

**THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION ON THE EXECUTION OF DECISIONS
MADE BY THE EUROPEAN COURT OF HUMAN RIGHTS**

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Amendments to the Russian Constitution take effect on 4 July 2020. In Chapter 3, "Federal Structure," of the Constitution of the Russian Federation there is a provision for a set of amendments specifying the status of constitutional law in the Russian Federation regarding domestic and international/interstate relations as well as relating to questions of Russian national/state identity and guarantees of its preservation and protection. On 15 January 2020 in the Presidential Address to the Federal Assembly a number of constitutional amendments were proposed for discussion, including the introduction of certain changes to the Constitution of the Russian Federation. These changes will be guaranteed priority in Russia's legal framework. President Vladimir Putin noted that, "requirements of international law and treaties as well as decisions of international bodies can be valid on Russian territory only to the point that they do not restrict the rights and freedoms of our people and citizens and do not contradict our Constitution."¹ The topicality of considering the relationship between national and international court jurisdictions is predetermined by the fact that Russia has ratified Protocol No. 15. On 1 May 2017 a federal law-ratifying protocol establishing a subsidiary role of the European Court of Human Rights was signed. Such a role, in addition to the national mechanism of the judicial protection of human

¹ Presidential Address to the Federal Assembly, President of Russia, 15 January 2020 (Dec. 1, 2020), available at <http://en.kremlin.ru/events/president/news/62582>.



rights, is necessary to implement judicial protection, primarily in Russian courts including the Supreme Court (which is the highest court for civil, economic, criminal and administrative cases and which also protects human rights and freedoms by considering cassation and supervisory complaints against final and binding court rulings) and the Constitutional Court (which, as the highest court body of constitutional control, considers cases of citizens' complaints about the violation of constitutional rights and freedoms by a law applied by state bodies). At the current level of legal development, there are both a necessity and practical possibility of altering approaches to the implementation of international rules. This paper considers the correlation of national and international law. On the basis of decisions of the Constitutional Court of the Russian Federation on the so-called request for the applicability of decisions of the European Court of Human Rights, legal views are given on the applicability of international rules by Russian courts, including their interpretation by international court institutions. The revised version of Article 101 of the Federal Constitutional Law on the Constitutional Court, which makes it possible to apply to the Constitutional Court contrary to an official ECHR decision, has been in effect since 2014.

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Introduction

The development of the institution of international treaties shows a progressive transformation of mechanisms and forms that harmonize the interests of various states. International treaties and their implementation by international organizations favor the formation of an international legal framework. The interrelationship between this system and the national legal system is secured by the law-enforcement activities of judicial authorities. A leading role in this sphere belongs to the Constitutional Court of the Russian Federation (Constitutional Court), whose decisions are not only



obligatory for persons who are parties to a case but also predetermine the possibility of challenging rules in general. Thus, in each case challenged rules are acknowledged as unconstitutional or their certain constitutional and legal meaning is established, changes which will affect all legal relations based on the rule in question. Decisions of the Constitutional Court reflect correlations between national and international law, as well as mechanisms of the constitutional assessment of acts of conventional control as the basis for revision of court decisions.

The sources of Russian law are defined by Articles 15 and 76 of the Russian Constitution. The inclusion of Russia's international treaties and universally acknowledged principles and rules of international law in the legal system as a subsystem does not mean *ipso facto* their inclusion into the system of the law of a state but rather imposes ties on both systems. The openness of intrastate law systems regarding the international legal system, their interaction and interpenetration become established on the principle of the sovereign equality of states in combination with the principles of justice and mutuality, independent of each other. Every state, the more so a law-governed state, develops on the basis of its own legal system and, if it borrows some elements from other systems, they, becoming part of the new legal system, acquire a new quality that makes it possible to identify their belonging to this particular system and not any other one. Thus, the international legal system and the Russian legal system differ in their range of goals and objectives, sources of law, subjects of legal regulation and subjective compositions of privies. Some aspects of their target functions and legal objects overlap only partially. The basic interactions of these systems are defined in part 4 of Article 15 of the Russian Constitution. At the same time, there exists a common sphere in which international and intrastate legal rules can simultaneously affect the same object and the issue, consequently, is to define which law should prevail here.

Despite differences in the continental and common-law legal systems, it is worth supporting the opinion of British lawyers on the applicability of international legal rules in the law-enforcement activities of states. International law is effective only insofar as its principles are acknowledged and perceived by our own internal law. There is no external force that imposes its rules on our own code of material or procedural law. Courts accept the existence of a body of rules that states have adopted in their relations with one another. On any issue touched upon in court, they attempt to establish what a corresponding rule represents and, having found it, consider it incorporated into internal law, since it is not incompatible with rules contained in laws or finally declared by intrastate courts.² A commonly shared point of view holds that a peculiarity of international law is that international relations have no suprastate mechanisms that exercise compulsion and therefore the rules of international law are exercised by international legal entities themselves.

² Броунли Я. Международное право: в 2 кн. Кн. 1 [Ian Brownlie, *International Law. In 2 books. Book 1*] 87 (1977).



In line with the Russian Constitution, international treaties are integral parts of the Russian legal system, binding the state to enforce international court decisions based on them (part 4 of Art. 15). An international treaty has a greater legal force under the Russian law-enforcement process than a federal law, but not equal or greater than the legal force of the Russian Constitution.

The implementation of international law in the Russian legal system is acceptable if the following is observed. The harmonization of Russian law with conventional ones is acceptable only insofar as it does not generate contradictions with the Russian Constitution. The Russian Constitution takes precedence in the Russian legal system. Therefore, it is inadmissible to implement international treaties in which participation may allow infringements on the foundations of the constitutional order. This also concerns the legal positions of the European Court that assess national law or suggest that its provisions should be changed. Therefore, international treaties are subject to implementation within the Russian legal system only if the Russian Constitution is recognized to have the highest legal force.

A decision of the European Court may not be deemed binding if the meaning of a specific provision of the Convention, interpreted in violation of the normal rule of construction of a treaty, differs from the imperative rules of general international law (*jus cogens*), among which is the principle of sovereign equality and respect for the rights inherent in sovereignty as well as the principle of noninterference in the internal affairs of states.

It is now becoming accepted that

“the relationship between international and local law – and even less so between international and domestic courts – cannot be described by a simplistic monist or dualist framework”³ ... and that “we should leave it at the existing divergences of national and transnational answers to the question of who has the last word.” In the era of pragmatism, working out mutually acceptable solutions for specific situations of disagreement is more important than setting up formal hierarchies.⁴

In this vein, top European national courts which at various points found themselves on a collision course with the Eur. Ct. H.R. developed some sort of balancing tests to deal with conflicting decisions of the Strasbourg court and of their own. In Germany, the Federal Constitutional Court [hereinafter FCC] declared in the *Gorgulu* case that German courts, on the one hand, “must

³ Andreas Paulus, *A Comparative Look at Domestic Enforcement of International Tribunal Judgments*, 103 Proceedings of the Annual Meeting (American Society of International Law) 47 (2009). *Cit. by* Grigory Vaypan, *Acquiescence Affirmed, its Limits Left Undefined: The Markin Judgment and the Pragmatism of the Russian Constitutional Court vis-à-vis the European Court of Human Rights*, 2(3) Russian L.J. 130, 135 (2014).

⁴ Gertrude Luebbe-Wolff, *Who Has the Last Word? National and Transnational Courts – Conflict and Cooperation*, 30(1) Yearbook of European Law 99 (2011). *Cit. by* Vaypan 2014, at 135.



give precedence to interpretation [of domestic law] in accordance with the Convention” but, on the other hand, must not enforce Eur. Ct. H.R. decisions “in a schematic way” and “must include the effects [of Eur. Ct. H.R. decisions] on the national legal system in their application of the law.” The FCC considered that lower courts may refuse to give domestic effect to the decision of the Eur. Ct. H.R. “provided this is the only way in which a violation of fundamental principles of the constitution can be averted.” Given, however, the emphasis by the FCC on “the Basic Law’s commitment to international law,” the invocation of “fundamental principles of the constitution” may itself turn into a valuebalancing exercise. Similarly, the Supreme Court of the United Kingdom [hereinafter UK] opined in the *Pinnock* case that British courts should implement “a clear and constant line of [Eur. Ct. H.R.] decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of [British] law and whose reasoning does not appear to overlook or misunderstand some argument or point of principle.” Accordingly, domestic courts may on “rare occasions” decline to follow the opinion of the Eur. Ct. H.R. if doing so would foster “valuable dialogue” with the Strasbourg court on points of disagreement. And even though the practice of the UK Supreme Court manifests the existence of a “strong presumption” in favor of compliance with Eur. Ct. H.R. rulings, on two occasions (in *Boyd* and *Horncastle* cases) the Supreme Court was successful in convincing the Grand Chamber of the Eur. Ct. H.R. to reverse respective Chamber judgments regarding compatibility with the Convention of certain important aspects of UK law. Finally, the Constitutional Court of Italy also laid down its balancing test in its decisions Nos. 348/2007 and 311/2009 where it reserved for itself the right to determine, when deciding upon the effect of Eur. Ct. H.R. rulings in the domestic legal system, “the reasonable balance between the constraint arising from international obligations, as imposed by Art. 117, para. 1, of the Constitution, and the protection of constitutionally protected interests contained in other articles of the Constitution.” This balancing exercise may, according to the Constitutional Court of Italy, justify non-implementation of Eur. Ct. H.R. rulings in “exceptional” cases.⁵

By way of background should say a word about the stages of forming the legal grounds for the execution of decisions European Court of Human Rights (hereafter “ECHR”).

1. Legal Basis

Amendments to the Russian Constitution take effect on 4 July 2020. They concern a number of social guarantees, expand the powers of parliament,

⁵ Vaypan 2014, at 136–137.



to improve the organisation and performance of public authority as an instrument to achieve constitutionally relevant goals that arise from provisions of chapters 1 and 2 of the Constitution ... Pursuant to the Law, decisions taken by supranational bodies in keeping with the provisions of the Russian Federation's international treaties shall not be enforced in the Russian Federation if they contradict the Constitution of the Russian Federation.⁶

Decisions of interstate bodies adopted based on the provisions of international treaties ratified by Russia in their interpretation that is contrary to the Constitution of the Russian Federation will not be subject to enforcement. The contradiction shall be established by the Constitutional Court.⁷

At the same time, in order to avoid possible disputes about the legal and constitutional nature of these provisions, the law on amendments provides for a procedure according to which the Constitutional Court of the Russian Federation must assess the constitutionality of these amendments.

Pursuant to Russian Federal Law No. 1-FKZ amending the Constitution of the Russian Federation of 14 March 2020 with a view to "improving the regulation of individual questions of organisation and functioning of public authority" (hereinafter "the Amending Law"), following the entry into force of that Law, the President of the Russian Federation shall send a request to the Constitutional Court of the Russian Federation, asking it to rule on the conformity with the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation of the provisions of that Law that have not yet entered into force, as well as the conformity with the Russian Federation Constitution of the procedure for the entry into force of Article 1 of that Law.

On 16 March 2020 the Constitutional Court of the Russian Federation published its Opinion on the Request of the President of the Russian Federation:

The Constitutional Court of the Russian Federation adopted its Opinion on the compliance with the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation of the provisions of the Law of the Russian Federation on the amendment of the Constitution of the Russian Federation "On improving the regulation of certain issues of the organisation and functioning of public authority," as well as on the conformity with the Constitution of the Russian Federation of the entry into force of Article 1 of this Law in connection with the request of the President of the Russian Federation.⁸

⁶ Law on Amendment to Russian Federation Constitution, President of Russia, 14 March 2020 (Dec. 1, 2020), available at <http://en.kremlin.ru/acts/news/62988>.

⁷ What Changes Will Be in the Constitution of the Russian Federation?, The State Duma, 12 March 2020 (Dec. 1, 2020), available at <http://duma.gov.ru/en/news/48039/>.

⁸ On 16 March 2020 the Constitutional Court of the Russian Federation published its Opinion on the Request of the President of the Russian Federation, Constitutional Court of the Russian Federation, 16 March 2020 (Dec. 1, 2020), available at <http://www.ksrf.ru/en/News/Pages/ViewItem.aspx?ParamId=2192>.



The Constitutional Court underlined the connection of this amendment with the proposed amendment to Article 125 of the Constitution, according to which the Constitutional Court shall rule on the possibility of executing decisions of interstate bodies taken on the basis of the provisions of the Russian Federation's international treaties in an interpretation that is contrary to the Constitution of the Russian Federation and also on the possibility of executing decisions of an international/interstate court or a foreign or international court of arbitration/mediation placing the Russian Federation under obligations where such a decision is contrary to the tenets of public order in the Russian Federation. The Constitutional Court found that,

these provisions, as follows directly from their wording, do not prescribe a repudiation by the Russian Federation of compliance with the international treaties themselves and of the honouring of its international obligations and, accordingly, are not contrary to Article 15 (paragraph 4) of the Constitution of the Russian Federation. The given mechanism is not intended to establish a repudiation of execution of international treaties and the decisions of interstate court bodies based thereon but rather to devise a constitutionally acceptable means of executing such decisions by the Russian Federation while steadfastly safeguarding the supreme legal authority of the Russian Federation Constitution within the Russian legal system, a component part of which is constituted by the unilateral and multilateral international treaties of Russia, including those providing for the corresponding powers of interstate courts.⁹

The most relevant changes contained in the proposed draft amendments are focused at the present opinion of the European Commission for Democracy through Law (Venice Commission) (CDL-AD(2020)009):

- Declare that decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation which collide with the Constitution may not be executed in the Russian Federation;
- Raise to the Constitutional level the ability of the Constitutional Court to resolve matters concerning the possibility of enforcing decisions of interstate bodies adopted on the basis of international treaties ratified by the Russian Federation, in case they contradict the Constitution of the Russian Federation.

The Venice Commission has already had the occasion to stress that the domestic solutions in respect of the relation between the international and

⁹ European Commission for Democracy Through Law (Venice Commission), Russian Federation, Opinion on the Draft Amendments to the Constitution (as Signed by the President of the Russian Federation on 14 March 2020) Related to the Execution by the Russian Federation of Decisions by the European Court of Human Rights, Opinion No. 981/2020, CDL-AD(2020)009, 18 June 2020 (Dec. 1, 2020), available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)009-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)009-e).



the domestic legal order are very diverse, and that there is a wide variety of choices as to the status of the ECHR in domestic law in relation to constitutional provisions. The choice of the relation between the national and the international systems is a sovereign one for each State to make. Similarly, the model of the division of power between the branches of the state (government, legislature and judiciary) is a matter for constitutional law (except where the state has undertaken specific international law obligations affecting this division, e.g. a duty to provide for judicial review in certain situations). Whatever model is chosen, however, the State is bound by international law under Article 26 of the Vienna Convention on the Law on Treaties ("*Pacta sunt servanda*"), which stipulates that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 27 of the Vienna Convention ("*Internal law and observance of treaties*") further stipulates that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ..." No legal argument at national law, including constitutional law, can justify an act or omission which turns out to be in breach of obligations stemming from international treaties which it has chosen to ratify. The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court. In countries where the constitution has supremacy over international law, there exists the – remote – possibility that a constitutional court may find that the interpretation of an ECHR provision given by the European Court of Human Rights collides with the domestic constitution. But this finding would not remove the obligation by that country to abide by a judgment rendered against it; in extreme cases, even the possibility of amending the Constitution could be envisaged. In the Russian Federation the – certainly uncommon – competence of the Constitutional Court to examine the compatibility of a given modality of execution proposed by the Government Agent (or other State organ) would not be problematic *per se*, should the matter remain on the agenda of the State institutions (the government, the parliament) which are responsible under international law for the enforcement of the judgment. The role of the Constitutional Court should be – as the Court itself has described it (see para 36 above) – "to devise a constitutionally acceptable means of executing such decisions by the Russian Federation while steadfastly safeguarding the supreme legal authority of the Constitution of the Russian Federation within the Russian legal system." A case in which an international judgment may not be executed because its execution would collide with the Constitution cannot be but truly exceptional. Instead, the Russian Constitutional Court is empowered to declare that the judgment is non-executable as such in all cases where an issue of compatibility with the Constitution arises ... the Commission is concerned that the proposed



amendments enlarge the possibilities for the Russian Constitutional Court to declare that decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation which collide with the Constitution may not be executed in the Russian Federation. Indeed, the proposed amendments use the notion “contrary to the Constitution,” which is too broad a formula, broader than that of current Article 79 (“limit[ing] the rights and freedoms of the individual and the citizen or contradict[ing] the fundamentals of the constitutional system of the Russian Federation”).¹⁰

Article 1 of the Amending Law provides for Article 79 of the Constitution of the Russian Federation to be supplemented with a provision stating that decisions of interstate bodies taken on the basis of the provisions of the Russian Federation’s international treaties in an interpretation that is contrary to the Constitution of the Russian Federation shall not be executed in the Russian Federation. Associated with this is a provision supplementing Article 125 of the Constitution of the Russian Federation, whereby the Constitutional Court of the Russian Federation, under the procedure established by federal constitutional law, shall rule on the possibility of executing decisions of interstate bodies taken on the basis of the provisions of the Russian Federation’s international treaties in an interpretation that is contrary to the Constitution of the Russian Federation, and also on the possibility of executing decisions of an international/interstate court or a foreign or international court of arbitration/mediation placing the Russian Federation under obligations, where such a decision is contrary to the tenets of public order in the Russian Federation (sub-paragraph “b” [“б” in the original Cyrillic text] of paragraph 51). These provisions, as follows directly from their wording, do not prescribe a repudiation by the Russian Federation of compliance with the international treaties themselves and of the honouring of its international obligations and, accordingly, are not contrary to Article 15 (paragraph 4) of the Russian Federation Constitution. The given mechanism is not intended to establish a repudiation of execution of international treaties and the decisions of interstate court bodies based thereon but rather to devise a constitutionally acceptable means of executing such decisions by the Russian Federation while steadfastly safeguarding the supreme legal authority of the Russian Federation Constitution within the Russian legal system, a component part of which is constituted by the unilateral and multilateral international treaties of Russia, including those providing for the corresponding powers of interstate courts.¹¹

¹⁰ European Commission for Democracy Through Law, *supra* note 9.

¹¹ European Commission for Democracy Through Law (Venice Commission), Russian Federation, Extracts from the Conclusion of the Constitutional Court of the Russian Federation N° 1-Z of 16 March 2020, Opinion No. 981/2020, CDL-REF(2020)022, 30 April 2020 (Dec. 1, 2020), available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2020\)022-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2020)022-e).



The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter “the Convention”) establishes and ensures the observance of the engagements undertaken by the High Contracting Parties in the Convention, thereby setting up ECHR (Art. 19). The states undertake to abide by the final judgment of the Court in any case to which they are parties (Art. 46). The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment (§ 61(3) Rules of Court).

The Convention was concluded on the basis of the sovereign equality of States. States must respect the rights and freedoms guaranteed by the Convention and must effectively resolve violations at the national level. The ECHR acts as a safeguard for violations that have not been remedied at the national level. Where the ECHR finds a violation, states must abide by the final judgment of the Court. The States are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The European Court interprets the Convention.¹²

It is worth noting the opinion of British lawyers that,

one of the first tasks of the initial members of the Council of Europe was to draw up the European Convention on Human Rights and Fundamental Freedoms, under which, by Article 1, the parties agreed to secure to everyone “within their jurisdictions” the rights and freedoms set out in the Convention.¹³

In this case,

Russian bodies of power proceed from the idea that Russia’s participation in various international conventions and agreements does not at all mean delegating of some or other part of state sovereignty of Russia on this level. Membership in the United Nations implies association and not delegating of sovereignties. It is on the basis of the idea of united nations and joint sovereignties (“pooling sovereignties”) that the United Nations Organization was created.¹⁴

¹² European Court of Human Rights, Brighton Declaration (Dec. 1, 2020), available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

¹³ Nick Phillips, *European Human Rights – A Force for Good or a Threat to Democracy*, 2 *Russian Law: Theory and Practice* 6, 8 (2014).

¹⁴ Valery D. Zorkin, Speech “Constitutional Justice in the Transitional Phase of the Historical Development of Russia” at the International Conference in St. Petersburg, 17 May 2016 (Dec. 1, 2020), available at <http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=77>.



In these circumstances the President of the Constitutional Court V. Zorkin suggested that,

Accordingly, Russia's participation in international agreements and conventions only means that Russia voluntarily imposes on itself obligations enumerated in these international instruments and leaves for itself sovereign right of final decisions in accordance with the Constitution of the Russian Federation, should disputes or legal collisions occur.¹⁵

The High Level Conference at Interlaken in its Declaration of 19 February 2010 noted that the deficit between applications introduced and applications disposed of continued to grow; it considered that this situation caused damage to the effectiveness and credibility of the Convention and its supervisory mechanism and represented a threat to the quality and the consistency of the case law and the authority of the ECHR. The High Level Conference at Izmir in its Declaration of 27 April 2011 welcomed the concrete progress achieved following the Interlaken Conference. The High Level Conference meeting at Brighton on 19 and 20 April 2012 declares,

The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.¹⁶

V. Zorkin also remarked that,

recognizing objective need of the European Court's activity in revealing structural defects of national legal systems, we expect that the European Court will more consistently adhere to the principle of subsidiarity. We hope that we will not be presented with a *fait accompli* of European consensus, reached behind our back. Agreeing on the whole with this form of legitimation

¹⁵ Valery D. Zorkin, Speech "Law of Force and Force of Law" at the International Conference in St. Petersburg, 28 May 2015 (Dec. 1, 2020), available at <http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=71>.

¹⁶ Brighton Declaration, *supra* note 12.



of the European Court decisions, we proceed from the assumption that European consensus is an informal understanding, which is achieved with our direct participation and in the course of which peculiarities of the historical development of Russia and objective hardships that it comes across on its way to law and democracy are taken into account.

At the same time,

interaction of European and constitutional legal orders is impossible in the conditions of subordination, only dialogue between different legal systems is the basis of their appropriate balance. The Constitutional Court of the Russian Federation is ready to act in the spirit of cooperation and dialogue with the European Court of Human Rights.¹⁷

N. Phillips, a former English judge and, until October 2012, the President of the Supreme Court of the United Kingdom, considers that,

At the heart of the debate lie three principles that are the creation of the Strasbourg Court: the doctrine that the Convention is a “living instrument”; the margin of appreciation; and proportionality.¹⁸

As to the margin of appreciation he noted,

Nonetheless, there have been some occasions, and they have probably been a growing number of occasions, where the Court has intervened to prefer its own views to that of courts of Member States that have not erred in the principles that they have applied, but only, in the view of the Court, in the result of their application. In some of these cases the Court has afforded the Member State concerned an insufficient margin of appreciation.¹⁹

The High-Level Conference meeting in Brussels on 26 and 27 March 2015 on the “Implementation of the European Convention on Human Rights: Our Shared Responsibility.” Brussels Declaration therefore reiterates the determination of the States Parties to fulfil their primary obligation to ensure that the rights and freedoms set forth in the Convention and its protocols are fully secured at national level, in accordance with the principle of subsidiarity. The Conference underlines

¹⁷ Zorkin, *supra* note 14.

¹⁸ Phillips 2014, at 9.

¹⁹ *Id.* at 13.



the importance of clear and consistent case-law as well as the Court's interactions with the national authorities and the Committee of Ministers.²⁰

Recommendation CM/Rec(2008)2 of the Committee of Ministers emphasises High Contracting Parties' legal obligation under Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to abide by all final judgments of the ECHR in cases to which they are parties. It reiterates that in judgments where the Court finds a violation there is an obligation by the High Contracting Parties to: Pay any sums awarded by the Court by way of just satisfaction; adopt, where appropriate, individual measures to put an end to the violation found by the Court and to redress, as far as possible, its effects; adopt, where appropriate, the general measures needed to put an end to similar violations or prevent them.²¹

In accordance with the wishes of the Member States, the Convention was amended on 24 June 2013 by the 15th Protocol. On 1 May 2017 the Federal Law ratifying Protocol No. 15 was signed, amending the Convention for the Protection of Human Rights and Fundamental Freedoms. As a preamble to the Convention, the Protocol introduces a reference to the ECHR subsidiarity with regard to national courts and underscores the existence of participant states' margin of appreciation in implementing the Convention at the national level.²² In line with Protocol No. 15 in accordance with the principle of subsidiarity, states have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols there to, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the ECHR established by Convention.

Russia is not entitled to conclude international treaties not conforming to the Constitution of the Russian Federation, – otherwise they may not be brought into effect and applied in the Russian Federation, i.e. may not be ratified. The Convention,

as an international treaty of the Russian Federation is an integral part of its legal system and, therefore, the State is obliged to execute a judgment of the European Court of Human Rights, passed on the basis of the provisions of the Convention on a complaint against Russia with respect to persons participating in the case and within the framework of a specific subject-matter of a dispute; in this case realization of measures envisaged by the judgment

²⁰ Brussels Declaration, High-Level Conference on the "Implementation of the European Convention on Human Rights: Our Shared Responsibility," 27 March 2015 (Dec. 1, 2020), available at http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf.

²¹ Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies (Dec. 1, 2020), available at <https://www.echr.am/resources/echr//pdf/25811f0ffa3ff0ed7f9fd4f1f1bc011.pdf>.

²² Law ratifying Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, President of Russia, 1 May 2017 (Dec. 1, 2020), available at <http://en.kremlin.ru/acts/news/54417>.



of the European Court of Human Rights – both of individual and general character – must be carried out in accordance with Article 15 (Section 4) of the Constitution of the Russian Federation also on the basis of recognition of such judgment as an integral part of Russia’s legal system.²³

Article 85 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation establishes a request to the Constitutional Court of the Russian Federation to verify the constitutionality of state actions shall be admissible if the petitioner deems them either unenforceable due to their unconstitutionality or enforceable notwithstanding the officially adopted by an inter-State body for the protection of human rights and freedoms, in which violation of human rights and freedoms by the Russian Federation in the course of application of a respective normative act or treaty and the need to make amendments to them eliminating the said violations are ascertained.

Ruling No. 21-P of 14 July 2015 of the Constitutional Court marks a new stage in the development of law-enforcement practices in correlation between national and international law. In addition, the decision made should be considered as an aim to avoid serious complications in a situation in which an ECHR decision implies the introduction into Russian legislation of changes fraught with the violation of civil and political rights and freedoms fixed by the Russian Constitution.

An ECHR ruling cannot be considered binding if the Court, when interpreting it during a trial, attaches another, rather than its usual, meaning to a notion used or interprets it contrary to the Convention’s object and goals. In this case, the state concerning which a ruling has been made has a right to refuse to execute it as a ruling that goes beyond the limits of obligations voluntarily assumed by this state when it ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, ECHR makes a reservation that in such cases, it is impossible to observe the obligation to use a rule of an international treaty interpreted by an interstate body within the consideration of a specific case. If the interpretation of a rule of an international treaty violates constitutional provisions, the Russian Federation cannot execute a decision of an interstate body regarding individual and general measures imposed on it. The issue of the valid meaning of corresponding provisions in the context of an arising contradiction and Russia’s international obligations shall be settled pursuant to constitutional proceedings.

The legal basis for considering requests about the possibility to execute a decision of an interstate body to protect human rights and freedoms are the provisions of Articles 104.1–104.3 of the Federal Constitutional Law. The Federal Constitutional

²³ By the judgment of 14 July 2015 No. 21-P/2015 the Constitutional Court gave appraisal of constitutionality of the provisions of Article 1 of the Federal Law “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto” etc. (Dec. 1, 2020), available at <http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-П.pdf>.



Law developed in connection with the Constitutional Court ruling of 14 July 2015 No. 21-P establishes the authority of the Constitutional Court to rule on the possibility of complying with the ruling of an interstate body protecting human rights and freedoms proceeding from the supremacy and supreme judicial power of the Constitution of the Russian Federation and sets the procedure the Constitutional Court will follow in considering such matters.

Under the Federal Constitutional Law, a request to enforce a resolution by an interstate body responsible for protection of human rights and freedoms can be filed with the Constitutional Court by a federal executive body of power authorised to ensure the protection of Russia's interests during consideration by an interstate body responsible for protection of human rights and freedoms of complaints filed against the Russian Federation based on an international agreement of the Russian Federation. Following the consideration of the case, the Constitutional Court shall rule on the possibility or impossibility to enforce the resolution of such interstate body responsible for protection of human rights and freedoms under the Russian Constitution. The Federal Constitutional Law establishes the right of the President and the Government of Russia to turn to the Constitutional Court with a request to interpret clauses of the Russian Constitution to avoid uncertainty in their understanding in view of any contradiction that may arise between provisions of a Russian Federation international agreement as interpreted by an interstate body responsible for protection of human rights and freedoms, and provisions of the Russian Constitution as it applies to the possibility of complying with the ruling of the appropriate interstate body.²⁴

On 22 September 2020, Russian President Vladimir Putin submitted to the State Duma the draft, "On Amendments to Federal Constitutional Law 'On the Constitutional Court of the Russian Federation.'" The draft provides for significant changes to the Federal Constitutional Law on the Constitutional Court in the procedure for the formation and powers of the Constitutional Court of the Russian Federation and is aimed at implementing the provisions of part 3 of Article 107, part 2 of Article 108, Article 125, parts 1 and 3 of Article 128 of the Constitution of the Russian Federation.

The draft brings the Constitution of the Russian Federation into line with the concept of the Constitutional Court as the highest judicial body of constitutional control in the Russian Federation, exercising judicial power independently and through constitutional legal proceedings in order to protect the foundations of the

²⁴ Amendments to Law on Constitutional Court (Dec. 1, 2020), available at <http://en.kremlin.ru/acts/news/50935>.



constitutional system, fundamental human and civil rights and freedoms and ensure the supremacy and direct operation of the Constitution of the Russian Federation throughout the Russian Federation.

The Federal Constitutional Law stipulates that the constitutional Court of the Russian Federation consists of 11 judges, including the Chairman of the Constitutional Court of the Russian Federation and his Deputy. In the event of retirement of any of the judges of the Constitutional Court of the Russian Federation or the number of judges becomes less than 8, the President of the Russian Federation may nominate another individual for the vacant position of a judge to the Federation Council within one month from the date of opening of the vacancy. The Constitutional Court is authorized to make decisions in sessions if there are at least 6 of the number of active judges.

The draft supplements the requirements for a candidate for the position of judge of the Constitutional Court with provisions on the need for permanent residence in the Russian Federation, the absence of citizenship of a foreign state, or a residence permit or other document confirming the right to permanent residence of a citizen of the Russian Federation on the territory of a foreign state.

It is established that the judge of the Constitutional Court is subject to the prohibitions and restrictions provided for by the Federal law regulating the status of judges, including the prohibition to open and have accounts (deposits), store cash and valuables in foreign banks located outside the territory of the Russian Federation, own and (or) use foreign financial instruments.

The list of grounds for terminating the powers of a judge of the constitutional Court is clarified and supplemented. It is stipulated that the powers of a judge of the Constitutional Court are also terminated due to the acquisition of citizenship of a foreign state or obtaining a residence permit or other document confirming the right to permanent residence of a citizen of the Russian Federation on the territory of a foreign state.

The procedure for terminating the powers of a judge of the Constitutional Court is specified. It is stipulated that the termination of the powers of the Chairman of the Constitutional Court, the Deputy Chairman of the Constitutional Court and judges of the Constitutional Court may be carried out by the Constitutional Court. In the event that they commit an act discrediting the honor and dignity of a judge and in all other cases provided for by law No. 1-FKZ, indicating that the judge cannot exercise his/her powers, the termination of the powers may be carried out also by the Federation Council on the proposal of the President of the Russian Federation.

In the event that a judge of the Constitutional Court has their powers terminated, the decision of the Constitutional Court is sent to the President of the Russian Federation and the Federation Council and is considered the official notice of vacancy.

Termination of powers of a judge of the Constitutional Court by the Federation Council on representation of the President of the Russian Federation is possible due to 1) violations of the procedure for the appointment of the judge of the Constitutional



Court to a position; 2) non-compliance with the appointment requirements for candidate for the position of a judge of the Constitutional Court; 3) the forfeiture of citizenship of the Russian Federation by the judge; 4) the acquisition of citizenship of the foreign state or residence permit or other document confirming the right to permanent residence of a of the Russian Federation on the territory of a foreign state; 5) a verdict of guilty that has entered into legal force against a judge 6) commission of an act that defames the honor and dignity of a judge; 7) engaging in activities or performing actions that are incompatible with the position of a judge.

The procedure for the review by the Constitutional Court of the request of the President of the Russian Federation about check of constitutionality of drafts on the amendment of the Constitution of the Russian Federation, projects of Federal constitutional laws and Federal laws adopted in the prescribed manner of the laws before their signing by the President of the Russian Federation and also laws of subjects of the Russian Federation prior to their publication of the higher official of the subject of the Russian Federation is established.

The draft clarifies the powers of the Constitutional Court of the Russian Federation. In particular, it is determined that the Constitutional Court checks the constitutionality of Federal Constitutional laws, Federal laws, normative acts of the President of the Russian Federation, the Federation Council, the State Duma, the government of the Russian Federation, the constitutions of republics, charters, as well as laws and other normative acts of the subjects of the Russian Federation issued by the following by the following parties: State authorities of the Russian Federation and joint jurisdiction of state authorities of the Russian Federation and state authorities of subjects of the Russian Federation. Thus, the list of objects of constitutional judicial control over complaints of violation of constitutional rights and freedoms is being expanded.

The list of subjects that have the right to appeal on this basis is also expanding. Under the draft the right to such treatment is granted to citizens, legal persons and their interests – the Ombudsman for human rights in the Russian Federation, Ombudsmen for human rights in constituent entities of the Russian Federation, other Ombudsmen in certain areas or certain categories of persons stipulated by the Federal law, as well as other bodies and officials in accordance with Federal law and nationwide organizations which, in accordance with the Federal law can represent the interests of citizens and legal entities.

The amendments also provide a new list of criteria for the admissibility of complaints about violations of the constitutional rights and freedoms of citizens and legal entities by a regulatory act.

According to the amendments the claim of a violation of constitutional rights and freedoms by the regulatory act shall be admissible if 1) there is evidence (trappings/signs) of violation of rights and freedoms of the applicant or person in whose interests a complaint to the Constitutional Court of the Russian Federation as



a result of application of the contested normative act in a particular case involving such person; 2) the complaint was filed not later than one year after the adoption of a judicial decision that exhausted domestic remedies and if a retrial by the court whose decision is usually exhausting domestic remedies in those cases was denied due to the omission of the term appeal – not later than one year after the final judicial decision which had applied the relevant regulations; 3) all other domestic means of judicial protection of the rights of the applicant or the person in whose interests the complaint is filed with the Constitutional Court have been exhausted in resolving a specific case.

Thus, under the “exhaustion of domestic remedies” refers to filing in accordance with the laws of the relevant type of proceedings by the applicant or person in whose interests a complaint to the Constitutional Court, appeal to the highest court for this category of cases or, if enforceable judicial acts on this category of cases are subjects to appeal only in the Supervisory review process if the judicial act, which has applied the challenged normative act, was the subject of a cassation or Supervisory appeal in connection with the application of this normative act and the filing of a cassation or Supervisory appeal did not eliminate signs of violation of the rights of such an applicant or person.

The Constitutional Court may also recognize domestic remedies as exhausted if the established law enforcement practice of the court, whose decision usually exhausts domestic remedies in the relevant category of cases, or the official interpretation of the contested normative act given in explanations on judicial practice in order to ensure uniform application of the legislation of the Russian Federation, indicates that the application of the contested normative act is different from that which took place in a particular case not assumed.

The draft specifies the procedure for consideration by the Constitutional Court of cases on the possibility of execution of decisions of the interstate body for the protection of human rights and freedoms. It is Established that the President of the Russian Federation, the Government of the Russian Federation, the Supreme court of the Russian Federation and Federal Executive authorities vested with competence in the field of supporting activities for the protection of the interests of the Russian Federation in an interstate authority may apply to the Constitutional Court with inquiries about the possibility of executing decisions of an interstate body due to the fact that in obliging the Russian Federation to take measures for its implementation, this decision is based on the provisions of the international Treaty of the Russian Federation in the interpretation, presumably leading to their discrepancy with the provisions of the Constitution of the Russian Federation.

The draft establishes the procedure for considering cases with the possibility of enforcement of decisions of foreign or international (interstate) courts and foreign or international arbitration courts (arbitrations). It stipulates that the President of the Russian Federation, the Government of the Russian Federation and the Supreme



Courts of the Russian Federation have the right to appeal to the Constitutional Court with a request of execution of decisions of foreign or international (interstate) courts and foreign or international arbitration courts (arbitration) which impose obligations on the Russian Federation.

Such a request is acceptable if the applicant believes that the execution of the decision is impossible because it contradicts the principles of public law and order of the Russian Federation; the decision imposes obligations on the Russian Federation both directly and through the imposition of obligations on individual Federal state bodies or organizations belonging to the Russian Federation; decision is based on a deviation from the usual meanings of terms used in the document under which it is adopted or their context, or on a deviation from the object, purpose or content of this document, or on non-compliance with the limits of competence in making such a decision; in the system of current legal regulation, including international legal regulation, there is no possibility of refusal to execute the decision within the framework of ordinary law enforcement.

The draft provides the power of the Supreme Court not later than 2 months after the publication of the decision of the Constitutional Court to provide an explanation on issues of judicial practice in order to ensure uniform application of the legislation in terms of the contested norms.

According to the amendment provided in the draft, a document confirming the right to appeal to the Constitutional Court, as well as the admissibility of such an appeal, is attached to the application sent to the Constitutional Court.

The draft also contains a number of provisions aimed to improve the organizational framework of the Constitutional Court of the Russian Federation.

The introduction of these amendments to the Federal constitutional law "On the Constitutional Court of the Russian Federation" will help strengthen the role of the Supreme judicial body of constitutional control.

2. Positions of the Constitutional Court

The Constitutional Court resorted to the possibility of executing decisions of the European Court on Human Rights within the framework of the Russian legal system in resolutions of 27 March 2012; 14 July 2015; 19 April 2016; and 19 January 2017.

On 14 July 2015 the Constitutional Court announced its judgement on constitutionality of the Federal Law "On the Accession of the Russian Federation to the European Convention on Human Rights" and of the provisions of the federal legislation, which pertain to the enforcement of the Judgments of the ECHR by the Russian Federation. According to the legal position of the Constitutional Court, court carrying out proceedings of reconsideration of a judicial act having entered into legal force on application of a person, on whose complaint the ECHR passed a judgment, ascertaining violation of the Convention by the provisions of the Russian



legislation, applied in this person's case, is obliged to suspend proceedings and petition the Constitutional Court with a request to review their conformity to the Constitution. State bodies, entrusted with the obligation to ensure fulfilment by the Russian Federation of international treaties of which it is a party, having come to the conclusion on impossibility of executing a judgment of the ECHR passed on a complaint against Russia because, in obliging the Russian Federation to take measures of individual and/or common nature it is based on the provisions of the Convention in the interpretation leading to its divergence with the Constitution, are entitled to petition the Constitutional Court for the solution of the question on the possibility to execute the judgment of the ECHR and take measures of individual and common character, aimed at ensuring the fulfilment of this Convention. Should the Constitutional Court come to the conclusion that the judgment of the ECHR, so far as it is based on the Convention in the interpretation contradicting the Constitution, cannot be executed, such judgment in this part is not subject to execution. The President and Government of the Russian Federation having come to the conclusion on the impossibility to execute a judgment of the ECHR passed on a complaint against Russia, because in the part obliging the Russia to take measures of individual and common character it is based on the provisions of the Convention in the interpretation leading to their divergence with the Constitution, are entitled to petition the Constitutional Court with a request to interpret respective provisions of the Constitution with the aim to eliminate uncertainty in their understanding, bearing in mind the revealed conflict and international obligations of Russia as applied to the possibility to execute the judgment of the ECHR and to take measures of individual and common character aimed at ensuring fulfilment of the Convention.²⁵

In this context the President of the Constitutional Court V. Zorkin noted,


The Convention in its interpretation by the European Court possessed stronger legal force than a federal law, but not the one equal or stronger than legal force of the Constitution of the Russian Federation.²⁶

The reasoning of the RF CC Ruling is that due to the primacy of the Constitution, international law provisions shall be interpreted as specification of the Constitutional provisions, but they cannot be applied if they go beyond the scope of the legal sense that is enshrined in the Constitution.²⁷

²⁵ Constitutional Court, *supra* note 23.

²⁶ Zorkin, *supra* note 15.

²⁷ Ref.: Зорькин В.Д. Право силы и сила права // Журнал конституционного правосудия. 2015. № 5. С. 6 [Valery D. Zorkin, *The Law of Force and the Force of Law*, 5 Journal of Constitutional Justice 1, 6 (2015)]; Nikolai S. Bondar, *The Constitutional Court of the Russian Federation in the National and Supranational Systems of Jurisdictional Bodies: Cooperation and Competition*, 4(1) Kutafin University Law Review 2, 25 (2017).



On 19 April 2016 the Constitutional Court has pronounced its judgment on the applicability of the judgment of the ECHR of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* (Applications nos. 11157/04 and 15162/05). The Constitutional Court has recognized as possible and realizable in Russia's legislation and judicial practice execution of this Judgment of the ECHR with regard to measures of general character, ensuring justice, proportionality and differentiation of application of the restriction of electoral rights, so far as in accordance with the Constitution and the provisions of the Criminal Code. The execution of the said the judgment of the ECHR with regard to measures of individual character, which are stipulated by the operating legislation of the Russian Federation with respect to Russia's citizens has been recognized as impossible, since these citizens had been sentenced to deprivation of liberty for a long term for the commission of particularly grave crimes and therefore could not count, even according to criteria elaborated by the European Court, on access to electoral rights.²⁸

In the opinion of the European Commission for Democracy through Law (Venice Commission) it was written that,

it is true that the Constitutional Court of the Russian Federation has demonstrated a certain openness to dialogue with the European Court of Human Rights. In its judgment in the case of *Anchugov and Gladkov*, the Court affirmed that the Strasbourg judgment could not be executed but at the same time indicated to the federal legislator a way out of the impasse. On the basis of these indications, the legislation was amended and the Committee of Ministers considered that the judgment had been fully executed. The case of *Anchugov and Gladkov* indeed demonstrates that constitutional hurdles may be addressed, which is what has happened, over time, in other Council of Europe member States.²⁹

In its judgment the ECHR suggested to Russia that it execute its decision through some form of political process or by interpreting the Constitution by the competent authorities in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them. The Constitutional Court supposes that such an interpretation of the Articles of the Constitution in interconnection with the provisions of the Criminal Code and judicial practice suggested by the present judgment allows to avoid similar collisions concerning restrictions of electoral rights of citizens staying in places of deprivation of liberty under a court sentence.³⁰

²⁸ By the judgment of 19 April 2016 No. 12-P/2016 the Constitutional Court resolved the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* (Dec. 1, 2020), available at <http://www.ksrf.ru/en/Decision/Judgments/Documents/Resume19042016.pdf>.

²⁹ European Commission for Democracy Through Law, *supra* note 9.

³⁰ Constitutional Court, *supra* note 23.



V. Zorkin returned to this issue in a speech at the International Conference, “Modern Constitutional Justice: Challenges and Perspectives” on 17 May 2016, saying,

[the] European Court was not taking into account the fact that applicants were contesting not simply a rule of law (which in itself meant the need that the state should take measures of general nature), but a norm of the country’s Constitution. Moreover, the norm which may be altered solely as a result of adoption of a new Constitution.³¹

In the opinion of the judge of the Constitutional Court N. Bondar,

The ECHR Decision dated July 4, 2013 in *Anchugov and Gladkov vs. the Russian Federation*, in compliance with which the ECHR, in fact, challenged one of the provisions of the Constitution of the RF (Part 3 Art. 32), became a serious manifestation of value conflicts that emerge due to the interaction between the jurisdiction under the European Convention and the Russian national constitutional system. At the same time, in the RF CC Ruling dated April 19, 2016 No. 12-P the Court, dealing with the question concerning the possibility of execution of the ECHR decision, evinced a flexible, constructive approach indicating existing options for implementation of the act of the jurisdiction under the European Convention that are consistent with the Constitution of the RF.³²

In the opinion of Julia Haak,

The violation of the Convention consists solely of the automatic occurring prohibition of the right to vote in every conviction to a deprivation of liberty, without any differentiation. An appropriate solution would be not to deprive every condemned person of the right to vote, one of the most important fundamental rights in a democracy. This approach, which would be achieved by a corresponding amendment to the federal laws, could solve the loudly raised conflict between the Russian Constitution and the ECHR.³³

On 19 January 2017 the Constitutional Court decided that it is impossible to enforce the ECHR judgement of 31 July 2014 in the case *OAO Neftyanaya Kompaniya*

³¹ Зорькин В.Д. Конституционная юстиция на переходном этапе исторического развития России // Конституционный Суд РФ. 17 мая 2016 г. [Valery D. Zorkin, *Constitutional Justice at the Transitional Stage of Russia’s Historical Development*, Constitutional Court of the Russian Federation, 17 May 2016] (Dec. 1, 2020), available at <http://www.ksrf.ru/ru/news/Speech/Pages/ViewItem.aspx?ParamId=75>.

³² Bondar 2017, at 26.

³³ Yulia Haak, *Constitutional Court of the Russian Federation, Decision from 19 April 2016, No. 12-P/16. An Assessment from a German Point of View*, 6 *Journal of Siberian Federal University. Humanities & Social Sciences* 845, 848 (2017).



Yukos v. Russia. However it did not exclude the possibility to protect the interests of shareholders suffering from unlawful actions of the company's management. The Constitution has the supreme legal force within the legal system of Russia. According to the legal position of the Constitutional Court, the judgements of the ECHR do not deny the priority of the Constitution in the latter's legal system. When deciding the Constitutional Court has held,

Not denying the rule of application of sanctions in respect of tax evasion, the Constitutional Court revealed the only possible, from the perspective of the Constitution, meaning thereof regarding their application in respect of unscrupulous taxpayers. Tax evasion of the 'OAO Neftyanaya Kompaniya Yukos' in such an unprecedented scale directly threatened principles of the rule of law in a democratic social state which obliged the authorities to act in the course of enforcement proceedings as effective as possible with regard to overcome resistance of unscrupulous taxpayers ... However the Russian Federation acting in a good faith can make certain payments to former shareholders of the Company who suffered from unlawful actions of the latter's management by means of newly detectable property of the YUKOS.

Broadly speaking this means that,

when a decision of an international body interpreting provisions of an international treaty unlawfully concerns fundamentals of the Constitution, Russia has an exceptional right to deviate from enforcement of this decision.³⁴

In the latter, the Constitutional Court withdrew from considering the procedural aspects of the ECHR decision to which the Russian Ministry of Justice had drawn attention, since otherwise it would have meant that the above decision had been assessed in terms of the relevance of procedural rules applied and procedural decisions based on them.

It follows from the adduced legal position, expounded in the judgment No. 21-P, that the Constitutional Court as the last instance of resolving, within the framework of the operating constitutional regulation, of the question of the possibility to execute judgments of the ECHR as the interstate body for the protection of human rights and freedoms must, in accordance with international obligations of Russia, find reasonable balance in carrying out this power, so that the decision taken by it should, on the one hand, answer the letter and spirit of a judgment of the ECHR

³⁴ On 19 January 2017 the Constitutional Court of the Russian Federation pronounced its judgement on the possibility of enforcement of the European Court of Human Rights judgement of 31 July 2014 *OAO Neftyanaya Kompaniya Yukos v. Russia* (Dec. 1, 2020), available at <http://www.ksrf.ru/en/News/Pages/ViewItem.aspx?ParamId=1970>.



and on the other – not come into a conflict with the fundamental principles of the constitutional order and legal regulation of human and civil rights and freedoms established by the Constitution of the Russian Federation.³⁵

3. Discussion and Conclusion

The President of the Constitutional Court V. Zorkin noted that,

Having signed the European Convention for the Protection of Human Rights and Fundamental Freedoms, Russia with due reasons recognized itself as a part of the European political and legal expanse. But we are entitled to expect that peculiarities of our country and difficulties which it comes across in the course of its entry in the European legal expanse will be taken into account in the forming of legal standards of the Council of Europe.

In this context he remarked:

Besides, the Russian Constitution, unlike the European Convention, is a much more comprehensive and detailed document, whose provisions constitute a united, internally accorded normative system. All this means that the bounds of activism of a national body of constitutional control are not as wide as those of its supra-national vis-à-vis.³⁶

In the opinion of the judge of the Constitutional Court A. Kokotov, as long as in the course of constitutional judicial proceedings the provisions in question are found conforming to the Constitution, the Constitutional Court within the framework of its competence should define the possible constitutional ways of executing the judgment passed by the ECHR.

The Constitutional Court's decisions form a significant channel for introducing legal positions of international judicial authorities into Russian law. Therefore, by specifying conclusions of the European court of Human Rights as regards their compatibility with particularities of Russian legislation and of its own decisions, the RF Constitutional Court solves the problem of implementing provisions of the Convention on Protection of Human Rights and Fundamental Freedoms and of the European Court's resolutions into Russian legislation. Consequently, the Constitutional Court's legal positions can be considered as an instrument similar to general measures on execution

³⁵ Constitutional Court, *supra* note 23.

³⁶ Zorkin, *supra* note 14.



of the European Court's resolutions if the latter are not just seen as procedures for enforcement of certain rulings in cases to which Russia was a party.³⁷

The judge of the Constitutional Court N. Bondar noted,

It cannot, however, be denied that there are some decisions of the ECHR that unambiguously demonstrate double standards and a lack of polyphony of European constitutionalism ... this problem concerns the balance between the European consensus and the national constitutional identity, meaning that the concept of "European consensus" is sometimes used to the detriment of constitutional pluralism and "constitutional polyphony" as the part of a European constitutional area. While elaborating the mechanisms of resolving conflicts between national jurisdictional bodies and the ECHR, it is necessary to take into account that conflicts per se including those that arise as a result of correlation and confrontation between national and supranational law have constitutional significance. And all disputes that are constitutional due to their legal nature, character and consequences are subject to settlement by means of constitutional procedures ...

It is evident that the character of relations between the Constitutional Court of the Russian Federation and the European Court of Human Rights are not defined, by any means, by conflicts that emerge between the jurisdiction under the Convention and the national constitutional jurisdiction.³⁸

This confirms the legality of the Constitutional Court's approach, which ensures the search for a valid compromise to maintain the international system of protection of rights and freedoms. The objective of the Russian highest body of constitutional control is to ensure a reasonable balance so that, on the one hand, a decision made would meet the letter and intent of a decision of an international court of justice and, on the other, would not contravene the foundations of the Russian constitutional order and the legal regulation of civil and political rights and freedoms established by the Constitution of the Russian Federation.

The execution of the condition of exhausting domestic remedies remains a debatable issue. The High Level Conference at Brighton on 19 and 20 April 2012 in its Declaration invites the European Court of Human Rights to develop its case law on the exhaustion of domestic remedies so as to require an applicant, where a domestic remedy was available to them, to have argued before the national courts or tribunals the alleged violation of the Convention rights or an equivalent provision

³⁷ Alexander N. Kokotov, *On the Lawmaking Matters of the Acts of the Constitutional Court of the Russian Federation*, 1 Russian Law: Theory and Practice 6, 11 (2015).

³⁸ Bondar 2017, at 24, 26.



of domestic law, thereby allowing the national courts an opportunity to apply the European Convention for the Protection of Human Rights and Fundamental Freedoms in light of the case law of the ECHR. The Constitutional Court stated that the role of the European Court, additional to the national mechanism of human rights remedy, is predetermined by the necessity to be protected primarily by all courts of the Russian Federation, including the Supreme Court (which is the highest court for civil, economic, criminal and administrative cases and which also protects human rights and freedoms by considering cassation and supervisory complaints against final and binding court rulings) and the Constitutional Court (which, as the highest court body of constitutional control, considers cases of citizens' complaints about the violation of constitutional rights and freedoms by a law applied by state bodies).

If a decision of an interstate body contains an instruction based on interpretation of an international treaty that illegitimately affects the fundamental principles and rules of the Russian Constitution, Russia, on an exceptional basis, may derogate from the execution of obligations imposed on it by this decision if this derogation is the only possible way to avoid the violation of the Russian Constitution. Such a derogation is possible in cases of conventional and constitutional collisions, which, as a rule, concern not so much the main content (essence) of various rights and freedoms as such but their concrete definitions. For example, ECHR rulings contain interpretations that result in the negation, unmotivated by the literal content of the Convention, of legal constructs that have emerged in the Russian legal system.

The role of international organizations in the contemporary world is hard to overestimate, but we should not forget that states are the only holders of sovereignty, which should not be violated either by independent sovereign states or by the activities of international judicial bodies. State sovereignty, which took the global community centuries to recognize, is an earnest of international stability. International organizations cannot determine the development of international relations, because this function contradicts their legal nature as platforms that elaborate approaches to solve international disputes and the acceptance of these approaches remains an act of good will for every independent subject of international law.

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