inadmissibility of implementation into the legal system of the state of international treaties, participation in which can entail restrictions of human and civil rights and freedoms or allow any infringements to the constitutional system of the Russian Federation and thereby break constitutional prescriptions, neither the Convention for the Protection of Human Rights and Fundamental Freedoms as international treaty of the Russian Federation nor legal positions of the European Court of Human Rights based on the Convention containing appraisals of national legislation or concerning the need to alter its provisions, do not abrogate for the Russia's legal system the priority of the Constitution of the Russian Federation and therefore are subject to execution within the framework of this system only with the condition of recognition of supreme legal force exactly of the Constitution of the Russian Federation.

- in a situation when the content of a judgment of the European Court of Human Rights, including the part of prescriptions addressed to the respondent state and based on the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, interpreted by the European Court of Human Rights within the framework of a specific case, unlawfully, from the constitutional-law point of View, affect principles and norms of the Constitution of the Russian Federation, Russia may, as an exception, deviate from fulfilment of obligations imposed on it, when such deviation is the only possible way to avoid violation of fundamental principles and norms of the Constitution of the Russian Federation.

- if the European Court of Human Rights, interpreting a provision of the Convention for the Protection of Human Rights and Fundamental Freedoms in the course of the consideration of a case, gives to a notion used in the Convention a meaning other than the ordinary one or carries out interpretation contrary to the object and purpose of the Convention, the state, in respect of which the judgment has been passed on this case, has the right to refuse to execute it as it goes beyond the obligations, voluntarily taken by this state upon itself when ratifying the Convention. Accordingly, the judgment of the European Court of Human Rights cannot be regarded obligatory for execution, if as a result of interpretation of a specific provision of the Convention for the Protection of Human Rights and Fundamental Freedoms on which this judgment is based, it was carried out in violation of the general rule of interpretation of treaties, the meaning of this

provision will diverge from imperative norms of customary international law (jus cogens), to which without doubts the principle of sovereign equality and respect for rights inherent in sovereignty and the principle of non-interference with internal affairs of states belong.

- Russia joined the Convention for the Protection of Human Rights and Fundamental Freedoms striving for provision of realisation of a fundamental provision concerning human rights and freedoms as the supreme value in the law-governed state, stated in Article 2 of the Constitution of the Russian Federation, with additional guarantees. Due to the fact that participation of Russia in this Convention, the observance of which the European Court of Human Rights is called upon to ensure, is determined by the task of realisation of this very constitutional provision, harmonisation of Russian law with the conventional one, interpretation and application of which is carried out by the European Court of Human Rights in the course of consideration of specific cases, is admissible insomuch as it does not engender contradictions with the Constitution of the Russian Federation.

Bound by the requirement to observe an international treaty having entered into force, such as the Convention for the Protection of Human Rights and Fundamental Freedoms, the Russian Federation is nevertheless obliged to ensure the supremacy of the Constitution of the Russian Federation within the framework of its legal system, which forces it in the event of emerging of any collisions in this field, whereas the Constitution of the Russian Federation and the Convention for the Protection of Human Rights and Fundamental Freedoms are based on the same basic values of the protection of human and civil rights and freedoms, to give reference to the requirements of the Constitution of the Russian Federation and thereby not follow literally the judgment of the European Court of Human Rights in the event if its execution contradicts constitutional values.

Accordingly, the Constitutional Court of the Russian Federation cannot support interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms given by the European Court of Human Rights if it is the Constitution of the Russian Federation (including its interpretation by the Constitutional Court of the Russian Federation) as a legal act having supreme legal force in the legal system of Russia, more complete, if to compare with respective provisions of the Convention in their interpretation by the European Court of Human Rights ensures protection of human and civil rights and freedoms, including in the balance with rights and freedoms of other people (Article 17, Section 3, of the Constitution of the Russian Federation).

- interaction of the European and constitutional legal orders is impossible in the conditions of subordination, so far as only dialogue between different legal systems is the basis of their appropriate balance. This is the approach, which the European Court of Human Rights is intended to adhere to in its activity as the

interstate subsidiary judicial body, and this is its respect for national constitutional identity of the states-parties to the Convention for the Protection of Human Rights and Fundamental Freedoms that effectiveness of its norms in the inter-state legal order in many respects depends on. Particular attention of super-national bodies to basic elements of this constitutional identity, which constitute intra-state norms on fundamental rights as well as norms on the basis of the constitutional system guaranteeing these norms, will allow to reduce the probability of conflict between national and super-national law, which, in its turn, in many respects will determine, with preservation of constitutional sovereignty of states, effectiveness of the entire European system of protection of human and civil rights and freedoms and further harmonisation of the European legal space in this field.

Thus, the basic approach of the Constitutional Court implies that refuse to execute the European Court of Human Rights judgments is possible only in exceptional circumstances as a last resort under the Basic Law, as a sort of self-defense against supra-national interpretation of the Convention provisions in contradiction with the Constitution provisions.

At that, distinction should be drawn between non-execution or limited execution on the basis of contradiction with the Constitution provisions (there were only two examples in this regard – the *Anchugov* case and the *YUKOS* case), i.e. the resort to special procedure under the Constitutional Court Act, and non-execution or prolonged execution of final ECtHR judgments conditioned by difficulties or peculiarities of the national system of public authorities' functioning.

The first type (Constitution-based limits for execution) implies that the Constitutional Court within its competence imposes rather strict limits to the measures that can be taken in order to execute the ECtHR judgment (and accordingly identifies impossibility to undertake certain measures). The practice of realisation of this machinery, however scarce, demonstrates that the Constitutional Court always strives to find a constitutionally acceptable and lawful compromise for execution of "problematic" judgments. i.e. to pursue the dialogue.

The second type implies a much broader scope of the dialogue between the Russian authorities and the Committee of Ministers of the Council of Europe. The execution of the ECtHR judgments in this case may continue for a long time and include a number of stages.

Among the main unexecuted judgments against Russia the following could be mentioned by way of example:

- *Kalashnikov* group of cases, and *Ananyev and others* pilot judgment (inadequate conditions of pre-trial detention, lack of efficient legal remedies);

- *Klyakhin* group of cases (various violations of the right to liberty and security);

- *Khashiyev and Akayeva* group of cases (violations related to a large-scale counter-terrorist operation in the territory of Northern Caucasus).

These are only three examples of the large number of judgments remaining under the supervision of the Committee of Ministers. It should be underlined that the CMCE has recognised positive developments in many ECtHR judgments, including the cases mentioned above. For example in the Kalashnikov group of cases the CMCE welcomed the adoption by Russia of a new Code of Administrative Procedure and following court practice. As regards Klyakhin group only one aspect remains not executed yet – unreasonably long pre-trial detention.

The execution of such judgments should be based on the dialogue between the Russian authorities and the Committee of Ministers of the Council of Europe. In many cases the results of such dialogue are reflected in complex enhancement of the national legal system as well as recognising the ECtHR judgments as successfully executed.

The examples of such systemic improvements may be seen in execution of the *Kormacheva* and *Smirnova* groups of cases, leading not only to creation of the national legal remedy for excessively long court proceedings, but also to systemic improvements in the administration of justice, including the aspects of qualification of judges, their disciplinary liability, financing of the judicial system, optimisation of court proceedings etc. As it was noted in the Action Report of the Russian authorities on execution of these groups of cases, presently the vast majority of cases are resolved by the Russian courts in compliance with the reasonable time criterion[14]. This protection of rights in this field is almost entirely secured on the national level and the ECtHR is practically not considering this type of cases anymore.

Similarly, the execution of the pilot *Burdov* judgment, related to violations concerning excessively log execution of national courts' judgments rendered in favour of the applicants upon their actions against state or municipal authorities did not stop at the creation of the relevant compensatory remedy, but was effectively supplemented by a set of measures, including those in the field of budgetary regulations.

Finally, the work on complex improvement of civil procedural legislation has led to a reform of appeal procedure, allowing to secure "extraordinary" nature of review for final national courts' judgments, which allowed to recognise successful execution of the *Ryabykh* group of judgments related to violation of the principle of legal certainty because of quashing of final judgments rendered in favour of the applicants.

[14] Document DH-DD(2016)469 published on the official website of the Committee of Ministers of the Council of Europe