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EUROPEAN COURT OF HUMAN RIGHTS JUDGEMENT AS A BASIS FOR REVIEW OF THE NATIONAL COURTS' JUDGEMENT

The purpose of the article - a critical analysis of the position of the Constitutional Court of the Russian Federation, the justification, through the analysis of the ECtHR practice and scientific work on execution of the ECtHR judgments, about the coordination of positions of national courts and the supranational body.

The methodological basis for the study: general scientific methods (analysis, synthesis, comparison); private and academic (interpretation, comparative legal, formal-legal).

Problems and basic scientific results:

The issue of implementation of the Human Rights Court decisions at the national level occurs when the compensation is not enough to eliminate the revealed violations. Russian legislator opted for the situation of Human Rights by the European Court finding a violation of the provisions of the Protection of Human Rights and Fundamental Freedoms in the consideration by the court of a particular case, in connection with the decision by which the applicant applied to the ECHR mechanism for review of the decision on the new circumstances. Supreme Court puts forward three conditions for the implementation of the revision of the judicial act on a national level, which should be available at the same time: 1) the continuous nature of the adverse effects; 2) the existence of violations of the Convention or gross procedural violations; 3) a causal link between the breach and the consequences.

The author point out that the regulation of possible conflicts between the Convention and national legislation is based on cooperation (not confrontation) States and the European Court of Human Rights. Such practice of cooperation based on the principles of subsidiarity (addition to national rights protection system); evolutionary interpretation of the Convention (which implies flexibility, and accounting for changes in public relations); Judges dialogue and to develop advisory opinions. Consequently, the task of the Constitutional Court can not be default search options, on the contrary, its task - to determine exactly how, taking into account the differences in the legislation, the decision will be enforced. Failure, as well as the improper execution of judgments of the ECtHR may involve the establishment of a new violation of the provisions of the Convention and sanctions against violators.

Key words: review of effectual judgments; *new facts; Judgment of the European Court of Human Rights; execution of the European Court of Human Rights judgments'; conflicts between RF Constituon and ECtHR judgments; the supremacy of the Constitution; violation of constitutional rights; evolutionary interpretation; cooperation practices; principle of subsidiarity.*

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As a rule, adjudication of the body of supranational jurisdiction does not require further action. The decision of the European Court of Human Rights is a statement of violations of the European Convention on Protection of Human Rights and Fundamental Freedoms and the awarding, where necessary, appropriate compensation to the applicant (Article 41 of the Convention). The question of the implementation of this decision at the national level occurs when the compensation is not enough to eliminate the revealed violations.

Rightly noted that, until recently, the institute of review of judicial acts was in the sphere of regulation of domestic law, which excludes the impact of international law. This situation is due to the characteristic of the domestic perception of justice of international law as a regulator which spreads its effect only on the area of international relations and has no value for the national courts [1, c. 208].

This situation has changed dramatically after Russia's accession to the Protection of Human Rights and Fundamental Freedoms, and needs the solution of very serious issues related to the implementation of the order of ECHR judgments in the territory of the Russian Federation. Russian legislator opted for the situation by the European Court finding a violation of the provisions of the Convention in the consideration by the court of a particular case, in connection with the decision by which the applicant applied to the ECHR mechanism for review of the decision on the new circumstances (p. 4 hours. 3 Art. 311 APK, p.4 p.4 Art.392 CPC).

However, scholars speak about the impossibility to review the judicial act in such manner as the court which had not applies or had incorrectly applied the Convention, made a guilty miscarriage of justice [2, c. 282; 3, c. 137-139]. In fact, a review should be conducted in the procedures of appeal or a supervisory review, using the filtering rules (as the pre-admissibility) complaints.

Thus, according to S.M.Ahmedov, the presence of the ECHR judgment should serve as a basis for the supervisory review procedure, as in this case there is a cancellation of the judicial act of the court admitted in the proceedings before a judicial error: the court should be guided by the universally recognized principles and norms of international law belonging to the legal framework twhich is to be applied in justice [4, c. 21 - 22].

V.V.Blazheev indicates on the priority of the Convention rules to the Russian law and the need for immediate application by its courts [5]. G.A.Zhilin believes that the failure of this obligation should be regarded as a substantial miscarriage of justice, which is intended to eliminate the appeal and review proceedings [6, c. 104-114].

Indeed, the mechanism of the Convention implies that he judge of first instance is the "first judge of human rights", he should know the Convention and its interpretation by the ECHR, and the litigant has the right to invoke the courts to the Convention in the sense in which it is interpreted by the Strasbourg Court [7, 21]. Therefore, if the Russian judge made any violation of the Convention or did not apply these rules, it is thereby committed as the guilty error.

It is noteworthy that the use of provisions of the Convention by Russian courts is facing difficulties due to lack of understanding of its mechanism of action (for example, scholars discuss the problem of creating of lists of ECHR positions to be applied, creation of a mechanism of implementation of the legal position), [8; 9, c. 57-59], and the more difficult paves the way for an understanding of the consequences of a decision against Russia and order its implementation at the national level.

But is a review of the decision of the Russian court mandatory?

The most common violations in civil cases by the ECHR are inadequate notification, as well as violation of the principles of equality of the parties. The review of the decision of the Russian court requires a certain set of factors, it is also possible to use other methods. For example, the award of additional compensation by the state (in addition to the already awarded by the Court); the presentation by the interested party independent claim for pecuniary damage (including with article 1070 of the Civil Code of the mechanism of action). In civil proceedings, the requirement to restore

the rights of the applicant is opposed to another, also protected by the Convention requirement - compliance with the principle of legal certainty [10, c. 41-45; 50-51].

The content of the principle of legal certainty include: 1) publicity in the adoption of laws and decisions; 2) the certainty and clarity of laws and decisions; 3) final and binding decisions; 4) limiting the retrospective operation of laws and decisions; 5) provision of legitimate expectations [11, c. 549].

From the point of view of the principle of legal certainty, there is one more ground for reviewing of the judicial act – the unproper move. We also note that the final judicial decision taken by the court, having the necessary competence to review the subject matter in respect of the Parties to apply the category res judicata [12, c. 138], indicating the need to maintain social relations in a stable condition [13, c. 300]. The multiplicity of ways to review the decision which has entered into force, including the revision of new or newly discovered facts is regarded as one of the most serious threats of legal certainty. And although the parties are entitled to use the whole arsenal of the procedural rights that are granted to them by law, the task of the court in this case is the protection of an enforceable decision on the unjustified attacks [14, c. 156-161].

The unenforceable judgment has a lot of protective mechanisms and a lot of opportunities and overcome it. One of them is the revision of new and newly discovered circumstances - one of them. Revision of the decision after the ECHR is very difficult [15, c. 146-188].

The issue is not resolved completely and the legislator continues searching for an acceptable option [16, c. 161-163].
Is it necessary to apply the revision? The Supreme Court in the Resolution of the Plenum of 11.12.2012 (para. 11-g) notes in accordance with paragraph 4 of Part 4 of Article 392 of Code of Civil Procedure of the Russian Federation (hereinafter – CPC), taking into account the recommendations of the Council of Europe Committee of Ministers Nr. R (2000) 2 on the revision of cases or reopening of certain cases at domestic level following judgments of the European Court of human right, that the basis for revision of the judgment is a judgment of the European Court of Human Rights which found a violation of the Convention for the protection of human rights and fundamental freedoms and (or) the Protocols thereto, affect the correct resolution of the applicant's case. T.V. Sahnova believes that the recommendations of the Russian legislator "have been read literally": it refers to the need to ensure at national level adequate possibilities for restitutio in integrum, and not necessarily in accordance with the procedure stipulated by Chapter 42 CPC [17, c. 778-779] .

In the Resolution of the Plenum of June 27, 2013 № 21 "On application by the courts of general jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto" with reference to the provisions of Article 46 of the Convention, as well as the above-mentioned recommendation of the Council of Europe Committee of Ministers № R (2000) 2 on 19.01.2000, the Supreme Court puts forward three conditions for the implementation of the revision of the judicial act on a national level, which should be available at the same time: 1) the continuous nature of the adverse effects; 2) the existence of violations of the Convention or serious procedural violations; 3) a causal link between the breach and the consequences (claim 17 of the judgment).

Is it possible to refuse revision under the new circumstances and, respectively the ralization by the ECHR Resolution? This question must not be raised. However, in Russia it is determined by obvious political reasons and to retouch this evidence the discussion has been moved to the measurement of legal force of the Convention and of the Constitution of the Russian Federation.

Positions of the ECHR in cases "Markin v. Russia" and "Anchugov and Gladkov v. Russia" have been marked as problematic ones. In the first case there was a following collision: before appealing to the European Court of Human Rights K.A.Markin has appealed to the Constitutional Court of the Russian Federation. The Constitutional Court found it impossible to leave the provision of child care the man-soldier; and the ECHR, on the contrary, considered such an approach to be a discrimination. In the case Anchugov and Gladkov v. Russia, challenging the prohibition of voting rights for convicted to deprivation of liberty, there was no pre-position of the Constitutional Court. However, in the latter case there were precedents of the ECHR: The Court, having gone on the path chosen in Hirst against the United Kingdom, came to the conclusion that the respondent State (Russia) has gone beyond the discretion granted to it in the field of electoral law.

The following problems arised in the abovementioned cases: 1) the ratio of the conclusions of the Constitutional Court and ECHR made in one case, and 2) a possible divergence of interpretations of the Convention and the provisions of the Constitution. Resolution of these issues was entrusted to the Constitutional Court of the Russian Federation.

The Constitutional Court fully met expectations of the claimants.

Thus, in its Resolution of 06.12.2013 Nr. 27-P the Court gave an explanation on the request of the Leningrad Military District Court which found uncertainty about conformity to the Constitution of the Russian Federation, paragraphs 3 and 4 Art.392, Article 11 of the Code of Civil Procedure. The Constitutional Court came to the following conclusion: the court can not refuse in review under the new circumstances, but in this case the Court is faced with a different interpretation of the Russian law by the Russian Constitutional Court and the European Court of Human Rights from the point of view of the violation of rights and freedoms of citizens. In this situation the court considering the application should suspend the proceedings and refer to the Constitutional Court; without such an application the decision according to Art.392 is inadmissible since the supremacy of the Constitution, which has the supreme legal force in relation to any Russian legal acts is questioned. It turns out that the Constitutional Court controls both itself (self-control) and the ECHR (although it is not authorized for this).

E.N. Kuznetsov rightly wonders why the applicant who has endured a significant number of court procaduress (after all, before applying to the ECHR subject is required to exhaust all available domestic remedies), having suffered significant financial, time and moral costs, even including consideration of his question to the ECHR must still do something with the particular act in his case [18, p. 238].

The Constitutional Court judgment of 07.14.2015 Nr. 21-P, is progressing further in the identified issues, as the Constitutional Court directly speaks about the priority of the Constitution and the possibility of not executing the ECHR judgments "in exceptional cases".
Initially, the Constitutional Court based on the fact that the final decision of the ECHR on the complaint shall be executed. The respondent state should have the appropriate enforcement mechanism. The particular method is chosen by the state itself (paragraph 2.1).

Furthermore, recognizing the Convention as international treaty and integral part of the Russian legal system, the Constitutional Court, referring to Part 1 of Article 4, Part 1 of Article 15, Article 79 of the Constitution enshrining the sovereignty of Russia, the rule of supreme legal force of the Constitution and the inadmissibility of the implementation in legal system of the state of international treaties, participation in which may result in the restriction of human rights and freedoms or the encroachment on the constitutional order of the Russian Federation, still mentions the priority of the Constitution. Russia's accession to international agreements and participation in interstate associations does not mean giving up national sovereignty, especially if the interpretation

of the Court's rules of the Convention in the particular case affects the principles and norms of the Constitution. Then, in exceptional circumstances, Russia can afford not to comply with the ECHR decision. This is the only way to avoid the violation of fundamental principles and norms of the Constitution of the Russian Federation (2.2). That is the logic of the Constitutional Court.

In para.6 3 of the judgement the Court held idea that the international agreement corresponded the Constitution of the Russian Federation but has been interpreted in such a way it that came into conflict with the provisions of the Constitution, primarily relating to human rights and freedoms, as well as to the basics of the constitutional order, including national sovereignty and the supreme legal force of the Constitution. The Constitutional Court can also not support the interpretation of the Convention by the ECHR if the Constitution protects human rights and freedoms more fully than the provisions of the Convention (par.3 4).

Therefore, the Constitutional Court allows itself to retain the priority, if: 1) it is established that the interpretation of the ECHR changes the original meaning of the provisions of the Convention (as it was when Russiajoined the Convention); 2) if the Constitution of the Russian Federation more fully compared with the provisions of the Convention in their interpretation of the ECHR, protects human rights and freedoms.

The need to appeal to the Constitutional Court for the Russian courts in accordance with clause 5.1 of the judgement appears in two cases: if during the procedure according to para 4 Art.392 CPC the judge comes to the conclusion about the impossibility of execution of the ECHR judgment without giving up application of provisions of the law previously recognized by the Constitutional Court of the Russian Federation not violating the constitutional rights of the applicant in a particular case; or if the applicant has not previously appealed to the Constitutional Court no position the Constitutional Court on the case has been formed, but the court in a retrial under the new circumstances came to the conclusion that the possibility of the application of the relevant law can be resolved only after the confirmation of its conformity to the Constitution.

As mentioned above, the Ministry of Justice sent to the Constitutional Court a request for the possibility of execution of the ECHR judgment of 4 July 2013 "Anchugov and Gladkov v. Russia" which was considered the lack of prisoners' electoral rights a violation. Earlier the Constitutional Court has already referred to the case "Hirst v. The United Kingdom" (Hirst was sentenced to life imprisonment and believed that the deprivation of his right to vote was a discrimination), which has been considered to be similar.

The judgment in the case "Hirst v. the United Kingdom" expressed the recommendations to rule the issues arising from the collisions of national law and the ECHR positions. Regulation of the contradictions between the Convention and national legislation is based on cooperation (not confrontation) of the States and the European Court of Human Rights. Such practice of cooperation is based on the principles of subsidiarity (addition to national rights protection system); evolutionary interpretation of the Convention (which implies flexibility, and accounting for changes in public relations); dialogue of the judges and development of advisory opinions [19, c. 144-145]. So the task of the Constitutional Court is to determine exactly how, to implement ECHR decision.

A.I. Kovler mentions the following: the supranational level, even in the sphere of protection of human rights, can not be autonomous, it succeeds only in interaction with national human rights system. Supranational control system is additional (subsidiary) in relation to the national one. This dialectical interaction is the first aspect of subsidiarity. The second (theoretical) aspect of subsidiarity is the ECHR restraint in assessing the necessity of its interference with protected under the Convention rights and freedoms, because the authorities of the States Parties to the Convention have adequate legitimacy [20]

The principle of dialogue of the judges can be seen in the Constitutional Court's judgements: they often used ECHR positions expressed in specific rulings. ECHR also refers to the opinion of the highest judicial authorities of the participating states. The dialogue of the judges (in particular in the proceedings "Hirst v. the United Kingdom") led to the development of the concept of "evaluation field" or "discretion."

The task of the Constitutional Court is to determine how to enforce the ECHR decision in the territory of the Russian Federation in case of divergence of interpretation of the Convention and of the Russian legislation. Therefore, we have marked the time gap and the change of the interpretation of the Convention; as key areas requiring theoretical understanding and practical conclusions. In fact, the the Constitutional Court comes to the desired conclusion: the Constitutional Court should find constitutional ways of execution of ECHR judgments in caseof a collision. That is the "evaluation field".

The judgement Nr. 12-P of 19.04.2016 develops the idea of the time-gap between the conclusion of the international agreement and its interpretation by the Court expressed by the Constitutional Court in its previous judgement from 14.07.2015 Nr. 21-P. Thus, the Court notes the impossibility (in the sense of Art. 15 of the Constitution of the Russian Federation) of the conclusion an international treaty that does not meet the Constitution. Russia signed the Convention in 1998 on the basis of the fact that Article 32 of the Russian Constitution is fully consistent with Article 3 of the Protocol № 1 of the Convention, whereas in the Decision "Anchugov and Gladkov v. Russia" the ECHR gave Article 3 of Protocol 1 sense, implying a change in article 32 of the Constitution, on the ratification of the Convention that the Russian did not give consent (paragraph 4.2 of the Decree of the RF Constitutional Court on 04.19.2016). This interpretation is inadmissible.

First, prior to the signing of the Convention it has been necessary to study the precedents of the ECHR with regard to the constitutional rights and rules, which can not be changed by the Russian Federation. The Russian Constitution of 1993 has been acting at the moment. In fact, the Constitutional Court is trying to justify the impossibility of his actions in relation to the Russian Federation by unknowing the law. In the text of the decision the Court refers to the allegedly changed practice of the European Court and cites the example of the ECHR judgments delivered after 2000, i.e. after Russia's accession to the Convention (article 4.3).

Second, the Constitutional Court's position in its Resolution of 19.04.2016 is extremely controversial. First shown on the mandatory prohibition Article 32 (that is, it is impossible to interpret and amend the Constitution in this part can not be), he immediately points to the inability to examine the conformity of the same provisions of the Constitution - Article 16 - another of her norm - Article 32 (paragraph 4.1 of the Regulation 04.19.2016). Next the Constitutional Court interprets the Constitution and the existing criminal law and comes to the conclusion that since the choice of the penalty of deprivation of liberty occurs differentiated, then the limitation of voting rights of convicts, too, is differentiated and it is their interpretation of the said "overcoming conflicts" between the ECHR practice and Russian law (items 5.2 and 5.4). But this is not the final answer. In fact, the Constitutional Court agrees with the Court that the conflict is not overcome, encouraging Russian lawmakers still make changes to the Criminal Executive Code of the Russian Federation and to optimize the system of criminal sanctions.

If the "time gap" rule does not work and the conclusion in paragraph 5.5 coincides with the ECHR position, the only purpose for which the consideration of the fact Anchugov / Gladkov case was initiated in the Constitutional Court was to bring a ruling in which would contain the words "impossible to enforce". This goal has been achieved. We agree with E.N.Kuznetsovym that "the context in which the Constitutional Court said, obviously testifies about finding the Constitutional

Court arguments and justifications in favor of the non-recognition of inconvenient for Russia decision" of the European Court of Justice. The problem is that the Russian legislators and law enforcers should pay attention to the need to respect previously assumed commitments under international agreements [18; c. 242]

The most "inconvenient" judgement is the judgement on Yukos case. The request of the Ministry of Justice for permission to question the possibility of execution of the ECHR judgment for compensation on the complaint №14902 / 04 "OJSC" Oil Company "YUKOS" v. Russia entered the Constitutional Court on October 13, 2016.

It should be stated that the Constitutional Court of the Russian Federation has created objective difficulties in the way of execution of judgments of the ECHR, although it is a typical procedural issue.

In conclusion we would like to note once more that there is no alternative for methods of execution of the ECHR Decisions. Otherwise, the national legislator and the Constitutional Court of the Russian Federation undermine the basis of their own authority. The introduction of the compensation for the duration of proceedings and execution of decisions have reduced the number of applications of Russian citizens to the European Court of Human Rights. Obligation to send requests to the Constitutional Court may make a difference in the opposite direction and reduce the attractiveness of the constitutional proceedings and generally increase the term of protection of violated rights.

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