

## **Russian Constitutional Court and ECtHR: The ‘Right to Object’ as a Tool for Constructive Dialogue, not a Revolution**

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### *Introduction*

On 14 July 2015 the Russian Constitutional Court (RCC) passed a very alarming ruling No. 21-P (the ‘Supremacy of the Constitution’ Ruling) whereby all lower courts shall stop the proceedings on any case submitted for their consideration and refer to the RCC in order to review the constitutionality of legislation in which the European Court of Human Rights (ECtHR) has found flaws. Should the RCC come to a conclusion that the Strasbourg decision is incompatible with the Constitution, it is not to be implemented. Later in 2015 a Federal Constitutional Law was adopted solidifying the right of the RCC to rule, essentially, on the constitutionality of a Strasbourg judgment (No. 7-FKZ of 14 December 2015). On 31 March 2016 this federal law was used for the first time when the Ministry of Justice requested the RCC to assess the constitutionality of ECtHR judgment on prisoners’ voting, *Anchugov and Gladkov*.<sup>2</sup>

If not a sign of a change in the general political attitude towards the implementation of decisions of the Strasbourg Court, this ruling at least brought forward the debate about international obligations and state sovereignty. The RCC reasoned that:

‘the participation of the Russian Federation in any international treaty does not mean giving up national sovereignty. Neither the ECHR, nor the legal positions of the ECtHR based on it, can cancel the priority of the Constitution. Their practical implementation in the Russian

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<sup>2</sup> Applications nos. 11157/04 and 15162/05, Judgment of 4 July 2013. For details of the request see ‘RCC Registered the First Request of the Ministry of Justice Regarding Enforceability of an ECtHR Judgment’ [Online], 2 February 2016. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3801](http://www.echr.ru/news/msg.asp?id_msg=3801) [Accessed 18 February 2016].

The previous attempt to review ‘constitutionality’ of *Anchugov and Gladkov* by the Central Election Commission was unsuccessful (see RCC Ruling on Admissibility No. 2055-O of 6 October 2015).

legal system is only possible through recognition of the supremacy of the Constitution's legal force.'

Importantly, the RCC classified their reserved position as the 'right to object' which, in view of the Court can only be used 'in the most exceptional cases for the sake of making a contribution to the balanced formation of the European Court of Human Rights.' Clearly, the 'right to object' is not a revolutionary invention of the RCC. It is used in one form or another by the Constitutional Courts of Austria, United Kingdom, Germany and Italy. Russian participation in what is understood as a European dialogue between equal members of the Council of Europe is therefore not absolutely inappropriate. Although Russia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) only in 1998,<sup>3</sup> the immediate readiness to transform Russian policies, institutions and practices to match the requirements of the organisation leaves no room for doubt about Russia's equal status in the dialogue. Certainly, many problems can still be registered regarding the implementation of judgments and the adoption of general measures. Nevertheless, the fast and profound assimilation of ECHR norms in the Russian legislation and the wide acceptance of the Strasbourg jurisprudence by Russian courts is an established fact. It gives Russia the necessary confidence to use the same methods that fellow members are using to establish the balance between national interests and respect for international obligations. In fact, such position may be interpreted as demonstrating awareness of the existing approaches to the Strasbourg jurisprudence in the highest courts of other member states. Moreover, it shows the maturity of the RCC assuming the responsibility of an actor of formation and improvement of the Convention mechanism and not a mere consumer.<sup>4</sup>

Essentially, there are reasons to agree with the RCC on the point that 'the interaction of European and constitutional legal orders is impossible in conditions of subordination, because only dialogue between different legal systems is the basis of a proper balance.' However, such position should in no way lead to exclusion, either voluntary or forced, from the European human rights mechanism. Consequences of such exclusion may be catastrophic for both parties of the dialogue and, which is most important, for millions of Russian people.

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<sup>3</sup> Federal Law No 54-FZ of 30 March 1998.

<sup>4</sup> For an opposite position on maturity see Dmitriy Golobov, 'Their Own Rules or How the Supreme Court of Great Britain Will Help the Constitutional Court of Russia to 'Beat' the ECtHR', Pravo.ru, 9 February 2016, [Online], Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3813](http://www.echr.ru/news/msg.asp?id_msg=3813) [Accessed 18 February 2016].

This paper uses legal sources, as well as statistical data, empirical evidence and political statements to review the current status of the European human rights mechanism in the Russian legal system. It argues that 1) the level of assimilation of the conventional mechanism in the Russian legal system is very high; 2) the impact of the Convention is profound and irreversible; 3) the systemic problems that impede on full implementation of the ECtHR judgments are being slowly but consistently eliminated with the exception of a few principled issues; and 4) the accent of the debate about ECtHR's influence changed from 'delegation of sovereignty' to the need to improve democratic system of checks and balances of the Council of Europe by its member states.

### *Assimilation of ECHR norms and jurisprudence in the Russian legal system*

The Convention has a constitutional priority above the acts of Russian legislation, both made by the Parliament (the State Duma) and evolving through ministerial decrees and presidential orders. In fact, being an international treaty, the Convention is 'a component part' of the Russian legal system. In case of a conflict between the norms of the Convention and the rules established by domestic law, the conventional norms prevail (Art 15.4. of the Russian 1993 Constitution). The Convention has a priority above domestic law (*zakon*), but not above the national Constitution. The latter is not referred to as *zakon* and has a specifically defined legal status. Absolute supremacy of the Constitution is based on its Art. 15(1) which accords the Constitution the highest legal force and direct application throughout the whole territory of the Russian Federation.

Since its ratification in 1998 the Convention has significantly impacted on the volume and the quality of litigation in Russian courts. Moreover, the effect of its consistent application on the transformation of judicial institutions is undoubted. It has been established that ECtHR judgments have a 'special positive role in modernization of the Russian legal system and the course of many reforms aimed at strengthening of human rights institutions in Russia.'<sup>5</sup> This role is evident in the clear and stable dynamic shown by the Russian courts increasingly referring to ECtHR judgments in response to the positive encouragement to do so by the Supreme Court.<sup>6</sup> By 2013, annual citation of

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<sup>5</sup> Brief results of the International Scientific and Practical Conference 'In Search of the Balance between Private and Public Interests in Judgments of International and National Courts', *Rossiiskoye pravosudiye* 7 (75): 107-109; 108.

<sup>6</sup> Supreme Court of the Russian Federation Plenum Ruling No. 5 of 10 October 2003 'On Application by the Courts of General Jurisdiction of the Universally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation', *Rossiiskaya Gazeta* 244, 2 December 2003 and Supreme Court of the Russian Federation Plenum Ruling No. 21 of 27 June 2013 'On Application by the Courts of General Jurisdiction of the

the ECHR by regional courts reached over 6,000 cases. In the short period 2012-2014, the number of rulings of regional courts referring to ECHR almost doubled (from 3,800 to 7,400).<sup>7</sup> The high citation rate has a qualitative impact on the nature of Russian jurisprudence. Through application of the ECtHR's 'legal positions' by Russian courts, some of the concepts characteristic of the Strasbourg jurisprudence have migrated to Russian judicial practice. For example, there is sufficient evidence to assert the internalisation by Russian courts of such concepts as balance of public-private interests, legal certainty and predictability of legal regulation, legitimate expectations, proportionality and other.<sup>8</sup>

Paradoxically, the Convention and ECtHR jurisprudence have such a progressively profound impact even despite the fact that the judgments of the Strasbourg Court are neither officially translated into Russian, nor systematically published. The Russian version of the monthly Bulletin of the ECtHR only contains summaries of cases.<sup>9</sup> Several law journals sporadically publish selected unofficial translations.<sup>10</sup> A selection of judgments was published in 2001<sup>11</sup> and in 2002 a selection of 91 cases was translated and distributed by the *Garant* legal database according to the contract with the Council of Europe.<sup>12</sup> Currently, 3,500 judgments (including 1,500 against Russia), translated by individuals, are contained in the semi-commercial legal database ConsultantPlus.<sup>13</sup> In addition, a UK-funded website accumulates news about the ECtHR jurisprudence and contains a few cases.<sup>14</sup> Recently, a textbook for judges was prepared by the Russian Academy of Jurisprudence, comprising a systematized compendium of the most important ECtHR judgments along with a formula to assist

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Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto', *Rossiiskaya Gazeta* 145, 5 July 2013.

<sup>7</sup> Search engine of the online public legal database ConsultantPlus [Online], Available from: [www.consultant.ru](http://www.consultant.ru) [Accessed 18 February 2016].

<sup>8</sup> Starzhenetskiy, Vladislav (2013). 'International Courts and Transformation of National Legal Systems', *Mezhdunarodnoye pravosudiye* 3 (7): 64-77; 65.

<sup>9</sup> Bulletin of the ECtHR [Online], Available from: <http://subscribe.ru/catalog/law.europeancourt> [Accessed 18 February 2016].

<sup>10</sup> Internet Conference of the Council of Europe and the European Court of Human Rights "European standards for the protection of human rights. Providing access in the Russian Federation", 12 February 2002, Moscow: Moscow State University. [Online], 12 February 2002. Available from: [http://www.rroi.narod.ru/echr/commentary/internet\\_konferenzia.htm](http://www.rroi.narod.ru/echr/commentary/internet_konferenzia.htm) [Accessed 18 February 2016].

<sup>11</sup> Decisions of the European Court of Human Rights, Moscow : Norma, 2001, in 2 volumes.

<sup>12</sup> *Internet Conference* (2002).

<sup>13</sup> Online public legal database ConsultantPlus [Online], Available from: [www.consultant.ru](http://www.consultant.ru) [Accessed 18 February 2016].

<sup>14</sup> See [www.echr.ru](http://www.echr.ru). Lawyer Oleg Anischik's website is another private initiative of the similar nature. [Online], Available from: <http://europeancourt.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/> [Accessed 18 February 2016].

in their application.<sup>15</sup> All these efforts lack systematization, coherence and official recognition, let alone normative regulation. The latest attempt to introduce legislation establishing the source and procedure of official publication of judgments issued against Russia was unsuccessfully undertaken by a group of MPs in 2003.<sup>16</sup> The draft was declined because it failed to solve the problem of selection of judgments and the issue of quality and consistency of legal language.<sup>17</sup>

*The legal status of ECtHR judgments: binding precedents or a mere guidance for interpretation of the Convention?*

Lack of official publication raises the issue of binding nature of the judgments. According to the Head of the Committee on Constitutional Legislation of the Parliament's upper chamber, Andrey Klishas, ECtHR judgments cannot have a binding force without official translation. Moreover, he continues, hierarchically, Russian courts are not subordinate to the Strasbourg Court.<sup>18</sup> Indeed, it was the initial euphoria of joining the Council of Europe in 1996 that has led to believing that ECtHR judgments shall be absolute and final and shall have an unquestionable binding force.<sup>19</sup> However, with time, this point of view has evolved into its extreme opposite. By 2010 some critics of the compulsory nature of ECtHR rulings went as far as calling the concept of human rights, as a 'product of the Western civilisation'.<sup>20</sup> This point of view is particularly interesting as it sheds some light on the current debate on the validity of Strasbourg jurisprudence. Afansiev complains that the supreme value of human rights was promoted by the Russian state in the 1993 Constitution. As a result, the Russian legal system proved to be 'absolutely defenceless' against the Western concept of human rights. Ratification of the ECHR in 1998 led to establishing supra-national jurisdiction of the

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<sup>15</sup> Zimnenko, Bogdan (2010). *International Law and the Legal System of the Russian Federation: Special Part: Cases*. Moscow: Russian Academy of Justice; Diplomatic Academy of the Ministry of Foreign Affairs; Statut. 543 p.

<sup>16</sup> Draft No. 166294-3, [Online], Available from: [http://asozd2.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=166294-3](http://asozd2.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=166294-3) [Accessed 18 February 2016].

<sup>17</sup> See the Resolution of the Duma Committee on State-Building of 22 April 2002, [Online], Available from: [http://asozd2.duma.gov.ru/arhiv/a\\_dz\\_3.nsf/ByID/87DA811D15D58A6243256EF30049B3EF?OpenDocument](http://asozd2.duma.gov.ru/arhiv/a_dz_3.nsf/ByID/87DA811D15D58A6243256EF30049B3EF?OpenDocument) [Accessed 18 February 2016].

<sup>18</sup> 'The Presidential Envoy to the Constitutional Court: The Ratification of the Convention on Human Rights is Consistent with the Constitution' [Online], TASS, 1 July 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3582](http://www.echr.ru/news/msg.asp?id_msg=3582) [Accessed 18 February 2016].

<sup>19</sup> See, from that period, Neshataeva, Tatiana (1999). 'On the Competence of the European Court of Human Rights in Respect of Property Rights', *Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoy Federatsii* 4: 93-97; 96; Topornin, Nikolai (1997). 'Introduction' in Topornin, Nikolai (ed.) *European Convention on Human Rights. Commentary on Articles 5 and 6*. Moscow: Institute of State and Law of the Russian Academy of Science: 3-7; 3.

<sup>20</sup> Afanasiev, Anatoliy (2010). 'The Concept of Human Rights and National Security of Russia (Axiological, Legislative and Judicial Aspects)' in *Preparation of a Report on the Current State of Human Rights in the Russian Federation and Foreign Countries*. Moscow: Yurist: 6-11; 10.

ECtHR in the Russian legal system and the priority of the Convention above decisions of all Russian authorities, including, in particular, courts and legislature. In its decisions the Court interprets the Convention in the context of ‘Euro-Atlantic civilizational and cultural paradigm of liberal values’. Therefore, the future of the Russian legal system is indeed alarming as it is increasingly formed by the ECtHR judgments and not by the Russian state in accordance with its highest axiological priorities.<sup>21</sup> Clearly, this point of view is rather extreme and not representative of the whole debate on whether the ECtHR judgments have a legal force of a precedent in the Russian legal system.

This debate is indeed one of the most heated debates in the Russian scholarship on domestic application of international law. On the one hand, the binding force of all ECtHR judgments is recognised due to them being constituent part of the Russian legal system just as the Convention itself, because they interpret it and contain universally recognised norms and principles of international law.<sup>22</sup> The RCC Chairman Valeriy Zorkin has a more nuanced opinion. He asserts that the RCC regards ECtHR rulings as *de facto* sources of law.<sup>23</sup> RCC adopts rulings that not do only accord with ECtHR practice, but are also based upon it.<sup>24</sup> On the other hand, the RCC Justices Bondar and Vitruk disagree with their Chairman. Justice Bondar believes that ECtHR rulings are not universally obligatory, they are only compulsory for Russia in the cases brought up against Russia.<sup>25</sup> He further insists that cases against other countries are only compulsory in the part of their interpretation of the Convention.<sup>26</sup> Justice Vitruk, in turn, concedes that there are no reasons to place ECtHR rulings ‘in one row’ with the conventional norms themselves.<sup>27</sup> General measures should be taken by all member states following a certain ECtHR ruling without waiting for a similar claim to

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<sup>21</sup> Ibid 10-11.

<sup>22</sup> Veliyeva, D. S., Kalashnikov, S. V. (2013). 'The role of international law in the judicial system of the Russian Federation'. *Grazhdanin i pravo* 4: 42-53; 53. Yershov, Valentin (ed.) (2006) *Independence and Impartiality of Judicial Power in Russia*. Moscow: Yurist: 148-149.

<sup>23</sup> Zorkin, Valeriy (2007). *Russia and the Constitution in the XXI Century. View from Ilinka*. [Rossiya i Konstitutsiya v XXI veke. Vzgl'yad s Il'inki]. Moscow: Norma: 566: 46.

<sup>24</sup> Zorkin, Valeriy (2006). 'Integration of the European constitutional area: challenges and responses'. *Zhurnal rossiyskogo prava* 12: 14-23.

<sup>25</sup> As referred to by Nikiforova, E. A. (2009). 'Acts of international law and the case law of the European Court of Human Rights as a source of the Russian electoral law' in *State and Law of Russia: History - Present – Prospects of Development. Proceedings of the IV regional interuniversity scientific and practical conference* (10 December 2008, Nizhny Novgorod). Nizhny Novgorod Branch of the Institute of Business and Politics: 122-138; 127. Similar position in Matveev D. Yu. (2002). *Russia as a member of the Council of Europe: the implementation of treaty obligations*. Moscow. Publishing House IKF "Catalogue": 84.

<sup>26</sup> As referred to by Veliyeva, D. S. & Kalashnikov, S. V. (2013). 'The role of international law in the judicial system of the Russian Federation.' *Grazhdanin i pravo* 5: 21-32; 21.

<sup>27</sup> As referred to by Nikiforova (2009): 127.

be brought against them by their citizens.<sup>28</sup> According to the third line of argument, ECtHR precedents constitute a totally new source of law incorporated into the Russian legal system.<sup>29</sup>

Indeed, the move towards judicial precedent can be identified as one of the recent trends in the Russian legal system.<sup>30</sup> It is impossible to attribute its growing importance to any other factor than increasing reference to the ECtHR jurisprudence that has been explicitly encouraged if not enforced by the government.<sup>31</sup> Although the theoretical dispute on whether judicial precedent is a source of law continues<sup>32</sup> and there are still sceptical voices,<sup>33</sup> the need to accommodate the conventionally binding legal force of ECtHR judgments within the Russian legal system is becoming clear.<sup>34</sup> Previously, the precedential nature of any judicial decisions, apart from guiding explanations of the Supreme Court Plenum,<sup>35</sup> had been denied, but the recent trend has now led to new approaches in doctrine,<sup>36</sup> policy<sup>37</sup> and practice.<sup>38</sup>

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<sup>28</sup> As referred to by *Veliyeva & Kalashnikov (2013)*: 21.

<sup>29</sup> Zverev, D. V. (2006). 'New sources of civil procedural law in the light of the European Convention on Human Rights' in Kallistratova, R. F. & Fokin, M. A. (eds.) *The European integration process and the development of the civil law in Russia. Collected articles*. Moscow: RAP: 17-22.

<sup>30</sup> See, among others, Yershov, Valentin (ed.) (2006). *Autonomy and Independence of the Judicial Power of the Russian Federation*. Moscow: Russian Academy of Justice, Jurist: 164, 166, 236, 249, 254; *Matveev (2002)*: 84; *Zorkin (2007)*: 125; Eckstein, K. (2004). 'Recognition of General Principles of Law. The Doctrine of the Rule of Law State' in *The Generally Recognized Principles and Norms of International Law, International Treaties in the Practice of Constitutional Justice* (Moscow, 24 December 2002). Moscow: International relations: 36-39; 36.

<sup>31</sup> Supreme Court of the Russian Federation (2003) Plenum Ruling No. 5 of 10 October 2003 'On Application by the Courts of General Jurisdiction of the Universally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation'. *Rossiiskaya Gazeta* 244, 2 December 2003.

<sup>32</sup> For the summary of the dispute see Justices of the Constitutional Court: Aranovskiy, Konstantin & Knyazev, Sergey (2013). 'The Destiny of Judicial Precedent in Roman-Germanic Law'. *Zhurnal konstitutsionnogo pravosudiya* 4 (34): 30-39; Gadjiyev, Gadis (2013). 'Methodological Problems of the 'Precedent Revolution' in Russia'. *Zhurnal konstitutsionnogo pravosudiya* 4 (34): 5-8. Zorkin, Valeriy (2004). 'Precedent Nature of Constitutional Court of the Russian Federation Rulings'. *Zhurnal rossiyskogo prava* 12: 3-9.

<sup>33</sup> Malakhov, V. P. (2004). *Domestic Legal Systems and International Law: Interaction and Efficiency*. Moscow: Moscow University of the Ministry of Interior: 51; *Gadjiyev (2004)*: 244-248.

<sup>34</sup> Granat, Nina (1998). 'Sources of Law'. *Yurist* 9: 6-12; 12; *Zverev (2006)*: 17-22.

<sup>35</sup> On their legal status see, in much detail Burkov, Anton (2010). *Convention on Protection of Human Rights in Russian Courts*. Moscow: Wolters Kluwer: 87-125.

<sup>36</sup> Glukhoyedov, Maksim & Guschina, Nina (2013). 'Judicial Precedent in the Russian Legal System: History, Theory, Practice'. *Sovremennoye pravo* 2: 79-84; 80; Usanov, Vladimir (2008). 'Judicial Precedent: The Problems of Convergence into the Russian Legal System'. *Novaya yustitsiya. Zhurnal sudebnykh pretsedentov* 1: 18-23; 20; Pomeranz, William & Gutbrod, Max (2012). 'The Push for Precedent in Russia's Judicial System'. *Review of Central and East European Law* 37: 1-30; 16.

<sup>37</sup> Council on Development of Civil Society and Human Rights under the President of the Russian Federation: Permanent Commission on Precedent Cases [Online] 9 October 2015. Available from: <http://president-sovet.ru/presscenter/news/read/2770/> [Accessed 16 February 2016].

<sup>38</sup> See, for example, Fourth Arbitration Court of Appeal (2009). Resolution of the Presidium No. 17 of 29 June 2009 'Methodological Guidelines on the Study and Generalization of Court Practice and Other Analytical Activities'. [Online] Available from: <http://www.4aas.arbitr.ru/node/911> [Accessed 16 February 2016].

## *Compliance and implementation*

The problem of implementation of ECtHR judgments is a common phenomenon in most member states. The number of non-implemented judgments remains stable at nearly 11,000 cases. As noted in the PA Resolution No. 2075(2015) many of these cases concern structural problems in States parties, which continue to generate numerous similar applications to the Court. Russia remains in the top 10 countries that have ‘the highest number of non-implemented judgments and still face serious structural problems which have not been solved for more than five years’.<sup>39</sup> According to the Committee of Ministers 2014 annual implementation report, ECtHR judgments against Russia that require general measures account for 16% of all judgments requiring adoption of such measures. More than 1,400 judgments against Russia remain unimplemented<sup>40</sup> with 1,000 judgments under strict monitoring of the CoM. In 2014 around 150 new judgments were registered with 73 of them subject to monitoring with six leading cases and 67 repeated cases.<sup>41</sup>

Although these numbers seem high, there is no principled disagreement between Moscow and Strasbourg regarding most of the judgments, apart from a few cases described in the next section. As demonstrated by the following examples, Russia makes a certain legislative and organisational effort to implement the judgments both with regard to compensation and general measures. Annual federal budget law contains a clause on compensation in accordance with ECtHR judgments. The amount of compensation budget has increased from 114 million roubles (1.1 million pounds) in 2010<sup>42</sup> to 500 million roubles (4.7 million pounds) in 2016.<sup>43</sup> The latter number means, by the way, that the 1.9 billion euros compensation is definitely not going to be paid to *Yukos*<sup>44</sup> shareholders in 2016.<sup>45</sup>

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<sup>39</sup> Parliamentary Assembly of the Council of Europe Resolution No. 2075 (2015) of 30 September 2015 ‘Implementation of Judgments of the European Court of Human Rights’.

<sup>40</sup> ‘Russia has provided for only 0.4% compensation in the Yukos case in 2016 budget’ [Online], *RBC*, 9 October 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3670](http://www.echr.ru/news/msg.asp?id_msg=3670) [Accessed 18 February 2016].

<sup>41</sup> ‘Russia is among the Leaders in Terms of the Number of Non-Implemented Judgments of the Strasbourg Court’ [Online], *Kommersant-Online*, 23 March 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3423](http://www.echr.ru/news/msg.asp?id_msg=3423) [Accessed 18 February 2016].

<sup>42</sup> Vorontsova, I. V. & Solovieva T. V. (2010) *Judgments of the European Court of Human Rights in civil litigation in Russia*. Moscow : Wolters Kluwer: 88.

<sup>43</sup> Federal Law No. 359-FZ of 14 December 2015 ‘On the Federal Budget for 2016’, *Rossiyskaya Gazeta* 285, 17 December 2015. Art. 21(5).

<sup>44</sup> *OAO Neftyanaya Kompaniya Yukos v. Russia* (Application no. 14902/04, Judgment of 15 December 2014).

<sup>45</sup> ‘Russia has provided for only 0.4% compensation in the Yukos case in 2016 budget’. [Online], *RBC*, 9 October 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3670](http://www.echr.ru/news/msg.asp?id_msg=3670) [Accessed 18 February 2016].



Since 2011 the Russian Government monitors the implementation of law in certain areas of law. The annual monitoring reports include a section on implementation of ECtHR judgments. They are a perfect source of information about the general measures adopted to execute the judgments. In the most recent report the Government provides data on legislative change following the respective ECtHR judgments.<sup>46</sup> I will list several examples of implemented judgments below. In *Shtukaturov*<sup>47</sup> the Court found a violation of the Convention in connection with fair trial rights of a person who was deprived of his legal capacity in absentia while being under forced placement in a psychiatric institution. In order to comply with the requirements of this judgment the Civil Code was amended to ensure a better protection of the rights and interests of citizens suffering from mental disorders.<sup>48</sup> In response to the violation of Art 34 ECHR on procedural rights to apply to the ECtHR found in *Zakharkin*,<sup>49</sup> Russia adopted a federal law that excludes a possibility to deny communication between a prisoner or a detained person and his/her representative in the ECtHR.<sup>50</sup> On a similar note, in *Boris Popov*<sup>51</sup> the Court found a violation of the Convention in the lack of guarantees in the Russian law that correspondence between a prisoner and the ECtHR is confidential and safe. Such guarantee was added to the legislation.<sup>52</sup> In *Putintseva*<sup>53</sup> the applicant's son was killed by the guards of his military base. To address this systemic problem leading to violations of Art 2, the right to life, a number of legislative amendments were adopted.<sup>54</sup> This list could be continued with examples of other general measures adopted in response to ECtHR rulings on pre-trial detention conditions,<sup>55</sup> deportation,<sup>56</sup> cancellation of adoption<sup>57</sup> and other areas.

More importantly, a systemic problem of re-consideration of the original cases following an

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<sup>46</sup> Report on the Results of Monitoring of Law Enforcement in the Russian Federation in 2014. [Online] 14 December 2015. Available from: <http://government.ru> [Accessed 18 February 2016]: Annex 4.

<sup>47</sup> *Shtukaturov v. Russia* (Application No. 44009/05, Judgment of 27 March 2008).

<sup>48</sup> Federal Law No. 302-FZ of 30 December 2012 'On Amendments to Chapters 1, 2, 3 and 4 of the Civil Code of the Russian Federation', *Rossiyskaya Gazeta* 3, 11 January 2013.

<sup>49</sup> *Zakharkin v. Russia* (Application No. 1555/04, Judgment of 10 June 2010).

<sup>50</sup> Federal Law No. 193-FZ of 28 June 2014.

<sup>51</sup> *Boris Popov v. Russia* (Application No. 23284/04, Judgment of 28 October 2010).

<sup>52</sup> Federal Law No. 304-FZ of 30 December 2012.

<sup>53</sup> *Putintseva v. Russia* (Application No. 33498/04, Judgment of 10 May 2012).

<sup>54</sup> Presidential Decree No. 161 of 25 March 2015, amending the Presidential Decree No. 1495 of 10 November 2007.

<sup>55</sup> For *Ananyev, Kalashnikov* and further changes to pre-trial measures see: 'Russia Reported on Non-Execution of Strasbourg Judgments' [Online]. *RBC*, 14 April 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3474](http://www.echr.ru/news/msg.asp?id_msg=3474) [Accessed 18 February 2016].

<sup>56</sup> *Ibid*, re. *Garabayev*.

<sup>57</sup> *Ibid*, re. *Ageev & Ageeva*.

applicant's success in Strasbourg was solved by respective amendments to the civil,<sup>58</sup> administrative,<sup>59</sup> arbitration<sup>60</sup> and criminal<sup>61</sup> procedural legislation.<sup>62</sup> Cases now can be re-opened due to the 'newly established circumstances' in connection with violations confirmed by ECtHR judgments. Between 2002 and 2015 presidium of the Supreme Court reviewed 256 submissions for re-consideration of criminal cases. As a result 81 rulings of lower courts were cancelled with an order to re-consider the cases on merits. Similarly, 70 civil cases were reviewed in accordance with the ECtHR's conclusions. Of those 35 applications were satisfied and previously held judgments cancelled.

One of the most important examples demonstrating the readiness of the Russian government to implement large-scale measures in response to the ECtHR rulings is, undoubtedly, the legislative action taken in reaction to the pilot *Burdov-2*<sup>63</sup> case and 255 cases of the 'Timofeyev' group. The Court found a violation by the Russian authorities of Article 6.1 of the Convention and Article 1 of Protocol 1 on account of excessively long execution of judicial acts and the lack of effective means of redress. In *Burdov* the Court specifically held that there has been a violation of Article 13 of the Convention 'on account of the lack of effective domestic remedies in respect of non-enforcement or delayed enforcement of judgments in the applicant's favour'. The Court also held that the Russian Federation 'must set up, within six months from the date on which the judgment becomes final ... an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments'.

In response to this pilot judgment a federal law establishing a domestic mechanism of compensation for violation of the right to public hearing in reasonable time or the right to execution of the judgment in reasonable time.<sup>64</sup> This Federal Law creates a legal framework for receiving compensation for violations by state authorities of the right to fair trial. Importantly, it also applies

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<sup>58</sup> Federal Law No. 353-FZ of 9 December 2010 'On Amendments to the Civil Procedure Code of the Russian Federation', *Rossiyskaya gazeta* 281, 13 December 2010.

<sup>59</sup> Administrative Litigation Code No. 22-FZ of 8 March 2015, *Rossiyskaya gazeta* 49, 11 March 2015: Art 350.

<sup>60</sup> Arbitration Procedure Code of the Russian Federation No. 95-FZ of 24 July 2002, *Rossiyskaya gazeta* 137, 27 July 2002: Art 311.

<sup>61</sup> Criminal Procedure Code of the Russian Federation, No. 174-FZ of 18 December 2001, *Rossiyskaya gazeta* 249, 22 December 2001: Art 413.

<sup>62</sup> See on constitutionality of these provisions, RCC Ruling No. 27-P of 6 December 2013, *Vestnik Konstitutsionnogo Suda RF* 2, 2014 (following *Markin v. Russia*).

<sup>63</sup> *Burdov v. Russia* (No. 2) (Application no. 33509/04, Judgment of 15 January 2009).

<sup>64</sup> Federal Law No. 68-FZ of 30 April 2010 'On compensation for violation of the right to public hearing in reasonable time or the right to execution of the judgment in reasonable time', *SZ RF* 2010, No. 18, item 2144.

general provisions of the Civil Code (article 151) on compensation for moral damage caused by violation of non-material rights to the actions of the state authorities. In effect, this federal law indicates that civil law mechanisms can be used to protect human rights harmed by public authorities. Moreover, this federal law contributes to the objective of increasing public trust in the judiciary as it aims to incite people to resolve their problems more effectively within the national judicial system. It establishes a mechanism of financial liability of public authorities. Notably, this liability is extended to entities and institutions funded by the state budget for their decisions and actions that violate individual rights and interests.

The need to adopt a law on compensation was earlier stressed by different authorities, from ECtHR in earlier *Burdov* case in 2002 to the UN experts and the Russian Constitutional Court. For example, the UN Special Rapporteur on the independence of judges and lawyers Leandro Despouy in his report following a country visit to Russia from 19 to 29 May 2008<sup>65</sup> voiced ‘important concerns at the fact that an important percentage of judicial decisions, including those against State officials, were not implemented’.<sup>66</sup> He called for a prompt establishment ‘as a measure of utmost importance, [of] a mechanism for rapid and comprehensive execution of domestic and international judicial decisions be promptly established’.<sup>67</sup> The same attitude can be observed in an RCC Ruling of 2008<sup>68</sup> where the Court calls for urgent creation of a mechanism which would ‘expressly provide for compensation for the harm caused by the failure of judgments concerning claims against the State and public authorities’. Lack of such a mechanism was regarded by the Court as ‘a legislative gap facilitating violation of constitutional rights of citizens’. This RCC Decision was later cited in 25 other RCC rulings, in 31 Arbitration courts rulings, and in 53 rulings of regional courts of general jurisdiction (11 of the latter were successful, the compensation was awarded).

Since the Federal Law on Compensation entered into force on 4 May 2010 it has become a subject of constitutional review in 90 decisions of the Constitutional Court. In the most recent Ruling on

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<sup>65</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy following his mission to the Russian Federation, A/HRC/11/41/Add.2 of 23 March 2009. [Online]. Available from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/126/50/PDF/G0912650.pdf?OpenElement> [Accessed 18 February 2016].

<sup>66</sup> *Ibid*, para 94.

<sup>67</sup> *Ibid*, para 97.

<sup>68</sup> RCC Ruling on merits of 3 July 2008 No. 734-O-P ‘Regarding a claim of Ms V. on violation of her constitutional rights by Article 151 of the Civil Code of Russian Federation’

merits No. 28-P of 11 November 2014<sup>69</sup> the Court confirmed constitutionality of the law's provisions defining 'reasonable time' in criminal proceedings. In an earlier and more significant Ruling on merits No. 14-P of 25 June 2013<sup>70</sup> the Court held that several provisions of the Federal Law on Compensation contradict the Constitution and should be amended.<sup>71</sup> The Court concluded that the law has to create appropriate conditions for the realisation of the right to compensation for damages caused by unlawful actions of public authorities or their officials. In doing so the Federal Law provides a wider scope of protection in comparison with the ECHR as it entitles other litigants – not only persons 'charged with a criminal offence' as indicated in Article 6 ECHR – to apply for a compensation. In this wider understanding the law has to provide protection to those applicants who suffered from violations in cases where either suspect or accused were not established by the court.

Since the law entered into force on 4 May 2010 it triggered a surge of cases – 2,244 regional court cases in less than 4 years (only around 100 of them successful (compensation awarded) - 4.5 %), of 500 Supreme Court and Higher Arbitration Court cases only 91 (18.2 %) are in favour of the plaintiff (compensation is awarded). In regular Arbitration courts the percentage of success is higher: of 886 cases 363 (41%) are successful.

The right to compensation is now fully recognised by the legislation and is justiciable in Russian courts. A joint guiding principle of the Supreme Court and the Higher Arbitration Court of 23 December 2010 № 30/64 outlines procedural issues arising in compensation cases. This right can be, thus, seen as an effective domestic remedy, especially as it is recognised as such by the ECtHR, although the Russian side has yet to implement the Court's recommendation to guarantee restitution in natural form, not only monetary compensation.<sup>72</sup>

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<sup>69</sup> Russian Constitutional Court Ruling (on merits) No. 28-P of 11 November 2014 'Constitutional review of the provisions of paragraph 1 of Article 1 of the Federal Law 'On compensation for the violation of the right to trial within a reasonable time, or right to execution of a judicial act within a reasonable time' and part three of Article 6.1 of the Criminal Procedure Code of the Russian Federation in connection with complaints of citizens V.V. Kurochkin, A. B. Mikhailov and A. S. Rusinov', *Rossiyskaya Gazeta*, 2014, No. 266.

<sup>70</sup> Russian Constitutional Court Ruling (on merits) No. 14-P of 25 June 2013 'Constitutional review of Article 1, Article 3.1. (para. 1), Articles 3.6. and 3.7. of the Federal Law 'On compensation for the violation of the right to trial within a reasonable time, or right to execution of a judicial act within a reasonable time' the first and fourth parts of Article 244.1, paragraph 1, and the first part of the article 244.6 of the Civil Procedure Code of the Russian Federation in connection with complaint of A. E. Popova', *Rossiyskaya Gazeta*, 2013, No. 141.

<sup>71</sup> Federal Law No. 273-FZ of 21 July 2013 'On amending Article 3 of the Federal Law 'On compensation for the violation of the right to trial within a reasonable time, or right to execution of a judicial act within a reasonable time' and several legislative acts of the Russian Federation', *Rossiyskaya Gazeta*, 2014, No. 169.

<sup>72</sup> Oleg Anischik, 'The ECHR Noted that the Federal Law 'On Compensation ...' Does Not Solve All the Problems with the Failure to Implement Judicial Decisions',

Significantly, by 2016 the number of Russian applications to ECtHR was decreased by almost 4 times since 2010.<sup>73</sup> Justice Anatoliy Kovler believes that 2012 was the year of ‘big turn’ in ECtHR jurisprudence against Russia.<sup>74</sup> The number of unconsidered applications dropped by almost a quarter as a result of ratification of the Protocol No. 14 and arrival of a new team of 20 Russian lawyers. Furthermore, the new federal law on compensation resulted in an abrupt drop of this category of cases – from 40% to 7% in all Russian applications. Not only was the new law intensely applied at the national level, but also the Ministry of Justice and the Ministry of Finance promoted a commendable practice of concluding agreements with the applicants claiming compensation for non-execution of judgments.<sup>75</sup>

It can be argued, indeed, that the national filters and mechanisms are starting to work. The RCC Chairman Zorkin explains this trend, in general, by improved quality of judicial decision-making.<sup>76</sup> He also underlines the importance of domestic mechanism in reducing the number of claims. Russia's objective, he believes, as a country leading by far in the number of filed appeals, is to pay maximum attention to the improvement of domestic law and the national judicial system ‘to transfer the main burden of protecting the rights of citizens to the level the national authorities, which would - naturally and not a forced way - lead to reducing the flow of applications to Strasbourg.’<sup>77</sup> The question is then, to what extent the Russian judicial mechanism inspired by the RCC’s own practice is able to adapt to and promote Strasbourg jurisprudence and where are the boundaries of such cooperation?

### *ECtHR and RCC: partners or rivals?*

As a general rule, the Strasbourg Court and the highest Russian constitutional review body work in

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[Online]. 17 April 2012. Available from: <http://europeancourt.ru/2012/04/17/10040/> [Accessed 18 February 2016].

<sup>73</sup> 'Residents of Russia complain to the ECHR four times less than before', [Online]. *9111.ru*, 10 February 2016. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3817](http://www.echr.ru/news/msg.asp?id_msg=3817) [Accessed 18 February 2016].

<sup>74</sup> Kovler, Anatoli (2013). 'Russia in the European Court: 2012 – the Year of ‘Sharp Turn’ [Rossiya v Yevropeiskom Sude: 2012 - god “bol’shogo pereloma”] *Rossiiskoye pravosudiye* 3 (83): 15-30; 15.

<sup>75</sup> *Ibid*, 16.

<sup>76</sup> 'Reduction of complaints to the ECHR by the Russians indicates the improvement of the courts in the Russian Federation'. [Online]. *RAPSI*, 14 December 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3748](http://www.echr.ru/news/msg.asp?id_msg=3748) [Accessed 18 February 2016].

<sup>77</sup> Zorkin, Valeriy, 'Judicial Protection: Between Globalization and Sovereignty'. [Online]. *Rossiyskaya Gazeta*, 18 July 2007. Available from: <http://www.rg.ru/2007/07/18/zorkin.html> [Accessed 18 February 2016].

tandem. This cooperation is best illustrated by the constant appeal of the RCC Chairman Zorkin to the need to ‘overcome the neglect, slow and incomplete implementation in the Russian legislation of international legal norms contained in conventions (agreements) ratified or signed by the Russian Federation.’<sup>78</sup> He gives an example of lack of cooperation between the legislature and the judiciary that has led to losing a case in ECtHR despite the RCC’s warning. In 2003 confiscation of property as a form of criminal punishment was withdrawn from the Criminal Code. The RCC ruled that this withdrawal was unconstitutional as violating Russia’s international obligations.<sup>79</sup> This ruling was not executed by the parliament that has led to losing the *Baklanov* case in 2005.<sup>80</sup> In 2009 the RCC confirmed unconstitutionality of a provision of the Federal Law on Psychiatric Treatment after the same provision has been struck down by the ECtHR in *Shtukaturov*.<sup>81</sup> Finally, perhaps the most significant example in this context is the RCC’s activism in de facto abolishing the death penalty in line with the Council of Europe’s recommendations but against the will of the Russian legislature. This was achieved, first, through the Court’s moratorium on executions in 1999.<sup>82</sup> Ultimately, this was secured in 2009,<sup>83</sup> when the Court held that execution of the death penalty is invariably unconstitutional, despite the lack of any legislative decision to exclude death penalty from the Criminal Code.<sup>84</sup>

Such cooperation is strikingly consistent in most cases. However, now more and more often the Constitutional Court is faced with a legal problem of the coordination between international law (including international judicial decisions) and domestic law (including decisions of national courts). In such conflicts the role of the Constitutional Court is the key trendsetter. Zorkin insists that according to the Russian Constitution, international law is above the Russian laws, but not above the Constitution. On this basis, the RCC is obliged to ensure the ‘harmonious combination of national and international decisions in the Russian legal system’<sup>85</sup> in cases of conflict between them. In this

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<sup>78</sup> Zorkin, Valeriy, ‘Legal Flaws: Citizens will Pay for the Mistakes of the Legislator’. [Online]. *Rossiyskaya Gazeta*, 7 July 2006. Available from: <http://www.rg.ru/2006/07/07/zorkin.html> [Accessed 18 February 2016].

<sup>79</sup> RCC Ruling on Admissibility No. 251-O of 8 July 2004.

<sup>80</sup> Zorkin, ‘Legal Flaws’.

<sup>81</sup> RCC Ruling on Merits No. 4-P of 27 February 2009.

<sup>82</sup> RCC Ruling on Merits No. 3-P of 2 February 1999. This occurred despite Yeltsin’s failure to include a similar provision in his 1996 Decree: Presidential Decree No. 724 of 16 May 1996 ‘On Phasing out of the Death Penalty in Connection with Russia’s Entry into the Council of Europe’.

<sup>83</sup> RCC Ruling on Admissibility No. 1344-O-P of 19 November 2009.

<sup>84</sup> Zorkin explains the Court’s justification of this decision in Valeriy Zorkin, ‘Repeating the Past. Commemoration of the Sixteenth Anniversary of the Russian Constitution’. *Rossiyskaya Gazeta*, 11 December 2009.

<sup>85</sup> Zorkin, Valeriy, ‘Anniversary of the Constitutional Court: Speech at the Commemoration of the Twentieth Anniversary of the Constitutional Court’. [Online]. *Rossiyskaya Gazeta*, 27 October 2011. Available from: <http://www.rg.ru/2011/10/27/zorkin-site.html> [Accessed 18 February 2016].

situation, he believes, ‘the Constitutional Court acts as a kind of mediator, adapting approaches and positions of the ECtHR to the realities of our lives today. RCC has always actively applied the legal positions of the Strasbourg Court. Until recently there have been no contradictions between the positions of the ECtHR and the role and tasks of the RCC, as soon as we are called to protect the constitutional and conventional values’.<sup>86</sup>

It should be noted, however, that Zorkin is not talking about the conflict of norms. Instead, he insists that the Constitution and the Convention share the same basic values.<sup>87</sup> However, he continues, Russia is bound by the obligation to ensure the supremacy of the Constitution and this obligation requires to give priority to the requirements of the Constitution and thereby not literally follow the ECtHR decision if its implementation is contrary to the constitutional values. So, he concludes, the Constitutional Court cannot support an *interpretation* of the Convention given by ECtHR if the Constitution in its *interpretation* by the Constitutional Court provides better protection of the rights and freedoms. Certainly, such interpretational dispute is only possible ‘in exceptional cases’ and must be ‘justified by good reasons’.

Although the interpretative practice of ECtHR on a particular issue accumulated over a relatively long period of time may change, the Court’s judgments, as it would appear, should provide a higher – in comparison to the national regulation – level of protection of rights and freedoms of man and citizen. However, the ambiguity of such assumption is manifested in *Markin*.<sup>88</sup> This case has become a matter of contestation between the interpretations of the RCC and ECtHR on the issue of the presence or absence of gender discrimination as a result of deprivation of male soldiers of the opportunity to receive the same three-year leave for child care purposes as provided to female soldiers. The two courts disagreed on the definition and content of the term ‘positive discrimination’. The RCC in one of the later Rulings following up on *Markin* (No. 27-P of 6 December 2013) the Court made an attempt to provide a solution for further possible conflicts of interpretation. The Court ruled that if a lower court at any point in the future discovers lack of clarity in the assessment of legality of a legislative provision in the interpretation of ECtHR and RCC, the court should withhold the proceedings and send a request to the RCC in order to clarify whether the contested provision is indeed constitutional.

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<sup>86</sup> Zorkin, Valeriy, ‘The Limits of Flexibility’. [Online]. *Rossiyskaya Gazeta*, 29 October 2010. Available from: <http://www.rg.ru/2010/10/29/zorkin.html> [Accessed 18 February 2016].

<sup>87</sup> RCC Ruling on merits No. 21-P of 14 July 2015.

<sup>88</sup> *Konstantin Markin v. Russia* (Application no. 30078/06, Judgment of 22 March 2012)

Another typical example of the most obvious diversion from the provisions of the Constitution is, obviously course *Anchugov and Gladkov*.<sup>89</sup> By this judgment the provisions of the Russian legislation containing limitation of the right to vote of persons convicted by court were found in violation of Article 3 on the ‘right to free elections’ of Protocol No 1 to the Convention. This judgment is in fact directly contrary to Article 32(3) of the Constitution, according to which imprisoned citizens are deprived of the right to vote. However, even in such a manifest conflict of interpretation the RCC does not stubbornly insist on the priority of the Constitutional norm. On the contrary, in a Ruling on a similar matter adopted three months after the ECtHR judgment the RCC confirmed unconstitutionality of the unlimited and undifferentiated prohibition of standing for election of a previously convicted person with a reference to *Hirst, Mathieu-Mohin and Clerfayt, Frodl, Paksas, and Scoppola*.<sup>90</sup>

As opposed to these two most cited cases, it is very difficult to see in which way *Yukos* contradicts the Russian Constitution or its interpretation by the RCC. Similar difficulties may arise if the RCC will try to constitutionally justify possible violations of the Convention by ‘gay propaganda’ legislation<sup>91</sup> or discrimination of NGOs as foreign agents in Russia.<sup>92</sup> Therefore, in order to prepare to this difficult situation in advance, the RCC, and Zorkin personally, are trying to pre-empt the ECtHR’s criticism or even hostility. This preparatory work is justified, in rather bold and progressive way by the legitimate ‘right to object’ with an aim to improve the functionality of the whole European human rights mechanism.

### *The ‘right to object’ as a functional tool of reform*

The RCC’s ‘Supremacy of the Constitution’ ruling No. 21-P of 14 July 2015 refers to ‘the right to

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<sup>89</sup> For analysis see "Pride and Prejudice": On the Proportionality of the Complete Constitutional Ban on Prisoners Vote in Russia. European Court of Human Rights Judgment of 4 July 4 2013'. [Online]. *Legas*, 2 July 2014. Available from: <http://legascom.ru/notes/804-zapret-zakluchennim-golosovat> [Accessed 18 February 2016].

<sup>90</sup> RCC Ruling on Merits No. 20-P of 10 October 2013.

<sup>91</sup> See *Alekseyev v Russia* (Applications No. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010) as opposed by the RCC position in Ruling on merits No. 24-P of 23 September 2014, *Rossiiskaya Gazeta* 226, 3 October 2014.

<sup>92</sup> Currently no judgments, but several dozens of applications in ECtHR, see ‘Non-traditionalists from Arkhangelsk appealed the Ministry of Justice’s decisions to the European Court’. [Online]. *News29.ru*, 12 September 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3643](http://www.echr.ru/news/msg.asp?id_msg=3643) [Accessed 18 February 2016] against the position of the RCC in Ruling on merits No. 10-P of 8 April 2014. The Ruling extensively cites ECtHR jurisprudence, as in preparation to the possible difficult dialogue with the Court.



object' as an important mechanism that member states not only can, but also should exercise in exceptional cases. It should be done not so much in order to protect their sovereignty, but exclusively with a view to improve the balanced human rights protection in the European region.

The 'propaganda' of the right to object continues on both fronts. On the one hand, Zorkin expresses concern about the growing popularity of the ECtHR protection mechanism which is powerful enough to constantly expose a systemic crisis of Russian law and practice and its 'serious flaws'. As a consequence of these systemic flaws, he continues, an 'abnormal exaggerated tendency is manifested when a supranational legal system increasingly replaces the Russian legal system. That creates a threat to the sovereignty of our state.'<sup>93</sup> On the other hand, five years later, he admits that, in fact, 'unlike national courts exercising normative control in respect of legislative acts, the European Court of Human Rights is **not integrated in any system of checks and balances**. In other words - it does not have a corresponding equal legislator.'<sup>94</sup> Importantly, he mentions the threats of 'excessive politicization of the legal sphere' and impossibility of its 'full de-politicization'.<sup>95</sup> Zorkin detects danger in the political nature of the ECtHR decisions. Paradoxically, when such decisions are taken for the benefit of the rights and freedoms of citizens and the development of Russia, rigorous observation can be guaranteed. But when certain decisions of the Strasbourg court are questionable in terms of the essence of the European Convention on Human Rights and more directly affect national sovereignty and the fundamental constitutional principles, Russia has the right to develop a defense mechanism against such decisions.'<sup>96</sup> 'Russia cannot and has no right to leave the European legal sphere.'<sup>97</sup> Zorkin concludes that 'Russia voluntarily assumes obligations listed in international treaties and reserves the sovereign right to final decisions in accordance with the Constitution in case of collisions.'<sup>98</sup>

The justification of the right to object is slightly more nuanced in the 'Supremacy of the Constitution' Ruling. Nevertheless it remains rather stern. The Court refers to the conferences in Interlaken (2010), Izmir (2011) and Brighton (2012) as a sign of ongoing reform of the conventional

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<sup>93</sup> Zorkin, 'Judicial Protection'.

<sup>94</sup> Zorkin, Valeriy, 'The Supremacy of Law and the Imperative of Security' [Online]. *Rossiiskaya Gazeta*, 15 May 2012. Available from: <http://www.rg.ru/2012/05/15/zorkin-poln.html>. [Accessed 18 February 2016].

<sup>95</sup> Zorkin 'The Limits of Flexibility'.

<sup>96</sup> ibid

<sup>97</sup> ibid

<sup>98</sup> Zorkin, Valeriy, 'The Law of Power and the Power of Law' [Online]. *Rossiiskaya Gazeta*, 28 May 2015. Available from: <http://www.rg.ru/2015/05/28/zorkin-site.html> [Accessed 18 February 2016].

mechanism. At the same time, however diverse the suggestions for such a reform could be, ‘the effectiveness of conventional norms in a domestic legal order is largely dependent on respect by the Court of national constitutional identities of the States’. The RCC draws a special attention of the Court to the ‘basic elements of such constitutional identity’. A more delicate approach to the domestic rules on fundamental rights as well as norms on the foundations of the constitutional system that serve as guarantees to those rights, may well reduce the risk of conflict between the national and supranational law. The lower is the risk, the stronger is the efficiency of the entire European system of protection of rights and freedoms.<sup>99</sup>

Importantly, the RCC decision leading to creation of such a domestic legal mechanism of implementation of ECtHR rulings that would not contradict Russian national interests, was based on the similar practice in other member states. This approach is justified by the idea that ‘like other European countries, Russia must fight for the preservation of its sovereignty, and respect for the European Convention, its protection from inappropriate, questionable decisions.’<sup>100</sup>

### *Intra-National Dialogue*

The Ruling ‘On Supremacy of the Constitution’ mentions examples of collisions between the Convention and national constitutions. The most revealing in this respect is the practice of the Federal Constitutional Court of the Federal Republic of Germany based on the legal position regarding the "limited legal powers of the European Court of Human Rights" developed in its decisions of 11 October 1985, of 14 October 2004 and of 13 July 2010. In particular, in consideration of the question about execution of the ECtHR judgment in *Görgülü v Germany* of 26 February 2004 it communicated the principle of priority of the national constitution before the decisions of the ECtHR for the purposes of the national law enforcement from the following three standpoints:

- 1) in the domestic legal order the Convention has the status of a federal law, and along with the practice of the ECtHR is no more than a reference point for interpretation in determining the content and scope of fundamental rights and principles of the Basic Law of Germany and only under the condition that this does not lead to restriction or curtailment of fundamental

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<sup>99</sup> RCC Ruling No. 21-P of 14 July 2015.

<sup>100</sup> *Zorkin ‘The Limits of Flexibility’*.

rights protected by the Basic Law of the Federal Republic of Germany;

2) ECtHR decisions are not always binding on German courts, but should not be completely ignored;

3) national justice should properly take these decisions into account and carefully adapt them to domestic law.

However, as suggested by the Federal Constitutional Court of Germany, an agreement with ECtHR can be reached through avoiding conflicts between national and international law at the initial stage of the proceedings in the national court. Such conflicts should, in principle, be kept to a minimum since both courts use the same methodology (judgment of 14 October 2004 in the case 2BvR 1481/04 (BVerfGE 111, 307). A similar position was expressed by the German Court earlier in relation to judgments of the European Court of Justice (judgment of 29 May 1974 in the case 2 BvL 52/71(BVerfGE 37, 271) [«Solange-I»]).

A similar approach is used by the Constitutional Court of Italy when it disagreed with the conclusions of ECtHR concerning the cross-border pension payments which were formulated in *Maggio and others v Italy*, judgment of 31 May 2011. In particular, in the ruling of 19 November 2012 on the case No 264/2012, the Court pointed out that respect for international obligations cannot be a reason for reducing the level of protection already existing in the domestic legal order, but, on the contrary, can and should be an effective tool for expanding such protection. The priority of constitutional norms is also referred to in the judgment of the Constitutional Court of the Italian Republic on 22 October 2014 No 238/2014 in connection with the decision of the International Court of Justice in the case concerning jurisdictional immunities of states (*Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*), Judgment, ICJ Reports 2012).

The Constitutional Court of the Republic of Austria also came to the conclusion about the impossibility of applying the Convention's provisions as interpreted by ECtHR if such interpretation is contrary to the norms of the national constitutional law (judgment of 14 October 1987 case No B267/86).

Finally, the Supreme Court of the United Kingdom of Great Britain and Northern Ireland in its decision of 16 October 2013 ([2013] UKSC 63) pointed out the unacceptability for the British legal

system of conclusions and interpretation of the Convention by ECtHR in *Hirst v the United Kingdom (No 2)* judgment of 6 October 2005 regarding the problem of voting rights of prisoners. According to the Supreme Court's legal position the ECtHR judgments, in principle, are not to be seen as requiring unconditional application: as a general rule they are only "taken into account"; application of these judgments is considered possible only if they are not contrary to the fundamental substantive and procedural norms of national law.

In all of the cases cited above a conventional-constitutional conflict is understood not as a contradiction between the Convention and a national constitution but rather as a collision of interpretations. Assessing domestic legislation's compliance with a national constitution these national courts proceed from the idea of accepting the interpretation that offers better protection to human and civil rights in the legal system of the State. In this process due emphasis is accorded to safeguarding the balance between constitutionally protected values and international obligations. Further, domestic courts consider not only the interests of those who directly applied for protection, but also of those, whose rights and freedoms may be affected in the future.

### *Conclusion*

It is widely believed that the 'events taking place in Europe (and everywhere in the world) are so serious that constitutional courts feel a duty to keep acting as guardians'.<sup>101</sup> Since recently, the Russian Constitutional Court has assumed the same role. So, the dialogue continues, and, noteworthy in this respect, not only between the national courts and Strasbourg, but also between the like-minded courts themselves. It could be argued that consistency in mutual support of a dissenting position, such as denying the right of prisoners to vote,<sup>102</sup> will eventually result in a more nuanced balance of national interests v. the joint interest of keeping a robust regional mechanism of human rights protection.

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<sup>101</sup> Sarmiento, Daniel (2016). 'Awakenings: the „Identity Control“ decision by the German Constitutional Court' [Online]. *VerfBlog*, 27 January 2016. Available from: <http://verfassungsblog.de/awakenings-the-identity-control-decision-by-the-german-constitutional-court/> [Accessed 18 February 2016].

<sup>102</sup> See, for example, UK-Russia mutual referencing of the relevant cases. *Moohan and another v Lord Advocate* [2014] All ER (D) 186 (Dec) citing *Anchugov and Gladkov* and RCC Ruling on merits No. 20-P of 10 October 2013 citing *Hirst*. Or, Joint Committee of House of Lords and House of Commons Report on the Draft Investigatory Powers Bill [HL Paper 93, HC 651] published on 11 February 2016 referring to *Zakharov v Russia* (2015) application no. 47143/06 to, essentially, disallow thematic arrest warrants and to enable judicial commissioners to have powers to access new technology used in the observance of communications.

Thorbjørn Jagland's concern about the possible 'storm clouds that seem to be gathering around the Convention based on a mood of national 'push-back', if not downright resistance to the Convention's implementation'<sup>103</sup> is understandable. At the same time, the variety of national mechanisms of implementation of ECtHR judgments will not necessarily lead to a collapse of the European human rights mechanism. Leaving aside the question of 'constitutionality' of the Russian federal constitutional law establishing supremacy of the Constitution above decisions of international courts,<sup>104</sup> it is easy to see the parallels with the UK HRA and the consultative status of ECtHR judgments in the British legal system. At the same time, it does not mean that Strasbourg jurisprudence will necessarily be completely ignored. On the contrary, both countries ensure that a serious effort is made to implement individuals and general measures even in the most difficult cases and strive to execute all judgments to the maximum possible extent. Despite understandable panic<sup>105</sup> the dialogue continues<sup>106</sup> and, unlike Britain, there is no real possibility that Russia will leave the conventional mechanism, with or without consulting the general public.

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<sup>103</sup> Ed Bates (2016). 'The Convention under threat' (Secretary General of the CoE). [Online]. 4 February 2016. Available from: <https://ukstrasbourghspotlight.wordpress.com/2016/02/04/the-convention-under-threat-secretary-general-of-the-coe/#more-603> [Accessed 18 February 2016].

<sup>104</sup> 'Russian Law On Rejecting Human Rights Courts Violates Constitution, Experts Say'. [Online]. *Radio Svoboda*, 24 February 2016, Available from: <http://www.rferl.org/content/russian-law-on-rejecting-human-rights-courts-violates-constitution-experts-say/27432125.html> [Accessed 18 February 2016].

<sup>105</sup> 'The Road to Calvary: 20th anniversary of Russia's joining the Council of Europe celebrate with particular distrust towards each other'. [Online]. *Kommersant*, 15 February 2016. Available from: <http://kommersant.ru/doc/2911646> [Accessed 18 February 2016].

<sup>106</sup> See, among many other, 'The ECtHR is not offended by the Russian Federation for a decision on the priority of the Constitution, says the judge'. [Online]. *Russkaya Sluzhba Novostey*, 18 November 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3723](http://www.echr.ru/news/msg.asp?id_msg=3723) [Accessed 18 February 2016]; 'Representatives of the Constitutional Court and the ECtHR will discuss the challenges arising in execution of the ECtHR judgments', [Online]. *TASS*, 22 October 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3686](http://www.echr.ru/news/msg.asp?id_msg=3686) [Accessed 18 February 2016]; 'The Foreign Ministry does not want any competition between the RCC and the ECtHR'. [Online] *Kommersant*, 2 July 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3584](http://www.echr.ru/news/msg.asp?id_msg=3584) [Accessed 18 February 2016]; 'The ECtHR has offered the Russian Supreme Court to establish a dialogue and exchange staff'. [Online]. *RIA Novosti*, 8 June 2015. Available from: [http://www.echr.ru/news/msg.asp?id\\_msg=3532](http://www.echr.ru/news/msg.asp?id_msg=3532) [Accessed 18 February 2016].