

INITIATION OF PROCEEDINGS IN THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION BASED ON CITIZEN COMPLAINTS

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Subject of the research. Citizens' right to appeal to the Constitutional Court of the Russian Federation against a violation of constitutional rights and freedoms by a law or other regulatory act applied in a specific case should be defined as a direct appeal. Judges' inquiries, permissible when a judge questions the constitutionality of the law applicable in a case, may be considered an indirect appeal by citizens. The purpose of the research: to determine the nature of responsibilities for indirect regulatory control of courts for compliance of the law with the Constitution. Research methods: formal-legal method, analysis, synthesis, formal-logical method.

The main results. In addition to the element of a violation of the applicant's rights and freedoms, in accordance with Article 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation," a complaint against a violation of constitutional rights and freedoms by a regulatory act is admissible subject to two additional interrelated conditions: the exhaustion of all other domestic judicial remedies for the applicant's rights and the compliance with the appeal deadline (one year), the calculation of which is directly related to such exhaustion.

The rule of exhaustion of domestic remedies as a condition for the admissibility of a complaint is borrowed from the European Court of Human Rights. However, with regard to the activities of the Constitutional Court of the Russian Federation, two "buts" arise with such borrowing: (1) the Constitutional Court of the Russian Federation is a national body, albeit external to the system of courts of general jurisdiction and arbitration courts; the ECHR is supranational; (2) the European Court positions itself as a complementary means of protection to domestic methods of protecting human rights. The Constitutional Court of the Russian Federation takes a different approach when delineating its jurisdiction from the courts: a court of general jurisdiction or arbitration court, having concluded that a federal law or the law of a constituent entity of the Russian Federation is inconsistent with the Constitution of the Russian Federation, is not entitled to apply it in a specific case and is obligated to request the Constitutional Court of the Russian Federation to review the constitutionality of this law. This obligation exists regardless of whether the case considered by the court, which refused to apply the law it deemed unconstitutional, was decided on the basis of the directly applicable provisions of the Constitution of the Russian Federation. The rule introduced into Russian legislation requiring the exhaustion of domestic remedies before a citizen can appeal to the Constitutional Court of the Russian Federation against a violation of constitutional rights and freedoms by a normative act is not a full-fledged borrowing of the similar principle of admissibility of complaints in effect at the European Court of Human Rights. Only the condition, not the nature of the activities of these "domestic" bodies, is borrowed.

Conclusions. Both ways of appealing to the Constitutional Court of the Russian Federation—direct and indirect—require specific court activities to identify alleged inconsistencies between a law and the Constitution of the Russian Federation (indirect normative review). Special responsibility is assigned to the second cassation and supervisory instances as the final instances among domestic remedies. Given that the subject of these instances must necessarily be the issue of the alleged inconsistency of a law with the Constitution of the Russian Federation, the issue should ideally be resolved at the level of the Supreme Court of the Russian Federation. A citizen's appeal to the Constitutional Court of the Russian Federation may indicate an error on the part of the court system, and specifically the Supreme Court of the Russian Federation, which has failed to fulfill its responsibility for indirect regulatory oversight.

1. Introduction

In accordance with paragraphs 3 and 3.1 of Article 3 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation," citizens have two ways to appeal to the Constitutional Court of the Russian Federation: by filing their own complaint or by petitioning the court hearing the case to submit a judicial inquiry to the Constitutional Court of the Russian Federation regarding the constitutionality of a law. The first method applies to a law already applied in the case, while the second method applies to a law subject to application.

The right of citizens to appeal to the Constitutional Court of the Russian Federation with an individual or collective complaint regarding the violation of their constitutional rights and freedoms by a federal constitutional law, federal law, or other regulatory acts applied in a specific case (Article 96 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation") should be defined as a direct appeal.

Inquiries by judges, permitted when the judge hearing a case doubts the constitutionality of the law applicable in that case (Articles 101-102 of the Federal Constitutional Law), may be considered indirect appeals by citizens. In this situation, the desired result for citizens (assessment of the applicable law as unconstitutional) will be achieved indirectly – through the court's actions.

When using this terminology to describe the methods of appeal to the Constitutional Court of the Russian Federation, one should distance oneself from the existing debate in civil procedural science regarding the terms and classification options for forms of judicial review of normative legal acts. Within the framework of this debate, the following terms are proposed: "direct and indirect," "substantive and supporting," "abstract and concrete" review [1, p. 321; 2, pp. 115-116; 3,

p. 4; 4, p. 89; 5, p. 22] to designate the court's activity in assessing the legal force of the applicable act.

The citizen's ability to independently file a complaint with a constitutional review body in constitutional law researches is considered direct access. Indirect access implies that only another government agency can initiate consideration of a case at the request of, or in the interests of, the citizen [6, pp. 4-25]. However, in civil procedural science, these terms are given a different meaning. Thus, S.V. Nikitin uses them to distinguish types of judicial review: indirect review, unlike direct review, is carried out outside the framework of a special procedure for challenging regulatory acts; verification of the legality of a norm is conducted within the framework of the general case resolution procedure [7, pp. 88-101].

Thus, the same terms can be used to denote different phenomena. A discussion of the terms and the delineation of their spheres of application is beyond the scope of this study, and therefore it is proposed to designate the two aforementioned methods of citizen appeal to the Constitutional Court of the Russian Federation as direct and indirect.

2. Direct Appeal

In addition to the violation of the applicant's rights and freedoms, in accordance with Article 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation," a complaint against a violation of constitutional rights and freedoms by a regulatory act is admissible subject to two additional interrelated conditions: the exhaustion of all other domestic judicial remedies for the applicant's rights and the compliance with the appeal period (one year), the calculation of which is directly linked to such exhaustion (calculated from the date of the judicial decision that exhausts

domestic judicial remedies).

The Federal Constitutional Law "On the Constitutional Court of the Russian Federation" clarifies the concept of exhaustion of domestic judicial remedies: this involves filing a cassation appeal to the highest court for a given category of cases; or filing a supervisory appeal (for decisions on cases within the jurisdiction of the Supreme Court of the Russian Federation). Let's also note an important aspect: Article 97 of the Federal Constitutional Law stipulates another condition: the judicial act that applied the contested normative act was the subject of a cassation or supervisory appeal in connection with the application of that normative act, and the filing of the cassation or supervisory appeal did not eliminate the violation of the rights of the applicant or individual. Essentially, this requires that the cassation appeal include a request to review the disputed normative act for its compliance with the Constitution. The courts of the reviewing instances, in turn, are obligated to eliminate the violation of the applicant's rights.

The applicant may be relieved of the need to exhaust all statutory appeal avenues by convincing the Constitutional Court of the Russian Federation that, given the established law enforcement practice of the court, whose decision typically exhausts domestic judicial remedies for the relevant category of cases, or in the presence of an official interpretation of the contested normative act, provided in clarifications on issues of judicial practice for the purpose of ensuring the uniform application of the legislation of the Russian Federation, no other application of the contested normative act than that which occurred in his case is envisaged; and the Constitutional Court of the Russian Federation, in connection with this, recognizes domestic judicial remedies as exhausted.

The availability of domestic judicial remedies depends on: participants' awareness of the appeal procedure; the ease of filing a complaint and accompanying documents; clear

rules governing the jurisdiction of complaints; convenient appeal deadlines; and affordable state fees and other costs [8, p. 67]. Not all of the above-mentioned aspects are equally convenient (calendar deadlines may be extended, and fees may seem significant). However, all of these rules cannot be considered disproportionate or insurmountable in the process of fulfilling the conditions for filing an appeal with the Constitutional Court of the Russian Federation.

The order of appeal is a mandatory rule in the current civil procedural legislation. Thus, A.P. Fedorova points to the adherence to the order of appeal when she offers her definition of "exhaustion": "The exhaustion of other means of appeal is a condition for the filing of a cassation or supervisory complaint (representation) by persons determined by procedural law to the court of the appropriate instance, designed to ensure compliance with the principle of sequential appeal of judicial acts" [9, pp. 33-38].

The principle of instance is a comprehensive rule of civil procedure that includes the requirement for strict adherence to the sequential consideration and resolution of a case by the court of first instance, as well as the sequential appeal and review of judicial decisions in appellate, cassation, and supervisory instances [10, pp. 17-21].

The rule of exhaustion of domestic remedies as a condition for the admissibility of a complaint is borrowed from the European Court of Human Rights. However, when applied to the activities of the Constitutional Court of the Russian Federation, this borrowing raises two "buts": 1) the Constitutional Court is a national body, albeit external to the system of courts of general jurisdiction and arbitration courts; the ECHR is supranational; 2) the European Court positions itself as a complementary means of protection to domestic means of protecting human rights. The Constitutional Court of the Russian Federation takes a different approach to delimiting its jurisdiction from the courts, which

will be discussed below.

3. Indirect Appeal

The second form of protection we are considering is indirect, which means that a judge, when considering a specific case, has the right to submit a request to the Constitutional Court of the Russian Federation and effectively acts in the interests of the citizen even before a decision is rendered (the proceedings are suspended). Such a request is permissible in cases where the judge, during the consideration of the case, is faced with uncertainty as to whether the law applied in the case complies with the Constitution of the Russian Federation (Articles 101 and 102 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation"). Resolution No. 8 of the Plenum of the Supreme Court of the Russian Federation of October 31, 1995, states that a request may be made by a court of any instance and at any stage of the case's consideration (clause 3 of the Resolution as amended on April 16, 2013). The effectiveness of such a request for the parties to the case is immeasurably higher than direct filing of a complaint. Since the case has not yet been heard and the questionable law has not yet been applied, the court has the opportunity, after the Constitutional Court has reviewed the request, to issue a legal and reasoned decision on the case.

The law does not contain provisions regarding the right of participants in a specific legal proceeding to petition the court for such a request, but it also does not prohibit such actions. Court requests are more effective than complaints from the Human Rights Commissioner of the Russian Federation and other ombudsmen or the Prosecutor General [6, pp. 4-25]. Implementing constitutional judicial review through court requests saves judicial system resources and ensures the more rapid removal of regulatory obstacles to the protection of rights [11, pp. 49-76].

However, both direct and indirect methods

of appeal by citizens to the Constitutional Court of the Russian Federation depend on the specifics of indirect review permitted to the courts.

4. Indirect Norm Review

The Constitution of the Russian Federation, as one aspect of judicial independence, requires courts that, when considering a case, find an act of a state or other body to be inconsistent with the law, to make a decision in accordance with the law (Part 3 of Article 120). It would seem that this clearly provides for the possibility of reviewing only for "compliance with the law," not with the Constitution. However, the detailed mechanism laid out in Article 120 of the Constitution of the Russian Federation appears to be different in laws. Thus, Part 3 of Article 5 of the Federal Constitutional Law "On the Judicial System of the Russian Federation" establishes the following: "The court, having found, when considering a case, that an act of a state or other body... is inconsistent with the Constitution of the Russian Federation, a federal constitutional law, or a federal law,... shall make a decision in accordance with the legal provisions that have the greatest legal force."

Sectoral procedural codes—Article 11 of the Civil Procedure Code and Article 13 of the Arbitration Procedure Code—instruct courts that, when resolving a civil case, find a regulatory legal act inconsistent with a regulatory legal act of greater legal force to apply the provisions of the regulatory legal act with greater legal force. The type of regulatory act is not specified, and these articles make no direct reference to the Constitution of the Russian Federation.

The courts' disregard for acts that are inconsistent with the law when considering cases (as enshrined in Part 3 of Article 120 of the Constitution) is considered in procedural literature as indirect (mediated, abstract) normative review. Thus, S.V. Nikitin very clearly sees the essence of indirect normative review in the fact that, when rendering a decision on a case, the court refuses

to apply a legal act that, in the court's opinion, is illegal, ignoring it and resolving the case on the basis of an act with greater legal force. Moreover, the illegal act does not lose its legal force in general, but loses it within the framework of a specific legal case [7, pp. 88-101].

Is this approach applicable to assessing the conformity of a normative act with the Constitution of the Russian Federation? According to S.V. Nikitin, in the form of indirect normative review, a court of general jurisdiction and an arbitration court can check any normative legal act from the point of view of its compliance with a normative legal act that has greater legal force, including the Constitution of the Russian Federation, i.e. indirect normative review, unlike direct review, does not contain any restrictions on the assessment of the constitutionality of the legal norms applied by the court [7, pp. 88-101].

In cases where a court, when deciding cases involving the application of unconstitutional acts to a person, is guided not by the Constitution and the constitutional and legal meaning of the legal norms to be applied, and does not submit a request to the Constitutional Court of the Russian Federation to review the constitutionality of the norms to be applied in the given case, but applies an unconstitutional act or gives the act an unconstitutional meaning, it thereby legitimizes the damage caused by the unconstitutional act to the rights of this person [12, pp. 43-62].

In the practice of delimiting powers between the Constitutional Court and the courts, practically from the very beginning of the creation of the Constitutional Court and constitutional proceedings, there have been contradictions regarding the mandatory appeal of courts to the Constitutional Court with inquiries and the possibility of directly applying the Constitution of the Russian Federation without such an appeal. A consequence of this is a discussion in the academic community, the participants of which are divided according to the criterion of their attitude towards the conclusions of the

Constitutional and Supreme Courts [see: 13; 14; 15; 16, pp. 218-222; 17; 18; 7, pp. 88-101].

In this matter, it seems necessary to follow the position of the Constitutional Court of the Russian Federation, set out in its Resolution of June 16, 1998, in which it expressed the following opinion on the delimitation of powers between its own courts and those of other courts: the Constitutional Court of the Russian Federation operates within a special judicial procedure—constitutional proceedings—and its decisions have special legal consequences—the loss of legal force of the normative act (paragraphs 3 and 4 of the reasoning of the Resolution). Arbitration courts and courts of general jurisdiction cannot review the constitutionality of laws and other normative acts, as this is expressly assigned to the Constitutional Court of the Russian Federation.

Based on this, the Constitutional Court prescribes the following course of action: a court of general jurisdiction or arbitration court, having concluded that a federal law or the law of a constituent entity of the Russian Federation is inconsistent with the Constitution of the Russian Federation, is not entitled to apply it in a specific case and is obligated to petition the Constitutional Court of the Russian Federation to review the constitutionality of that law. This obligation to petition the Constitutional Court of the Russian Federation exists regardless of whether the case before the court, which rejected the application of the law it deemed unconstitutional, was decided on the basis of the directly applicable provisions of the Constitution of the Russian Federation (clause 2 of the operative part of the Resolution). Simply ignoring the law is not sufficient. The unconstitutional act must lose its legal force.

In Resolution No. 8 of the Plenum of the Russian Federation dated October 31, 1995 (as amended on March 3, 2015), the Supreme Court of the Russian Federation clarifies that the Constitution of the Russian Federation must be applied by the courts as a directly applicable act in necessary cases and provides an approximate list

of such situations (clause 2 of the Resolution). In cases of uncertainty regarding the constitutionality of a law applicable to a particular case, the court requests the Constitutional Court of the Russian Federation to determine the constitutionality of that law. Such a request may be made by a court of any instance (Article 101 of the Federal Constitutional Law). This clarification, using the term "applicable," creates the illusion of a single situation in which a court of first instance suspends proceedings and submits a request, awaiting the outcome of the case. However, the following provision in clause 3 indicates that such actions are also possible in courts of review instances. This is fair, since otherwise the Supreme Court of the Russian Federation as a cassation or supervisory authority would not be able to fulfill its role in consistently appealing judicial decisions to exhaust domestic remedies.

It appears that courts exercise indirect review of a law's compliance with the Constitution, but in a unique form. The court must address its reasoned doubts about the constitutionality of a rule ("having come to the conclusion that it is inconsistent with the Constitution of the Russian Federation"), which is to be applied in a case, to the Constitutional Court in the form of a request. Since issuing a request is the responsibility of the court (at any level), it seems preferable for a citizen to petition the court for such a request rather than to act independently by filing a complaint with the Constitutional Court after exhausting domestic remedies.

4. Constitutional Court to Replace the Court of Human Rights?

We have already suggested that existing national mechanisms for human rights protection are not comparable in effectiveness to supranational judicial mechanisms and are unable to fully compensate Russian citizens for the loss of the opportunity to file a complaint with the European Court of Human Rights. The

Constitutional Court of the Russian Federation could be considered as a "replacement," taking into account, however, the "disadvantages" that stem from its status as a national means of protection [19, pp. 208-219].

A.N. Kokotov notes the loss of the European Court of Human Rights' human rights resource in the country's legal space as a failure of an important mechanism, requiring its replacement by other regulatory means. It would be appropriate to fill this gap through the Constitutional Court of the Russian Federation and/or the Supreme Court of the Russian Federation [20, pp. 8-19].

Opinions have also been expressed that there is no need for Russia to seek an alternative to the ECHR in the form of a Convention Court of Human Rights; such an alternative exists – the Constitutional Court of the Russian Federation. For the same reason, there is no need to create a national court to determine the compliance of judicial decisions with the human rights enshrined in the Constitution of the Russian Federation [21, pp. 48-51]. The creation of a Russian human rights court would disrupt the existing judicial system, as it would effectively occupy a position "above" the Supreme Court of the Russian Federation and the Constitutional Court of the Russian Federation [22, p. 63].

A.N. Kokotov expressed reasonable doubts about the necessity of granting the Constitutional Court of the Russian Federation the authority to review decisions of courts of general jurisdiction and arbitration courts in specific cases for compliance with human rights. In such a case, the Constitutional Court would occupy the niche of "the highest judicial authority in the implementation of not only constitutional, but also civil, arbitration, administrative, and criminal proceedings." That is, the niche that, by virtue of Article 126 of the Constitution of the Russian Federation, the Supreme Court of the Russian Federation occupies. Moreover, such a step will lead to a sharp increase in the workload of the

Constitutional Court of the Russian Federation... As a consequence, its ability to effectively carry out its main purpose – verifying the constitutionality of regulatory acts – will be reduced” [23, p. 4].

The current normative model, which combines two directions - the protection and restoration of the constitutional rights of specific individuals seeking constitutional-judicial protection; as well as the improvement of regulatory frameworks and the maintenance of uniformity in law enforcement practice, is recognized in the literature as "flexible", creating normative conditions for the effective protection of the Constitution. At the same time, such a flexible normative model in practice can give rise to inflated expectations that do not correspond to the objective capabilities of constitutional justice [24, pp. 53-59].

There is a general understanding in the academic literature that it is impossible to require the Constitutional Court to simultaneously be a "human rights court" designed to correct court errors concerning the interpretation or application of legal norms (such an approach to constitutional justice will not only lead to an overload of the Constitutional Court - it is generally inconsistent with the exclusive nature of its competence); or errors of the Supreme Court of the Russian Federation, which failed to correct the error of lower courts [25, p. 57; 23, p. 4; 24, pp. 53-59].

In addition to the above, we note that the mechanism of the Convention for the Protection of Human Rights and Fundamental Freedoms presupposes that the trial judge is the "primary judge of human rights." He or she must be familiar with the Convention and its interpretation by the European Court, and the litigant has the right to invoke the Convention in the courts as interpreted by the European Court [26, p. 21]. As already noted, the European Court has always positioned itself as an additional, subsidiary means of protection in relation to the primary – national (domestic) – remedies. It is impossible to propose

a similar role for the Constitutional Court of the Russian Federation – as a "subsidiary" body in assessing the conformity of the law applied by the court with the Constitution, since it is the only body authorized to perform such an assessment.

5. Conclusion

Thus, the rule introduced into Russian legislation requiring the exhaustion of domestic remedies before a citizen can appeal to the Constitutional Court of the Russian Federation against a violation of constitutional rights and freedoms by a normative act is not a full-fledged borrowing of the similar principle of admissibility of complaints in effect at the European Court of Human Rights. Only the condition, not the nature of the activities of "domestic" bodies, is borrowed.

Both methods of citizen appeal to the Constitutional Court of the Russian Federation—direct and indirect—require specific court activities to identify the alleged inconsistency of a law with the Constitution of the Russian Federation. In the event of such a suspicion, courts of any instance are obliged to submit a request to the Constitutional Court of the Russian Federation. Special responsibility is assigned to the second cassation and supervisory instances as the final instances among domestic remedies. Given that the subject of these courts' review must necessarily be the issue of a law's alleged inconsistency with the Constitution of the Russian Federation, coupled with the obligation of any court to submit a request to the Constitutional Court of the Russian Federation, citizens' appeals to the Constitutional Court should, if not disappear, then be minimized, as the issue must be resolved at the level of the Supreme Court of the Russian Federation. If a citizen does file a complaint with the Constitutional Court of the Russian Federation, this fact alone may indicate a

possible error in the court system and, specifically, the Supreme Court of the Russian Federation (represented by the Judicial Collegium or the Presidium – the second cassation and supervisory instances, respectively), which have failed to fulfill their responsibilities for indirect regulatory review.

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