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The Constitutional Court of the Russian Federation
Конституционный Суд Российской Федерации

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**THE CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION**

**COOPERATION
OF CONSTITUTIONAL COURTS IN EUROPE –
CURRENT SITUATION AND PERSPECTIVES**

**National report
to the XVith Congress
of the Conference of European Constitutional Courts**

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**COOPERATION
OF CONSTITUTIONAL COURTS IN EUROPE –
CURRENT SITUATION AND PERSPECTIVES**

**I. CONSTITUTIONAL COURTS BETWEEN CONSTITUTIONAL LAW
AND EUROPEAN LAW**

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

Constitutional recognition of well-established principles and rules of international law, as well as of obligations derived from the international agreements of the Russian Federation, as an integral part of the national legal system predetermines consideration of the effective supranational rules, and specifically those of the European level, by the Constitutional Court of the Russian Federation (hereinafter – the Constitutional Court) when exercising the powers and authority thereof. Furthermore, the Constitution of the Russian Federation (hereinafter – the Constitution) explicitly prescribes application of the rules of an international agreement in case of antinomy of an international agreement of the Russian Federation and of a national law (Article 15.4).

Pursuant to the Constitution (Article 1.1; Article 2; Article 17.1) human rights in the Russian Federation are recognised and guaranteed in compliance with the well-established principles and rules of international law. The well-established principles and rules of international law and the international agreements of the Russian Federation concerning human and civil rights and freedoms enjoy a priority in the national legal system. The provision stipulated in the preamble of the Constitution, regarding recognition by the Russian people itself as a part of the world community gains its normative concretisation through the recognition of the international human rights standards by the Russian Federation.

The Constitutional Court has repeatedly remarked upon the role of international law and, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto, as well as of Judgments of the European Court of Human Rights (hereinafter – the Conventional law) in the Russian legal system (Judgments of 4 February 1996 No. 4-II, of 25 January 2001 No. 1-II, of 5 February 2007 No. 2-II).

The Constitutional Court collates in its case-law the regulation of human rights and freedoms exercised by the State with well-established principles and rules of international law. International-law argumentation is attracted for additional substantiation of legal opinions of the Constitutional Court and not infrequently used for clarifying the sense of constitutional text, as well as for revealing the constitutional-law sense of a reviewed legislative provision.

When interpreting the constitutional provisions the Constitutional Court reveals the State obligations conditional upon these provisions. As a rule, in Judgments thereof it is demonstrated in which particular way constitutional provisions, inclusive of the specified in legislation, are correlated by international obligations of Russia. Herewith, the Constitutional Court has repeatedly taken notice of that the international obligations predetermine manner and matter of the effective regulation and, particularly, the margin of appreciation of the legislator in the course of stipulation thereof.

By diligently applying provisions of international legal acts when deliberating its legal opinions the Constitutional Court demonstrates its consideration of international law as a significant benchmark which lawmaking and law enforcement are due to comply with. Referring to rules of international law in its Judgments the Constitutional Court not only directs the legislator and judges to more broad application of international law in perfection and enforcement of legislation, but as well directs the citizens– to more drastic appeal to supranational mechanisms in course of assertion of one’s rights (see Annex 1).

2. Are there any examples of references to international sources of law, such as:

a) *The European Convention for the Protection of Human Rights and Fundamental Freedoms.*

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), as well as the Judgments of the European Court of Human Rights (hereinafter – the European Court) – to the extent that they conform to the Constitution – are an integral part of the Russian legal system.

Pursuant to the Article 15 of the Constitution the Convention is integrated into the national legal system in the capacity of an international agreement which enjoys its priority over the internal legislation. According to the Federal Law “On ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto” Russia recognises the Convention as an integral part of its legal system.

The Convention, being an instrument of the European legal order effective at the national level, holds a specific place as compared to the other international agreements. Inasmuch as the rights and freedoms guaranteed by the Convention occur to be well-established, the conventional provisions act as constitutionally stipulated (in accordance with Articles 15 and 17 of the Constitution) remedial mechanism.

From perceiving the Convention as an international agreement placed above the law in the hierarchy of sources of the national law derives the recognition of the obligatory jurisdiction of the European Court in the matters of interpretation and application of the Convention, which designates a commitment to enforce final and binding decisions of the European Court rendered in cases, which Russia occurred to be a party in, as well as to consider the approaches of the European Court in law-enforcement activity in general.

It is worth to be observed that in course of ratification of the Convention Russia made a declaration that it “recognises as compulsory *ipso facto* and

without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention and its Protocols in the event of an alleged violation by the Russian Federation of the provisions of these instruments, where the alleged violation has taken place after their entry into force in respect of the Russian Federation.”

The Constitutional Court in its Judgments *de facto* eliminated both reservations appended by Russia in course of ratification of the Convention: on temporary remainder of the procedure for the extra-judicial arrest, detention and holding in custody according to the then-effective Code of Criminal Procedure of the Russian Federation and Disciplinary Regulations of the Armed Forces of the Russian Federation. The legislator enforced the respective Judgments by virtue of amending the named regulatory enactments.

Therewithal, even though Russia has not ratified Protocol No. 6 to the Convention (concerning the abolition of the death penalty) signed thereby prior to that, as well as has not signed Protocol No. 13 to the Convention, concerning the abolition of the death penalty in all circumstances, the Constitutional Court adopted the Ruling of 19 November 2009 No. 1344-O-P, in which it confirmed the inadmissibility of exercising the death penalty, inclusive of those based on a judgment of conviction rendered in accordance with a verdict, passed by a jury.

Therefore, the activity of the Constitutional Court results in that in the course of time the conventional provisions evolve into an instrument of constitutional-law regulation.

Artificially of 31 March 2013, 144 judgments of the Constitutional Court, as well as 230 rulings of the Constitutional Court contain references to the European Convention (and Protocols thereto, inclusive of those not ratified by the Russian Federation).

b) The Charter of Fundamental Rights of the European Union.

The Constitutional Court does not refer to the Charter of Fundamental Rights of the European Union in its decisions.

c) Other instruments of international law at European level.

Decisions of the Constitutional Court in statements of reasons thereof contain references to instruments (sources) of international law, effective within the following European inter-State organisations:

The Council of Europe (conventions; recommendations and resolutions of the Committee of Ministers of the Council of Europe; recommendations and resolutions of the Parliamentary Assembly of the Council of Europe; acts of recommendation, inclusive of those elaborated by the European Commission for Democracy through Law (the Venice Commission); advisory documents elaborated by associations affiliated with the Council of Europe; decisions of the European court and of the European Commission of Human Rights);

The Organization for Security and Co-operation in Europe / the Conference on Security and Co-operation in Europe (documents of meetings of the conference on the human dimension);

The Commonwealth of Independent States (conventions; model legislation, decisions of the CIS Economic Court).

d) Other instruments of international law at international level.

Decisions of the Constitutional Court in statements of reasons thereof contain references to instruments (sources) of international law, effective at international level within the following inter-State organisations:

The United Nations and its specialised agencies (The UN Charter; conventions concluded under the aegis of UN, including the Covenants on Human Rights, as well as Optional Protocols thereto; resolutions and declarations of the UN General Assembly, inclusive of the Universal Declaration of Human Rights; the UN Security Council resolutions; the Commission on Human Rights resolutions; comments and views adopted by the Human Rights Committee, UNESCO recommendations; documents, including acts of recommendation, of for a conducted under the aegis of UN);

The International Labour Organization (conventions, inclusive of those not ratified by the Russian Federation, recommendations, general surveys);

FATF (The Financial Action Task Force (on Money Laundering) – an international inter-governmental body for combating criminal money laundering and terrorist financing) (recommendations).

Therewithal, decisions of the Constitutional Court contain a number of references to the following documents of international law: the Geneva Conventions on international humanitarian law of 12 August 1949 and Additional Protocols thereto; the Rome Statute of the International Criminal Court; acts adopted on the basis of occupation law or occupational jurisdiction in Germany from 1945 to 1949; acts of international organisations, which Russia is not a member of (for instance, Protocol to the American Convention on Human Rights to Abolish the Death Penalty). Decisions of the Constitutional Court as well contain references to a number of acts elaborated by international conferences.

3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?

As noted above, Russia is bound by an obligation stipulated in Article 46.1 of the Convention and substantiated at the level of national legislation (Federal Law of 03 March 1998 No. 54-FZ) to enforce final and binding decisions of the European Court rendered in cases, which Russia occurred to be a party in.

Until quite recently a possibility for reconsideration of a legal case on the grounds of a decision of the European Court was foreseen only in criminal and arbitration procedures. Herewith, the wording of the Code of Criminal Procedure in fact sets decisions of the European Court equal to decisions of the Constitutional Court in the issue of legal consequences thereof (Article 413). The new stage of implementation of decisions of the European Court in the

national legal system was established by virtue of adoption of the Constitutional Court decision, according to which decisions rendered by the European Court were declared to be a ground for reconsideration of a legal case in a civil procedure (Judgment of 26 February 2010 No. 4-II). The given Judgment was enforced by the legislator by virtue of amending the effective civil procedure regulation (Federal Law of 9 December 2010 No. 353-FZ “On introducing amendments to the Code of Civil Procedure of the Russian Federation”).

4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?

Perceiving that the interests of human rights protection dictate application of not only the national legal instruments, the Constitutional Court extensively exploits the European Court case-law in course of its own activity.

The Constitutional Court reinforces argumentation of the decisions rendered thereby with the assertions borrowed from decisions of the European Court. Such a method of argumentation significantly facilitates similarity of the constitutional and conventional values.

When confirming constitutionality of a legal provision or when abrogating it, as well as when revealing the constitutional-law sense thereof, the Constitutional Court exploits legal opinions of the European Court, concerning the respective range of issues, as an additional argument.

The European Court approaches are exploited within the constitutional practice, particularly, through adverting to the European Court interpretation of the Convention provisions, by virtue of perception the sense of rules, principles and institutions appearing in the European Court decisions, without direct references thereto. Therewithal, the general approaches of the European Court regarding a given range of issues are taken into consideration.

The Constitutional Court in its decisions has repeatedly denoted the obligatoriness of application and consideration of the European Court decisions in particular cases not only in law-enforcement practice, but in legislative

activity as well. Thereby, generalisation of the European Court legal opinions was substantiated as well as the necessity for adoption of common measures of regulation for implementation thereof.

When dealing with the European Court decisions the Constitutional Court admits broad interpretation of its jurisdiction: from particulars to generals, from concretes to abstracts.

Within the constitutional practice the first and foremost regard is paid to the decisions of the European Court, in which Russia is held liable for violation of the Convention. However, the Constitutional Court does not limit the legal force of the European Court decisions in matters of interpretation of the Convention only to those cases in which Russia occurs to be a party in, and believes that such acts are to be considered by national authorities regardless of which State they are adopted with respect to, provided that they conform the Constitution, as well as well-established principles and rules of international law.

Inasmuch as the European Court decisions incur the obligation to adopt “effective measures to prevent new violations similar to those found by the Court”, to that extent, from the point of view of the Constitutional Court, the reference shall be made to all the violations revealed by the European Court and not only to those intimately concerning the State, the decision is adopted with respect to.

Though implementation of the European Court decisions generally takes place within the procedure of concrete constitutional review exercised by the Constitutional Court, references to the consequences following those decisions, related to adoption of general and individual measures, can as well be found in decisions adopted within the procedure of abstract constitutional review.

Therewithal, whilst the European Court case-law denotes an issue of incompatibility of national legislation with the provisions of the Convention as interpreted by the European Court, the Russian Federation in capacity of respondent State uses internal mechanisms in order to remedy the defects of

legal regulation, which includes constitutional review thereof. Simultaneously, the Constitutional Court, while dealing with the issues of compatibility of certain legislative provisions with the Constitution, pays due regard to legal opinions of the European Court which declare certain provisions of national law incompatible with the Convention (as interpreted by the European Court), if the situation so requires.

However, such due regard is not unconditional. Striving for maintenance of balance between national sovereignty interests and due performance of international obligations, the Constitutional Court assumes that the obligations, imposed on Russia due to its participation in the European Convention, allow for a relatively wide margin of appreciation in the issue of choosing general legislative measures, aimed at execution of the European Court decisions. In the absence of manifest mechanisms of *restitutio in integrum* within the Convention itself, the choice of particular means of remedy is reserved for the respondent State (effectiveness of the adopted measures is supervised by the Committee of Ministers of the Council of Europe). The Subsidiarity principle of the European Court jurisdiction in respect of human rights protection mechanisms, effective at national level, expels “mechanical”, *i.e.* depriving national legislator and law-enforcement authorities of sufficient discretion, implementation of the European Court decisions. Therewithal, the answer to the question of correlation of legal force of the decisions (legal opinions) of constitutional and European judicial bodies, which eventually determines the limits of obligatoriness of the European Court decisions, falls within the prerogative authority of the Constitutional Court.

In its entirety the Constitutional Court case law contributes to adaptation of the European Court legal approaches to the realities of the national legal system.

References to the case-law of the Court of Justice of the European Union are absent in the decisions of the Constitutional Court, which is attributable to non-participation of Russia in the given integrative formation.

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

As previously stated, the Constitutional Court substantiates its findings with references to the European Court case-law, inclusive of cases concerning other States. Particularly, an advert to the European Court case-law occurred in the context of issues of accessibility and effectiveness of remedies at the national level (Judgment in the case of “*Kudla v. Poland*”); a right to free elections (“*Gitonas and Others v. Greece*”, “*Mathieu-Mohin and Clerfayt v. Belgium*”); a right to freedom of speech (“*Bowman v. the United Kingdom*”); providing for equality of public institutions and private persons in course of enforcement proceedings (“*Stran Greek Refineries and Stratis Andreadis v. Greece*”); limitation to bringing to tax responsibility (“*Coëme and Others v. Belgium*”); preliminary participation of administrative bodies in execution of jurisdictional function (“*Malige v. France*”, “*Gradiner v. Austria*”); adoption of guarantees against arbitrary arrest or putting in custody (“*Murray v. the United Kingdom*”) and *etc.*

Artificially of 31 March 2013, 80 judgments of the Constitutional Court, as well as 91 rulings of the Constitutional Court contain references to the European Court decisions.

The following decisions might be named as the examples of influence of the European Court case-law on legal opinions of the Constitutional Court.

1. The Constitutional Court in its Judgment of 27 June 2000 No. 11-II held unconstitutional the provisions of the previous Code of Criminal Procedure, which restricted the everyone’s right to a legal assistance of an advocate (defense attorney) in any case where his rights and freedoms are significantly affected or might be significantly affected by actions and measures connected with the criminal prosecution. The given decision contains a direct reference to a number of provisions defined by the European Court regarding the right of

accused to a legal assistance of an advocate, which extends to pre-trial stages of proceedings (decisions of 24 May 1991 in the case of *Quaranta*, of 24 November 1993 in the case of *Imbriosciä*). The provisions of the given decision were later legislatively implemented by virtue of introducing amendments to the previous Code of Criminal Procedure, as well as in course of drafting the effective Code of Criminal Procedure of the Russian Federation.

2. Considering the constitutionality of legislative provisions regarding social protection of the citizens affected by radiation in the consequence of the accident at the Chernobyl Nuclear Power Plant, regarding compensation for harm to health of the citizens affected by this accident, the Constitutional Court in its Judgment of 19 June 2002 No. 11-II implemented a legal opinion of the European Court, which was denoted in its Judgment of 7 May 2002 in the case of "*Burdov v. Russia*", according to which it is not open to the State to cite lack of funds as an excuse for not honouring a judgment debt.

3. In its Judgment of 30 October 2003 No. 15-II the Constitutional Court assessed constitutionality of the provisions of the Law on elections regarding regulation of mass media activity with respect to informational support, agitation activity of journalists within an election campaign. When substantiating the legal opinion regarding the given issue, the Constitutional Court referred to the corresponding legal opinions of the European Court in the cases, concerning determination of the limits of the freedom of expression and the right to information within the election campaign.

4. In its Judgment of 15 June 2006 No. 6-II the Constitutional Court, when considering the issue of constitutionality of the legislative provisions on the absolute deadlines for privatising of housing by citizens, referred to a legal opinion of the European Court, according to which modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces, whose unrestricted activity, especially in the course of economics transformation, can cause a risk of undesirable social consequences and, therefore, represents not only private, but

also public interest (Judgment of 21 February 1986 in the case of “*James and Others v. the United Kingdom*”).

5. The Judgments of the European Court in the cases of “*Ryabykh v. Russia*”, “*Volkova v. Russia*”, “*Zasurtsev v. Russia*”, etc. were taken into consideration by the Constitutional Court who ordered the legislator to reform the supervisory procedure and set forth the procedures tangibly providing for well-timed revealing and reviewing of defective judicial decisions prior to becoming final and binding thereof (Judgment of 5 February 2007 No. 2-II).

6. With due regard to a reference contained in the Judgment of the European Court of 20 October 2005 in the case of “*Romanov v. Russia*” to that the presence of an applicant at the hearings is an essential condition of that the judge could personally assess his state of mind and, thereby, render a just decision, the Constitutional Court by declaring these provisions of the Code of Criminal Procedure of the Russian Federation being not in conformity with the Constitution to the extent that they – in the sense assigned by the established law-enforcement practice – deprived persons subject to compulsory medical measures of an opportunity to exercise their procedural rights, and simultaneously settled the question of bringing of the national criminal procedure legislation in conformity with European standards (Judgment of 20 November 2007 No. 13-II).

7. One of the most significant examples of influence of the Convention, as interpreted by the European Court, in the sphere of protection of constitutional rights in Russia is the implementation of the concept of accessibility to justice, which is deemed to be an indispensable element of the right to a judicial protection, which includes the right to a fair trial and the right to enforcement of judicial decision. The problem of failure to enforce judicial decisions being one of the leading reasons of application to the European Court by Russian citizens, frequently results in holding Russia liable for violation of Article 6 of the Convention. In the Judgment of the Constitutional Court of 21 January 2010 No. 1-II legal opinions of the European Court deliberated in the cases concerning

reversing judicial decisions, which became final and binding, on the grounds of changed by the national highest judicial authority interpretation of legal rules, which such decisions were based on, were implemented. The Constitutional Court came to a conclusion that it is inadmissible to give retroactive effect to judicial interpretation of a legal rule by the highest judicial authority, whereas it disadvantages a person in relationship with the State. When substantiating this finding, the Constitutional Court conducted a detailed review of the European Court case-law concerning reversing judicial decisions, which became final and binding, on the grounds of changed by the national highest judicial authority interpretation of legal rules, which such decisions were based on.

8. The Constitutional Court pays significant attention to the problem of enforcement of the European Court decisions rendered upon complaints against Russia in the context of procedural mechanisms, set forth in Russian legislation.

Concentrating on the analysis of substance of Russia's obligations as a respondent State, the Constitutional Court reveals legal consequences entailed by adoption of a decision upon complaints against Russia by the European Court. In particular, the Constitutional Court considers it necessary to review judicial decisions, rendered within national jurisdiction, provided that elimination of violation of the Convention, committed in adoption thereof, cannot be done without reversing the respective judicial acts. A significant step in this direction, as noted above, was made with adoption of the Judgment of 26 February 2010 No. 4-II.

9. In the Judgment of the Constitutional Court of 21 April 2010 a legal opinion of the European Court was implemented, which was proposed by the latter in the Judgment of 26 October 2000 in the case of "*Kudla v. Poland*", as well as in the Judgment of 30 November 2004 in the case of "*Klyakhin v. Russia*." In particular, the Constitutional Court denoted that the European Court had repeatedly recalled in its case-law that Article 13 of the Convention guarantees accessibility of remedies at national level for enjoyment of substantive rights and freedoms enshrined in the Convention, irrespective of that

in which form are they protected in national legal system; the remedies shall be effective to the extent that they shall preclude an alleged violation or restrain it, as well as to offer an adequate compensation for a completed violation.

10. Throughout the last three years the Constitutional Court has repeatedly referred in its case-law to decisions of the European Court, thereby continuing to contribute in the implementation of legal approaches thereof in the Russian legal system.

Most commonly, the Constitutional Court used legal opinions of the European Court *in the sphere of protection of personal rights*. Thus, for instance, in the Judgment of 27 June 2012 No.15-II the Constitutional Court, guided by legal approaches of the European Court, considers everyone's right to respect for his private and family life (Article 8 of the Convention) as comprising various aspects of physical and social identity, inclusive of right to personal independence, personal development, right to establish and develop relations with other persons or external world. Besides that, having stressed that the European Court had already called attention of the Russian Federation to that the persons of unsound mind, the national legislation distinguishes legal capability and incapability without due regard to "borderline" cases and, as distinct from common European standards in the given issue, does not provide for "distinguished consequences", which entails violation of Article 8 of the Convention, the Constitutional Court found the adopted by the legislator, as a measure of protection of rights and lawful interests of persons of unsound mind, model of legal regulation, according to which a citizen is found incapable and adjudged a guardianship, as not paying due regard to individual peculiarities of a particular person and to demand in protection thereof, non-conforming to the modern standards of human rights.

In the Judgment of 6 December 2011 No. 26-II the Constitutional Court referred to the conducted by the European Court detalisation of substance of the right to freedom of religion, including freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in

worship, teaching, practice and observance (Article 9), having concurred, in particular, in interpretation of the conventional provision “to manifest religion in community with others” as an indirect guarantee for establishing religious associations, which exist as organised foundations and, therefore, shall have the essential legal identity.

Thereafter, the Constitutional Court considered it appropriate to refer to the opinion of the European Court, according to which the right to freedom of religion in conjunction with Article 11 of the Convention, which enshrines the right to freedom of assembly, dealing with both private and public assemblies, as well as assemblies in a designated place and public marches, and relying upon that the religious communities traditionally exist as organised foundations – presume that the religious would be allowed to assemble freely without any unjustifiable interference from the government (Judgment of 5 December 2012 No. 30-II). Accordingly, the government shall refrain from inflicting any unjustifiable indirect limitations of the right to assemble peacefully, whereas any interference thereof in the given right is acceptable only in the presence of justifying compelling and irrefutable arguments.

In the Judgment of 14 February 2013 No. 4-II the Constitutional Court elaborated a legal opinion partly coinciding with those of the European Court, that the freedom of assembly in a democratic society appears to be a fundamental right and alongside with the freedom of thought, conscience and religion forms the basis of such society; it concerns both private and public assemblies, as well as assemblies in a designated place and public marches and can be exercised by particular participants and organisers thereof; the State, in turn, shall refrain from infliction of any arbitrary measures which can outrage the given right; therewithal, it is important that public authorities show certain tolerance in respect of peaceful assemblies even though they could affect somehow the ordinary living, including traffic hindrances, since otherwise the freedom of assembly would lose its substance. The freedom to participate in a peaceful assembly has such a high significance that a person cannot be brought

to responsibility – even from among the most lenient – for participation in a public event which has not been banned, if only he has not committed any culpable offence; certain persons participating in such an event shall be responsible for their conduct. Therewithal, it is inadmissible to bring organisers of public events to responsibility for conduct of other persons, with no exception for that caused any material damage.

The statement of reasons of the Judgment of 6 December 2011 No. 27-II reproduces the legal opinion of the European Court that the legal protection of person from arbitrary interference from the State into his right to liberty , guaranteed by the Convention (Article 5), presumes proportionality of restriction of the given right, which means providing for a balance between public interests, which may demand preliminary putting a person in custody, and the significance of the right to liberty – with due regard to the presumption of innocence; when establishing such balance the duration of keeping in custody, which shall not go beyond the reasonable limits, plays a significant role; the established law-enforcement practice as a result of the legislative vacuum and according to which a person is put in custody for an indefinite term, contradicts to the one of the fundamental principles of a state governed by the rule of law – the principle of legal certainty.

The elaborated by the European Court criteria defining the bounds of admissible restrictions of the right to freedom of expression in respect to civil servants were called for by the Constitutional Court in the Judgment of 30 June 2011 No. 14-II. When applying the interpretation of Article 10 of the Convention elaborated by the European Court, the Constitutional Court pointed out that the legal status of a civil servant, predetermined by his direct connection with the State and requiring moderation and loyalty in discharging the duties of civil service imposed on him, stipulates his observance – as distinct from other citizens – of certain rules when expressing his opinion in public regarding issues of public interest, inclusive of those concerning the violations committed by a public authority or a public individual, and in the case of impossibility of any

other – within the system of public administration itself – response to such violations, a public servant shall give an assessment in public thereto, which in such cases shall be substantiated, based on existent facts (circumstances) and paying due regard to the consequences of disclosure of respective information to public.

Following the European Court, the Constitutional Court, in respect to the issue of the freedom of expression in conjunction with the freedom of association in a trade union, stated that protection of the right enshrined in Article 10 of the Convention (“Freedom of expression”) appears to be one of the aims of the freedom of assembly and association (Judgment of 18 July 2012 No. 19-II).

Another widespread reason for referring to the European Court case-law by the Constitutional Court occurs to be consideration of range of issues related to *protection of the right to a fair trial*. Thus, in the Judgment of 26 May 2011 No. 10-II the interpretation of the requirements of Article 46 of the Constitution in conjunction with Article 6 of the Convention emerged to be based on the European Court case-law, substantiating the legitimacy of resorting of private persons – within the bounds of exercising the right to freedom of contract relied upon autonomy of will – to arbitration proceedings in the sphere of civil law relationships, which concedes resolution of disputes by virtue of public self-regulation, whereas public interests are ensured by the legislative provisions laying down the arbitration procedure rules, which assumes the guarantees for justice and impartiality, common to any judicial proceedings.

In the Judgment of 9 June 2011 No. 12-II the Constitutional Court shared the legal opinion of the European Court regarding the sense of Article 8 of the Convention, which disallows any restriction of the right to respect for private and family life by public authorities, except for the cases when such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the Judgment of 19 July 2011 No. 17-II the Constitutional Court having observed that exercising the right to a fair trial might be subject to certain restrictions, especially regarding the admissibility of a complaint, which, however, are not allowed to affect the very essence of the right and violate the reasonable proportionality of the applied measures and the legitimate aim, having denoted that the European Court case-law serves as a benchmark in solving the arising in this respect particular questions.

In the Judgment of 14 May 2012 No. 11-II the Constitutional Court reproduced the finding of the European Court that enforcement of a decision rendered by any court shall be deemed as an indispensable element of judicial protection, and that the everyone's right to judicial protection would become illusive if only the legal system of a State would admit that a final, binding judicial decision would remain unenforced to the disadvantage of one of the parties.

Alongside with the personal rights as well as the right to a fair trial the Constitutional Court in the resent time exploits in its decisions the legal approaches of the European Court concerning *protection of political rights*. Thus, in the Judgment of 28 February 2012 No. 4-II the Constitutional Court built on the principle findings that were previously elaborated by the European Court: free elections and the freedom of political parties as a form of association, significantly important for a due operation of democracy, form the basis of any democratic system, are interrelated and mutually strengthen each other.

Besides that, the Constitutional Court applies legal opinions of the European Court, developing and improving the substance of its own legal opinions, inclusive of those concerning *the basic principles of law*, which directly influence on the maintenance of the constitutional legal order. Thus, for instance, the arguments of the Constitutional Court used in the Judgment of 20

July 2011 No. 20-II were to a large extent built on the approach of the European Court to the principle of legal certainty, fulfillment of which is served, among others, the institution of limitations of action. Therewithal, setting forth in a law a term, within which not only in relationships of private persons, but in relationship of a private person with the State as well ensuing of adverse consequences might occur, implicates ensuring of the legal certainty and stability in the sphere of civil turnover, primarily, to the benefit of private persons.

Special emphasis should be made on that the Constitutional Court when referring to the European Convention as interpreted by the European Court, relies upon not only that the signatory States – Members of the Council of Europe, including Russia, undertook the obligation to ensure everyone being under the jurisdiction thereof the conventional rights and freedoms, but as well in the context of a significant conclusion of the European Court concerning special properties of the Convention, which appears to be a vivid instrument, subject to interpretation “in the light of concepts at the present time prevailing in democratic States” (Judgment of 7 July 2011).¹

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

Cooperation of the European Court and of a constitutional justice authority operating at a national level, notwithstanding the unity of aims of

¹ Due consideration of the European Court case-law by the Constitutional Court is contributed to with drawing up the reviews of the European Court decisions selected either according to a certain common topic or rendered with respect to a particular State, performed by the Secretariat of the Constitutional Court (“Death penalty in law and practice of the Council of Europe in the context of global trends”, “Deliver as a measure of injunction in administrative offence proceedings in the assessments of the European Court of Human Rights”, “The substance of the concept of “housing” in the European Court of Human Rights case-law”, “Issues of national constitutional judicial proceedings in the European Court of Human Rights decisions”, “Subjects entitled to a right for a review of national judicial acts on grounds of revealing of a violation by the European Court of Human Rights”, “Selected judgments of the European Court of Human Rights upon complaints against Germany”, Decisions of the European Court of Human Rights in the case of *Brumarescu v. Romania* concerning restitution of the nationalised property”).

foundation and operation thereof – ensuring protection of human and civil rights and freedoms – nevertheless is not deprived of certain contradictions.

While pointing out in its decisions the significance of the constitutional right to appeal to inter-State bodies of protection of human rights and freedoms if all the available domestic remedies have been exhausted, the Constitutional Court alongside with that relies upon the principal provision that the people-sovereign having declared the international law principles and rules and international agreements as a consistent part of the national legal system reserved and could not but reserve the indisputable supremacy for the Constitution. Therefore, the influence of international institutions on the national legal system and, in particular, on the constitutional-law relationships, is not boundless. The primary responsibility for determination of such bounds rests with the Constitutional Court.

The first and, probably, the sole resonant example of contradictions in the approaches of European and constitutional justice was the “*case of Markin*”. The Constitutional Court refused to admit his complaint to examination, having denoted that Russian legal regulation, which entitles female military servants to an opportunity of a nursing leave until a child attains a three-years age and, as a general rule does not recognise such a right of male military serviceman, does not infringe the provisions of the Constitution regarding the equality of rights and freedoms irrespective of gender (Ruling of 15 January 2009 No. 187-O-O). Contrawise, the European Court in its decision in the case of “*Konstantin Markin v. Russia*” of 7 October 2010 was critical about a thesis announced in the decision of the Constitutional Court regarding a special, connected with maternity role of women in the society, and considered the perception of women as prime fosterer of children a “gender prejudice”, which causes discrimination in exercising the right to respect for family life.

Notwithstanding the revealed in the recent time certain contradictions in European and constitutional practice, the Constitutional Court remains a dedicated supporter of a permanent dialogue with the European Court. In

particular, it takes a favourable view of the outlined benchmarks for the development of mutual cooperation at the new stage. Particularly, the new decision in the case of *Markin* rendered in March 2012 by the Grand Chamber of the European Court is implied. Compared with the preceding decision the requirements of amending legislation were eliminated and the polemic concerning legal approaches practiced within the national legal system (and, particularly, legal opinions of the Constitutional Court) was significantly softened.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

Russian courts, in accordance with the Constitution (Articles 15, 120) treat the interpretation of the Convention by the European Court as obligatory, considering that the Constitutional Court supports such interpretation in all the cases to the extent that it does not contradict the Constitution as the legal act of highest legal power. The obligation of the national law-enforcement authorities to accept legal opinions of the European Court in course of interpretation and application of the Convention is limited only by the obligation of respecting the supremacy of the Constitution (including the decisions of the Constitutional Court revealing the sense thereof) in the system of legal acts, the Convention is implemented to in capacity of an international agreement of the Russian Federation.

The Federal Constitutional Law “On the judicial system of the Russian Federation” enshrines a rule according to which a court when examining a case, having found an incompliance of an act of state or other body with the Constitution of the Russian Federation, a federal constitutional law, a federal law, well-established principles and rules of international law, an international agreement of the Russian Federation, a constitution (charter) of a constituent entity of the Russian Federation, a law of a constituent entity of the Russian

Federation adopts a decision according to the provisions of the highest legal force (Article 5.3). These provisions directly oblige the courts of the Russian Federation in course of examination of a certain category of cases to apply rules of international law. Non-application or mistaken application of these rules causes a reverse of a decision rendered with such violations.

The obligatoriness of consideration of the European Court case-law, which is determined by recognition by Russia its binding jurisdiction in the issues of interpretation and application of the Convention and Protocols thereto, is as well confirmed by the acts of the national highest judicial authorities.

Often in the course of enforcing judgments of the European Court certain situations arise, which require a reconsideration of national courts decisions that became final and binding. According to a legal opinion of the Constitutional Court, which was formulated in the judgment of 2 February 1996 No. 4-II (i.e. that was delivered prior to ratification of the Convention by Russia) and affected the procedure legislation, decisions of inter-governmental bodies may lead to a reconsideration of concrete cases by the superior courts of the Russian Federation in order to change courts' decisions delivered formerly.

The Code of Criminal Procedure of the Russian Federation attributes a violation of provisions of the Convention in the course of disposing criminal case found by the European Court to new circumstances as a ground for recommencement proceedings in the criminal case. That violation may be related to both application of a federal law inconsistent with provisions of the Convention and other violations of provisions of the Convention. Reconsideration of a court's decision shall be carried out by the Presidium of the Supreme Court of the Russian Federation following a motion of the President of the Supreme Court of the Russian Federation (see Article 415.5 of the Code of Criminal Procedure of the Russian Federation).

The similar grounds for a reconsideration of the courts decisions following judgments of the European Court are provided for by the Arbitration Code of Commercial Procedure of the Russian Federation (see Article 311.7).

In accordance with the Code of Civil Procedure of the Russian Federation if the European Court finds a violation of provisions of the Convention as to concrete proceedings, results of which were appealed to the European Court by an applicant, that finding shall be accepted as a new circumstance entailing a reconsideration of court's decision delivered formerly (see Article 329.4.4). Until such legal mechanism was provided for, procedural enactments on a reconsideration of cases in connection with a judgment of the European Court applied under the interpretation given by the Constitutional Court (see the Judgment of 26 February 2010 No. 4-II). In particular, a common court was unable to refuse to reconsider under application of a citizen a decision, delivered by that common court, following newly discovered circumstances where the European Court had found a violation of provisions of the Convention as to concrete proceedings, in which a court's decision was delivered and appealed to the European Court by an applicant.

Likewise there is certain an imbalance between provisions of enactments and of judgments of the Constitutional Court, between provisions of judgments and of informational letters of two other superior judicial bodies also as to application of the Convention and taking into account precedents of the European Court, on the one hand, and current the legal practice, on the other.

It appears that some small number of events of application of the Convention by courts is because of rooted national legal traditional rejection of precedential nature of any courts' decisions.

However in most judicial decisions (for example, judgments of the Supreme Court of the Russian Federation) there are references to the Convention just in connection with statements of parties invoking certain its provisions. The Conventional provisions are often quoted also in the context of references to appropriate judgments of the Constitutional Court, declarations of which invoke certain provisions of the Convention. In its judgments the Supreme Court of the Russian Federation refers to jurisprudence of the European Court so rarely.

Alongside with the above there is quite wide jurisprudence of the Supreme Court of the Russian Federation as to regarding cases on a banishment (a deportation) of citizens of another States who breached the regulations on a registration in the Russian Federation's territory, as an additional punishment where such citizens have families in the Russian Federation's territory, i.e. spouses and children, who are citizens of the Russian Federation. In those cases a setting aside of a decision on a deportation delivered by a low court is based on a reference to the Article 8 of the Convention alongside with an indicating that such a banishment violates the right of the relatives, citizens of Russia, to respect for private life. Delivering of decisions by common courts on the basis on the Conventional right is more encouraging because the Russian legislation permits such deportation. Nevertheless in the cases mentioned the Supreme Court of the Russian Federation follows namely the Convention and applies provisions of the latest as rules of direct effect.

The application degree of the conventional law in jurisprudence of courts depends also on qualification of parties' representatives in proceedings, on degree of the judges' knowledge of the jurisprudence of the European Court.

Finally acceptance of approaches and attitudes of the European Court in jurisprudence of national courts is being impeded by absence of official translations of judgments of the European Court into Russian. In these circumstances the role, which the Constitutional Court plays assisting in adaptation of the Conventional law for actual of the Russian legal system, is getting special importance.

Artificially of 31 March 2013 references to the jurisprudence of the European Court of Human Rights are in 16 judgments and 148 rulings of the Supreme Arbitration Court of the Russian Federation, in 67 decisions and 377 rulings of the Supreme Court of the Russian Federation, and also in 141 judgments of the Plenum and the Presidium of the Supreme Court of the Russian Federation.

References to judgments of the Court of Justice of the European Union could be found in 2 judgments of the Supreme Arbitration Court of the Russian Federation.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

An address by the European Court concerning jurisprudence of national judicial bodies comprises (alongside with an address by national courts in their decisions concerning jurisprudence of the European Court) main content of the interaction between the European Court and bodies of national jurisdiction. Due to absence of the institutional and procedural hierarchy between them this interaction is being generally called as “dialogue”.

The European Court addresses concerning legal attitudes of the Constitutional Court as the one of sources of the national law just in some situations.

Firstly where national constitutional court proceedings are immediate subject of an application filed with the Strasbourg Court.

Secondly where passing stages of the national constitutional court proceedings is the one of actual circumstances in a case of an applicant and very that fact is just laconically noted by the European Court in its judgment, for examples, if an applicant applied to the Constitutional Court but the application was adjudged inadmissible.

Thirdly where the European Court refers to decisions of the Constitutional Court as a source of the national law, which has significance for considering an application filed with the European Court. Such situation is most spread.

As a rule in its judgment, within the section “The facts”, the subsection “The relevant domestic law and jurisprudence” (the column “The jurisprudence of the Constitutional Court of Russia” or “The case law of the Constitutional Court of Russia”), the European Court states shortly content of a decision of the Constitutional Court, but subsequently the former do not address concerning the

latest's decision or just quotes the latest's decision. In that situation an act delivered within the constitutional court proceedings is taken into account by the European Court just as the one of elements of whole legal context, in which an alleged violation of the Convention took place. On such occasions the absence of any comments on behalf of the European Court should mean in all likelihood the consent to an attitude of the Constitutional Court.

Sometimes the European Court not only states content of a decision of the Constitutional Court but comments on that decision within the section "The law" of its judgment or decision, where the European Court makes its own assessment over claims of an applicant. As a rule that assessment contains an attitude of the Constitutional Court though it may have several discrepancies with that attitude. Namely in such situation the influence of the constitutional jurisprudence upon jurisprudence of the European Court appears most exactly.

With the lapse of years there is being more shown the tendency of addressing by the European Court not concerning one or another separate act of the Constitutional Court, but concerning aggregation of the latest's decisions developing appropriate legal attitude. For example, in its Judgment of 17 December 2009 in the case "*Shilbergs v. Russia*" the European Court referred to 11 rulings of the Constitutional Court.

Most often the European Court is addressing concerning legal attitudes formulated by the Constitutional Court as to the criminal procedure legislation and also as to exercising the freedom of confession.

Moreover the European Court's essential interest consists in attitudes of the Constitutional Court as to the civil procedure legislation, the legislation on the judicial system and the tax law.

Yet few the judgments contain legal attitudes of the Constitutional Court as to other matters.

Short contents of attitudes of the Constitutional Court in the scope of criminal procedural laws are contained particularly in the European Court's Judgments in cases "*Klyakhin v. Russia*" of 30 November 2004 and "*Panchenko*

v. Russia” of 8 February 2005; “*Isayeva v. Russia*”, *Yusupova v. Russia*” and “*Bazayeva v. Russia*” and “*Khashiyev v. Russia and Akayeva v. Russia*” of 24 February 2005, “*Vanyan v. Russia*” of 15 December 2005; “*Metelitsa v. Russia*” of 22 June 2006; “*Aldoshkina v. Russia*” and “*Stanislav Zhukov v. Russia*” of 12 October 2006; “*Bulgakova v. Russia*” of 18 January 2007; “*Belevitskiy v. Russia*” of 1 March 2007; “*Nikolay Fedorov v. Russia*” of 5 April 2011.

In a number of its other judgments referring to attitudes of the Constitutional Court in the scope of criminal procedure law the European Court gives more broad statements, but restrains also from any comments or assessments. It seems those judgments concern, in the European Court’s opinion, with especial important matters of law and very the cases have systematic nature problems. In particular, quite detailed contents of main parts of declarations of appropriate decisions of the Constitutional Court are given in the European Court’s Judgments “*Nikitin v. Russia*” of 20 July 2004 and “*Baklanov v. Russia*” of 9 June 2005 also, “*Sutyagin v. Russia*” of 3 May 2011, “*Romanova v. Russia*” of 11 October 2011.

In several its judgments the European Court adds to such contentions some remarks as to influence of decisions of the Constitutional Court, with which the European Court agrees obviously, upon general legal situation in Russia (for example, see the European Court’s Judgment of 12 April 2005 in the case “*Shamayev and 12 others v. Georgia and Russia*”). In its Judgment of 8 June 2006 in the case “*Korchuganova v. Russia*” the European Court noted: “*Their failure to respect the applicable legislation is all the more inexplicable in the light of the Russian Constitutional Court’s binding clarifications of 13 June 1996 and 25 December 1998, according to which repeated extensions of detention on the ground that the defendant has not finished studying the file, were not permitted by law and incompatible with the guarantee against arbitrary detention*” (see para 51).

Finally in its Judgment of 8 November 2005 in the case “*Khudoyorov v. Russia*” the European Court not just stated in detail the Constitutional Court’s

legal attitudes, but applied them as a ground for its own declaration, noting that same conclusion “*has been also the view of the Russian Constitutional Court, which found that Russian law did not contain “any provisions permitting the court to take a decision extending the defendant’s detention on remand [some time] after once the previously authorised time-limit has expired, in which event the person is detained for a period without a judicial decision”.*”

In the course of considering religious associations’ applications the European Court addressed sometimes concerning legal attitudes of the Constitutional Court as to matters of a religious association registration.

In its Judgment of 5 October 2006 in the case “*Moscow branch of the Salvation Army v. Russia*” the European Court states the contention of the Constitutional Court’s Ruling of 7 February 2002 (with which the former agrees in whole) following the application of the association mentioned, but makes also mention, with quotation of the one of resolutions of the Parliamentary Assembly of the Council of Europe, of two other the Constitutional Court’s acts: “*It was unable to obtain “re-registration” as required by the Religions Act and consequently became liable for dissolution by operation of law... The Court accepts that that situation had an appreciably detrimental effect on its functioning and religious activities... Even though the Constitutional Court’s ruling later removed the immediate threat of dissolution from the applicant branch, it is apparent that its legal capacity is not identical to that of other religious organisations that obtained re-registration certificates*” (see para 73).

The same Constitutional Court’s legal attitudes were referred to by the European Court in its Judgment of 5 April 2007 in the case “*Church of Scientology Moscow v. Russia*” (see para 95).

In its Judgment in the case “*Kimlya and others v. Russia*” of 1 October 2009 the European Court states in detail the Constitutional Court’s attitudes formulated in some judgments and rulings of the latest on matters of a religious association registration, especially in part of “the 15 years rule” necessary for the registration.

Alongside with the aforesaid in the course of considering complaints of refusing religious association registrations and when there was the matter of whether the refusing had followed “legitimate purpose”, the European Court agreed with the Constitutional Court’s attitude that such purposes had existed.

In its Judgment of 11 January 2007 in the case “*Russian Conservative Party of Entrepreneurs and others v. Russia*”, where the refusing registration at the election of the State Duma’s members, the European Court repeated in detail the Constitutional Court’s attitude. In reasoning its own attitude the European Court agreed in whole with the Constitutional Court’s conclusions: “*this was also the view of the Russian Constitutional Court, which subsequently found section 51(11) of the Electoral Law to be incompatible with the Russian Constitution in so far as it disproportionately restricted the party’s and other candidates’ right to stand for election The Constitutional Court ... established that disqualification of candidates and entire electoral alliances for reasons unrelated to their conduct unduly impaired their passive voting rights, irrespective of the grounds for the withdrawal of a top-three candidate, and was contrary to the legal principle nulla poena sine culpa. The Court sees no reason to dissent from these findings*” (see para 66).

In its Judgment of 22 February 2007 in the case “*Tatishvili v. Russia*” concerned over the citizen registration rules the Europe Court states thoroughly appropriate judgment of the Constitutional Court that is concurrent with the European Court’s assessment of the situation. Like in the case previously mentioned (“*Korchuganova v. Russia*”) the European Court criticized again non-enforcement of judgments of the Constitutional Court, with which the former agreed, by Russian authorities: “*The Court pays special attention to the authoritative interpretation of the Regulations for registering residence given by the Constitutional Court of the Russian Federation in 1998 It held that the registration authority had a duty to certify an applicant’s intention to live at the specified address and that it should have no discretion for reviewing the authenticity of the submitted documents or their compliance with the Russian*

laws. It determined that any such grounds for refusal would not be compatible with the Constitution. It appears, however, that the binding interpretation of the Constitutional Court was disregarded by the domestic authorities in the applicant's case” (see para 53).

The European Court paid attention to the non-enforcement of decisions of the Constitutional Court by the legislator also in the former's Judgment of 7 June 2011 in the case “*Ryabikina v. Russia*”. A common court had refused to judge on the merits of the applicant woman's legal action and noted that legislation in force does not contain a ground or mechanism for consideration of claims for damages caused by a non-compliance with court proceedings terms, and prescriptions of the Constitutional Court's Judgment of 25 January 2001 # 1-P concerning rules for consideration of those cases are not yet provided for by the legislator. In the Judgment mentioned the Constitutional Court had emphasized that a person should have a right to receive a compensation for any damages caused by a court's violation of the person's right to a fair trial within the meaning of Article 6 of the Convention. The European Court found that the applicant woman had been deprived of right to application to a court, and that a violation of Article 6 § 1 of the Convention had taken place in relation to the said.

Though critical remarks of the European Court entail first of all some indifference of the national legislator about attitudes of the Constitutional Court formulated by the latest as to criminal procedure matters, the European Court is finding inauspicious state of affairs in others fields of legal regulation also. For example, in its Judgment of 6 December 2011 in the case “*Gladysheva v. Russia*” the European Court noted that section 302(1) of the Civil Code of the Russian Federation permits reclaiming of a property from a faithful acquirer where such a property was alienated out of right of possession of the owner or possessor out the latest's awareness. The interpretations of the Supreme Court's Plenum and of the Supreme Arbitration Court (see the Judgments of 29 April 2010 and of 27 January 2011 accordingly) and also of the Constitutional Court

consist in that in order to reclaim a property from a faithful acquirer the original owner should prove that such a property was alienated out the latest's awareness. The superior courts gave law enforcement persons a direct prescription to examine the owner's intentions as an independent matter differing from the matter of whether the contract on a lapse of right was valid. However common courts did not follow the prescription, and therefore the European Court indicated an existence of the shortcomings in the course of application of the national legislation including because of insufficient clearance of the law.

Besides instances of the inertness which is inadmissible from the viewpoint of a compliance with the Conventional rights and freedoms but is taking place in a behavior of the legislator in relation to the Constitutional Court's decisions that are addressed directly to the latest, acts of the European Court contain often indications to the national law enforcement persons' non-readiness (first of all, courts) which breaches in same way the obligations under the Convention by Russia to apply legal attitudes of the Constitutional Court in whole.

So, in its Judgment of 28 June 2011 in the case "*Miminoshvili v. Russia*" the European Court stated that a court's refusal to attach a testimonies to the case had contradicted directly the Constitutional Court's attitude that such testimonies must be attached to a case at least in order to assess a necessity of interrogation of witnesses in person.

In its Judgment of 27 September 2011 in the case "*Alim v. Russia*" the European Court emphasized that in its Judgment of 17 February 1998 No. 6-II the Constitutional Court noting that holding of a person who should be subjected to a banishment from Russia, in custody during undefined term is inadmissible because such holding may present several punishment, had listed compulsory procedural guaranties in connection with the said. Moreover the European Court reminded that according to the Constitutional Court's attitude a court's decision on holding of a person who should be subjected to banishment from Russia in

custody must establish that such holding in custody is necessary for an administrative banishment, that a court must verify lawfulness and grounds for the holding in custody, and that the holding in custody for undefined term is inadmissible. Meanwhile those prescriptions were not followed by common courts in the case mentioned.

In its Judgment of 20 September 2011 in the case “*Fedorenko v. Russia*” the European Court paid special attention to that the arguments which were stated in common court’s decision delivered in the case of the applicant, had contradicted the interpretation of the national legislation applicable given by the Constitutional Court which had emphasized some times that courts must establish the terms in the course of making decisions on the holding of a person in custody or on prolongation of term of the holding in custody at any stage of proceedings in the criminal case.

In another instances the European Court is considering that it is permissible to the European Court to afford the interpretation of a sense of attitudes of the Constitutional Court for the national authorities. So, in its Judgment of 3 March 2011 in the case “” the European Court paid attention to that the Constitutional Court’s case law requires a repeated prolongation of the holding in custody on same ground be directly indicated and provided for criminal procedure law. The adoption of new the Criminal Procedure Code of the Russian Federation in 2003 did not affect effectiveness or applicability of the Constitutional Court’s case law. Meanwhile the Constitutional Court’s Ruling of 19 March 2009 to which the Russian authorities had referred to, did not change the Constitutional Court’s attitude because the Ruling had not concerned the matter of an admissibility of the repeated holding. The restricted interpretation given by the Constitutional Court is compatible with requirements of Article 5 of the Convention that accepts a holding in custody as an exclusive derogation from the right to liberty and as admissible in instances listed exhaustively and defined strictly. Meanwhile in the case mentioned the common courts and in its submissions before the European Court the Russian authorities applied wide

interpretation of Article 109 of the Criminal Procedure Code arguing that in the absence of direct prohibition for the repeated prolongation of the term on that ground an appropriate court would be eligible to prolong the term so many times as expedient in circumstances of the case. Such wide interpretation of the provision is not compatible with the restricted interpretation given by the Constitutional Court and is incompatible with the principle of a protection against arbitrary enshrined by Article 5 of the Convention. Accordingly the legal ground of decisions on prolongation of the term of the holding in custody had been unsatisfactory and the holding of the applicant in custody during those terms had violated Article 5.1 of the Convention.

Nevertheless the European Court where it takes as a rule the Constitutional Court's side in the course of finding of incompatibility of the current law enforcement with the Constitutional Court's attitudes, is not intending to forget that the European Court's assistance to maintenance of the constitutional legality (by an appropriate enforcement of constitutional review body's decisions also) presents just the one of means for an achievement of the main task: protection of the Conventional rights and freedoms. In its Judgment of 31 May 2011 in the case "*Khodorkovskiy v. Russia*" the European Court noted that the national authorities had not provided the applicant's participation in sitting of a court contrary to the Constitutional Court's prescriptions (see the Ruling of 8 April 2004 No. 132-O). Subsequently those prescriptions were confirmed in the Constitutional Court's Judgment of 22 March 2005. Meanwhile the Russian authorities' argument on that the court which considered the applicant's case had could not be aware of the Constitutional Court's Ruling because the Ruling had been published later was regarded by the European Court as non-relevant because circumstances of the case had contradicted requirements of Article 5.4 of the Convention.

In the European Court's acts delivered in the cases against Russia it is seen not just a recognition of the Constitutional Court's efforts to adapt judgments of the European Court for the national legal system, but addressing

the procedural mechanism a access to which has been open due to the Constitutional Court's activity. So in its Judgment of 14 June 2011 in the case "*Denisova and Moiseyeva v. Russia*" the European Court noted that in accordance with the Constitutional Court's Judgment of 26 February 2010 No. 4-II judgments of the European Court are compulsory to the Russian Federation and a finding by the European Court of a violation of the Convention or of the Protocols to it is the ground for a resumption of civil proceedings under section 392 of the Civil Procedure Code and for reconsideration of national courts' decisions taking into account the Conventional principles established by the European Court. In such circumstances the reconsideration in detail would be the most appropriate way for an elimination of the violations.

It is significant that in its Judgment of 13 January 2011 in the case "*Kazmin v. Russia*" the European Court which is, as it is known, tended to regard a lead-time of a consideration of the applicants' cases by national courts as a serious violation of the Conventional right to court protection, where the European Court stated a delay of the proceedings in awaiting for the Constitutional Court's prescriptions and interpretation, nevertheless the former regarded the delay as a reasonable measure taken in the interests for a fair adjudication of the applicant's case.

On the matters of a State's compensation for damages caused in the course of an administration of justice the European Court referred repeatedly to legal attitudes of the Constitutional Court. In 2009 the European Court delivered the Pilot Judgment of 15 January 2009 in the case "*Burdov v. Russia*" (# 2) in relation to the Russian Federation firstly. As it was mentioned above the European Court is tended to state the instances of an untimely and insufficient application of legal attitudes of the Constitutional Court (with that the European Court itself agrees in whole or in principle) by the legislator and law enforcement practice. However in the Judgment mentioned where the European Court noted that the legislator's ignoring the Constitutional Court's conclusions about the necessity for a legislative regulating of the mechanism and grounds of

a State compensating damages caused in the course of an administration of justice had led to that the Russian authorities' violations of the Conventions a systematic nature, the European Court applied the Pilot-Judgment Procedure holding that Russia must take the appropriate "common measures". Thus the European Court not just correlated its judgment with the Constitutional Court's attitude, but bound an indication on the necessity for an additional normative regulation namely to an appropriate application of decisions of the Constitutional Court.

Traditionally the European Court is often addressing a jurisprudence of the Constitutional Court on the matters of holding in custody including the instances where there are extradition aims. In particular, in its Judgment of 8 January 2009 in the case "*Khudyakova v. Russia*" the European Court had to state the ignorance of appropriate legal attitudes of the Constitutional Court in the law enforcement practice.

In the course of considering matters of providing the civil procedure rights of the persons serving imprisonments (first of all the right to participation in person in a court sitting in a civil case) the European Court addressed repeatedly legal attitudes of the Constitutional Court expressing its consent to the attitudes by the same interpretations actually (for example, see the European Courts Judgments of 15 October 2009 in the case "*Sokur v. Russia*", of 17 December 2009 in the case "*Shilbergs v. Russia*", of 22 December 2009 in the case "*Skorobogatykh v. Russia*", of 4 March 2010 in the case "*Mokhov v. Russia*" and of 10 June 2010 in the case "*Mukhutdinov v. Russia*"). Alongside with the above in the cases mentioned the European Court found a consideration of the civil cases in absence of the applicants as a violation of Article 6 of the Convention because the applicants' civil claims had been bound closely to the applicants' identities and personal experiences.

In the course of considering the cases related to a provision of rights for the persons deprived of their legal capacity and taken at a mental facility (see the case "*Shtukaturvov v. Russia*") the European Court is noting that after the

European Court's finding of a number of violations of the Convention in the applicant's case the Constitutional Court declared the appropriate provisions of the national legislation applied in that case as unconstitutional.

The European Court is relatively often addressing the Constitutional Court's legal attitudes on the matters of social rights and, in particular, social security of the military personnel. In its Judgment of 29 January 2009 the European Court referring to the national constitutional body's attitude declared the application on the Russian legislation's violation of the applicant's rights manifestly ill-founded and dismissed it.

Outside the fields mentioned above the Constitutional Court's legal attitudes which the European Court is addressing are represented in general by several judgments and rulings on various matters of different field relating. So, for example, the short content of appropriate decision of the Constitutional Court takes place without any comments in the European Court's Judgment of 1 June 2006 in the case "*Shatunov v. Russia*" as to the Russian Ministry of Finance's enforcement of courts' acts on legal actions against the treasury.

It should be noted that the European Court does not usually enter into a discussion with the Constitutional Court and therefore either just gives a content of the Constitutional Court's attitudes as an element of the national legal context or agrees with the attitudes (explicitly or implicitly) and sometimes even emphasizes positive influence of the attitudes upon the law enforcement practice.

In duration of the all time of considerations of the applications against Russia the Judgment of 7 October 2010 in the case "*Konstantin Markin v. Russia*" has been the first where contrary to the tendency the European Court had expressed explicitly its disagreement with an attitude of the Constitutional Court.

Meanwhile it appears remarkable that the European Court is in principle considering that it is necessary to pay attention to an inappropriate, in its opinion, conception of the Constitutional Court's legal attitudes by the

legislator² or law enforcement persons³. Outside the said in the one of its judgments the European Court indicated the procedural shortcomings of the Representative of the Russian Federation at the European Court that related to the untimely (from the procedural viewpoint) reference of the respondent State to the Constitutional Court's Judgment and interpretation of the legal consequences of that Judgment.⁴

In principle alongside with the taking into account of attitudes of the European Court at national level, the back impact assisting to an elaboration of legal attitudes of the European Court in the course of interpretation and application of the Convention by the latest strengthens the constructive nature of dialogue between the European and national jurisdictions.

II. INTERACTIONS BETWEEN CONSTITUTIONAL COURTS

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

In its acts the Constitutional Court does not refer to decisions of other courts including constitutional courts which are operating at national level (though in very rare instances it is possible to see references to a foreign constitutional practice in dissenting opinions of the Justices of the Constitutional Court).

Meanwhile within structure of the Secretariat of the Constitutional Court there is operating the special unit for study and generalization of a foreign constitutional control practice which, where there is a necessity for studying a comparative legal aspects of the matter being a subject of proceedings in the Constitutional Court, is preparing (as a rule under a request of the reporter

² Besides the cases mentioned see also the European Court's Judgments of 3 May 2007 in the case "*Sobelin and others v. Russia*", of 10 April 2008 in the case "*Wasserman v. Russia*" (# 2), of 20 November 2008 in the case "*Bezborodov v. Russia*".

³ Besides the cases mentioned see also the European Court's Judgments of 11 January 2007 in the case "*Russian Conservative Party of Entrepreneurs and others v. Russia*", of 22 February 2007 in the case "*Tatishvili v. Russia*", of 5 April 2007 in the case "*Church of Scientology Moscow v. Russia*", of 12 June 2008 in the case "*Vlasov v. Russia*", of 12 June 2008 in the case "*Shchebet v. Russia*".

⁴ See the European Court's Judgment of 25 October 2007 in the case "*Lebedev v. Russia*".

Justice) the surveys on decisions of foreign constitutional control bodies, first of all, European constitutional courts, as to appropriate themes.

Besides issuing the thematic surveys there are being issued surveys on decisions of constitutional control bodies of concrete countries in order to make the Justices of the Constitutional Court and members of the Secretariat of the Constitutional Court aware of actual tendencies of foreign constitutional courts' practices.

In duration of the two decades there were prepared the surveys on decisions of European constitutional courts, in particular, of Austria (for 1993-2008), of Azerbaijan (for 2004), of Armenia (for 1996-2010), of Belorussia (for 1997-2004), of Bulgaria (for 1993-2002), of Hungary (for 1993-2005), of Spain (for 1995), of Italy (for 1973-2006), of Lithuania (for 1993-1995), of Macedonia (for 1995-2011), of Moldova (for 2004-2006), of Poland (for 1993-2007), of Portugal (for 1987-2001), of Romania (for 1993-2002), of Slovakia (for 1994-2004), of Slovenia (1993-2011), of Turkey (for 1993-2009), of Ukraine (for 2009), of the Federal Republic of Germany (for 1996-2009), of Croatia (for 1993-2004), of the Czech Republic (for 1994-2004), and also the surveys dedicated to constitutional control problems in decisions of the Supreme Court of Cyprus (for 1983-2003), the Federal Court of Switzerland (for 1974-2009), of the Court of Arbitration of Belgium (for 1993-1995) and of the Constitutional Council of France (for 1975-2011).

Besides the said there were issued the surveys on practices of the constitutional courts operating outside the European continent, in particular, of the Republic of Korea (for 1989-1991 and 2003-2007), of Peru (for 2003-2010), of Tajikistan (for 1996-2009) and also the surveys dedicated to constitutional control problems in decisions of the Supreme Courts of Brazil (for 1990-2007), of Israel (for 1984-2004), of Canada (for 1985-2002) and of the Constitutional Council of Algeria (for 1989-2008).

There is an established practice of working out thematic reviews concerning a practice of constitutional court of a concrete country (for example,

“The Constitutional Court of the Federal Republic of Germany on legal force and enforcement of judgments of the European Court of Human Rights in Germany”, “The judgments of the Constitutional Court of the Federal Republic of Germany on refusing a restitution of the properties impounded in the Soviet occupation zone in Germany in 1945-1949”, “The judgment of the Constitutional Court of the Republic of Lithuania in the case of releasing the Prosecutor General”).

2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?

As it follows from the answer to the previous question, decisions of the Constitutional Court are not containing references to a foreign constitutional practice whether there are any criteria (including linguistic characteristics).

3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

In the course of an elaboration of draft decisions and other draft acts of the Constitutional Court there are being taken into account the materials contained in the thematic surveys on a foreign constitutional control practice which are being issued by analysis units of the Secretariat of the Constitutional Court.

The first direction of the surveys on a foreign constitutional control practice consists in general problematic of a constitutional law (in particular, the matters related to International agreements, status of universally recognized principles and norms of International law and of International agreements in national legal systems, immunity of a member of parliament, leaving a parliament faction and/or a political party by a parliamentarian elected through the party list where there is being applied the proportional representation electoral system, expiration of parliamentarian mandate on the grounds of its

inconsistence with another payable activity and/or posts in commercial entities, parliament's dismissing a candidature for the head of government nominated by the head of State, parliamentary procedure on voting for draft laws, suspending a effect of enactments by budget laws, moment of an expiration of powers of a parliament where dissolution of the latest takes place, terms for signing of laws by the head of State, expiration and transfer of powers of the head of State, stating an inability of the head of State to carry out its duties, status of constituents of a federative State, giving a power to chief officials of constituents of federative States, secession from a State, combination of governmental and self-governmental powers, responsibility of local authorities and self-governmental authorities, creation of regional political parties, creation of political parties on the basis of a nationality and religion, limitation of number of political parties' members in the course of that parties, policy as to languages, study of regional languages and national minorities' languages at educational facilities, establishment of a national cultural autonomy, religion and Church, rights of religious associations and also decisions delivered by constitutional control bodies on wide number of matters of military activities).

The second direction of the surveys on a foreign constitutional control practice consists in problematic of personal rights (in particularly, the matters related to abolition of capital punishment, restricting a person's legal capacity depending on a person's mental illness, procedure for taking of a person into metal facility, terms for pretrial custody, rights of accused/detained persons in duration of criminal proceedings, long visits of prisoners by their relatives, integrity of private life and privacy of communications, defining a "private privacy" and "family privacy", production and sale or acquirement of special technical devices for informal receiving an information, compensating a personal injury suffered by a military man in the course of carrying out his/her military service duties, refusal to compensate the injury caused by job-related accident, issue of personal identify numbers, taking of drunken persons into sobering-up stations, contestation of record on parents in birth register, record

on parents in a case of surrogate maternity, restricting a travel outside of State for persons admitted to a State classified information, exile and extradition of foreign nationals, restricting an enter for foreign nationals on the ground of national security, restricting a foreign nationals' choice among territories of a temporary residence, enter and temporary stay of foreign nationals infected with HIV (AIDS), taking of foreign nationals' family circumstances into account in the course of giving them the permits for a temporary residence, and also the matters of freedom of religion and confession).

The third direction of the surveys on a foreign constitutional control practice consists in problematic of political rights (in particular, the matters of citizenship, right to petition to public authorities and entities, rules on a holding of public events and on liability for breaches of that rules, guaranteeing a representation of various people groups in the course of selection of jury for a participation in criminal court proceedings). Here the problematic of electoral rights takes special place (the matters of restricting a passive electoral right of the persons convicted of offences, active electoral right of the persons serving punishments in the form of an imprisonment, right to contest at a court the results of representative body elections where there is being applied the proportional electoral system, passive electoral right, electoral threshold for political parties at parliamentary elections, positive discrimination of women at representative body elections, coverage of election campaigns by media, registration of political party candidates at elections, requirements to a political party's decision on exclusion of a candidate from the party list at elections, encouraging a nomination of candidates at elections by signings of "qualified subjects" of political system, voting against all candidates at elections, holding of pre-electoral agitation by non-participants, methods of forming of representative bodies of local self-government, electoral systems at elections of representative bodies of self-government, terms of holdings of national-wide referenda, rising the questions as to budget or another financial duties of State at national-wide referendum).

The fourth direction of the surveys on a foreign constitutional control practice consists in problematic of social and labor rights (in particular, the matters of annulment of social rights granted, guaranteeing an education free of charge and accessible, restitution of budgetary educational expenses by the persons who were expelled from professional military education facilities, status of pensioners, payments to the pensioners who are still working, minimal standard of retirement pensions, social security of former military men who were deprived of their military ranks, taking of insurance and labor experiences into account in the course of calculating a retirement pensions, enforcement upon a pension, regular payments to relatives of the military men who were killed in the course of carrying out the military service duties, air-transfer price benefits for children, enforcement upon single dwelling, giving leave to a father for child care, labor relations of workers who represent other workers, occupying the professorial positions at educational facilities).

The fifth direction of the surveys on a foreign constitutional control practice consists in problematic of economic rights (in particular, the matter of confiscation of property, confiscation of weapons that were used for commission of offences but are in ownership of third persons, derogation from bank privacy, regulating a bank deposit of natural person, bankruptcy (insolvency), liability of mother company for causing a damage to daughter company, liability for listing and holding of a register of shareholders, differentiation of a property belonging between the public facilities having historical inherited importance and the public facilities having cultural inherited importance, rights of the persons previously committed offences to acquire firearms).

The sixth direction of the surveys on a foreign constitutional control practice consists in problematic of procedural and institutional guarantees of rights and freedoms (in particular, the matters of publicity of court sittings, making objections as to records of judicial proceedings, status of a first instance court's decision, notification of parties and persons taking part in the case of considering that case by supervisory instance court, appealing from courts'

decisions, compensating the damage caused in the course of administration of justice, jurisdiction of jury to hear criminal cases, changing an accusation in criminal proceedings, prohibition of aggravation in the course of reconsideration courts' decisions in criminal cases, right to assistance of an advocate (a defender), status of the persons being suffered from mental illness in criminal proceedings, familiarization of parties with dissenting/concurring opinion of a judge where the criminal case was considered by first instance court's panel of judges, inter-spherical prejudice in criminal proceedings, jurisdiction of criminal cases where the crimes were committed on airplane, sea or river ship outside territory of the State, reconsideration of the sentenced entered into force, status of pardon acts, amnesty, bringing to administrative responsibility, breach of road traffic rules, presumption of innocence in the course of bringing to responsibility for breach of road traffic rules that was fixed by technical devises, bringing of military men to disciplinary responsibility in the form of an arrest, representation of natural and legal persons as parties in civil and administrative proceedings, appealing from decisions in civil and administrative proceedings delivered by superior national court as first instance court, responsibility for tax offences, terms in the cases initiated from tax legal relations, financial sanctions for failing an information antimonopoly body, status of the person being suffered from mental illness as a party in civil proceedings, reconsideration of courts' decisions by a supervisory court in civil cases, compensating a damages to victims of terrorism, payments for legal services within property contests, period of limitation for to State's demands as to budgetary credits, status of intermediate courts and their competence in relation to property litigations with participation of a public element).

Finally *the seventh direction* is dedicated to several aspects of judicature (in particular, the matters of status of judges, competitive selection of candidates for a judicial position, engagement of the judge retired in payable professional legal activity, verification of application on breach of discipline by a judge, territorial jurisdiction of materials on carrying out operation search actions in

relation to a judge in the context of judicial immunity) including a functioning of constitutional justice (in particular, the matters of terms for filing applications on subsequent control of constitutionality of normative acts, a constitutional court review of quasi-normative judgments of other superior national courts, review of constitutionality of International agreements not yet entered into force).

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

The influence of the Constitutional Court being confirmed by direct references to judgments and rulings of the latest is being seen in jurisprudence of constitutional courts of some member States of the Commonwealth of Independent States. In particular, decision of the Constitutional Court of the Republic of Azerbaijan of 12 March 2012 “On review of section 14 of the Tax Code of the Republic of Azerbaijan and section 390 of the Civil Code of the Republic of Azerbaijan” contains a reference to the Judgment of the Constitutional Court of the Russian Federation of 1 April 2003; the decision of 17 April 2012 “On review of a consistence of the decision of the Military Panel of the Supreme Court of the Republic of Azerbaijan of 7 July 2011 with the Constitution” contains a reference to the Judgment of the Constitutional Court of the Russian Federation of 14 January 2000; the decision of 20 October 2012 “On review of Article 1193 of the Civil Code of the Republic of Azerbaijan” contains a reference to the Rulings of the Constitutional Court of the Russian Federation of 17 May 1995 No. 31-O and of 22 March 2011 No. 421-O-O; the decision of 20 October 2012 “On review of Articles 39.1.5 and 41.2 of the Code of Criminal Procedure of the Republic of Azerbaijan” contains a reference to the Ruling of the Constitutional Court of the Russian Federation of 4 December 2003 No. 440-O.

In its decision of 14 September 2010 “On review of Article 7 of the Law of the Republic of Armenia “On transplantation of organs and(or) human tissues”” the Constitutional Court of the Republic of Armenia refers to the Ruling of the Constitutional Court of the Russian Federation of 4 December 2003 No. 459-O.

Finally the references to the jurisprudence of the Constitutional Court can be sometimes found in dissenting opinions of justices of constitutional courts of several member States of the Commonwealth of Independent States (for example, the Dissenting opinion of Justice of the Constitutional Court of the Ukraine V.E. Skomorokh to decision of the Constitutional Court of the Ukraine of 25 November 1997 “On interpretation of Article 55.2 of the Constitution of the Ukraine and Article 248-2 of the Code of Civil Procedure of the Ukraine (right to appeal from illegal actions of an official to a court”).

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

The official and academic events being held jointly, the various forms of mutual interaction (visiting by the delegates, discussing the matters of mutual interests including in periodical professional journals etc.) should be called as another forms of cooperation beyond the mutual acknowledgement of court decisions.

III. INTERACTIONS BETWEEN EUROPEAN COURTS IN THE JURISPRUDENCE OF CONSTITUTIONAL COURTS

1. Do references to European Union Law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?

Any questions of this title imply the negative answers as Russia is not a member of the European Union and is not also having associative relations with the latest (therefore even the Constitutional Court in its decisions is not referring to jurisprudence of the Court of Justice of the European Union).⁵

⁵ Alongside with the said the several provisions of declarations of some decisions of the Constitutional Court are sometimes being argued by references to the acts both enacted by the European Community/European Union's bodies and included in part into communitarian legal order (including self-regulation acts, adopted by professional associations). It is, in particular, the (1992 European) Community Customs Code, the Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, the Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (adopted by the Council of the European Union on 25 November 2003), the Resolution of the European Parliament of 18 January 1994 on the profession of notary in the Community, the Resolution of the European Parliament of 12 February 1996 on sects in Europe, the Code of Conduct for Lawyers in the European Union (adopted by the Council of the Bars and Law Societies of the European Union on 28 October 1988 in Strasbourg). Moreover several dissenting opinions of Justices of the Constitutional Court refer to recognition by the Court of Justice of the European Union of the principle of legal certainty as a significant common principle of law.