DOCTRINAL CONVERGENCE OF THE RUSSIAN CONSTITUTIONAL COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

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I. The context of the relationship between constitutional courts and the European Court of Human Rights

1. Introduction to the debate

Within the doctrine of the increased constitutional role of the European Court of Human Rights (ECtHR) considerable academic debate is focusing upon the relationship between national and international courts. It appears that within national judicial systems the lower level courts have in recent years shown more and more willingness to apply directly the ECHR norms and the ECtHR jurisprudence, raising the question in the eyes of the highest national courts 'who is the master in the house?'[1] In a recent comparative analysis about the relationship between the national courts and the ECtHR jurisprudence, Janneke Gerards demonstrates that the doctrine of 'shared responsibility' between the national courts and the ECtHR for protecting human rights has stimulated the national courts to act as 'Convention courts' when directly applying the Strasbourg case-law[2]. This comparative analysis, besides being a noteworthy contribution to the ongoing discussion whether the national courts act like marionettes when following the ECtHR case-law, clearly demonstrates on the example of six Member States of the Council of Europe[3], that often national constitutional review and human rights protection architectures rely on the ECtHR setting constitutional standards. Despite the differences in the competences of national courts to review the compatibility of national legislation with international law and regarding the status of the ECHR in the national hierarchy of norms[4], the analysis of the six countries reveals that the semi-constitutional function of the ECtHR is now an inseparable part of national legal and judicial systems. As there is no sign of reverse dynamics, the discussion whether the ECtHR should define itself more as a

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[1] For context see the monograph by Mitchel Lasser, where he demonstrates how the balance of powers between the French legislature and judiciary has shifted in favour of the latter, as well as how the ECtHR jurisprudence has 'shaken' French judicial and administrative hierarchies – Mitchel Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe,* Oxford University Press 2009.

[2] Janneke Gerards, *The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility',* in: Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law (ed by Janneke Gerards and Joseph Fleuren), Intersentia 2014, at 89.

[3] The analysis covers Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom

[4] For discussion see: Janneke Gerards and Joseph Fleuren*, Comparative Analysis (chapter 9),* in: Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law (ed by Janneke Gerards and Joseph Fleuren), Intersentia 2014.

constitutional or adjudicatory court already has an answer through the legal realities in the Member States – thus the discussion may even be devoid of practical purpose[5].

Ideally then, if all national courts are to act as 'Convention courts', the ECtHR has its main or sole task of setting the applicable standards – very much similar to the tasks of a national constitutional courts. Where does this leave national constitutional courts within the European human rights system? Giuseppe Martinico has analysed the 'counter-limits' doctrine in response to the growing constitutional aspirations of the ECtHR, observing the trend of convergence within many European countries' highest courts jurisprudence[6]. Céline Lageot notes the refusal of the French Constitutional Council to interpret constitutional principles in the light of the fundamental rights guaranteed by the ECHR[7]. Or take the almost anecdotal shift from the question among German courts from "What will Karlsruhe[8] say about it?" to "What will Strasbourg say about it?"[9] Despite the growing literature about the relationships between the national and supranational courts, the question about the degree of penetration of the Strasbourg court's jurisprudence into domestic jurisprudence of the Member States' has not been researched utilizing quantitative methods[10]. Until the new academic aspirations to apply quantitative methods to human rights protection and compliance in national legal systems yield publishable results, the argument that national courts need the ECtHR constitutional principles for daily litigation remains narrative-based[11]. However, within the doctrine of 'input-legitimacy'[12], which focuses on the question whether constitutional courts are set up in a way that properly confers legitimacy on them, the constitutional function of the ECtHR receives input from the application of the ECtHR standards from the national ordinary courts and not necessarily from the national constitutional or supreme courts.

This article will address the issue of the relationship between the ECtHR and the Russian Constitutional Court from the perspective of doctrinal similarities or

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[5] The phenomenon of the national courts applying the ECtHR principles and jurisprudence seems to have appeared within the last decade. Perhaps one of the reasons behind this shift is indeed the increased ability of the ECtHR to offer for national courts a full 'judicial basket' of constitutional principles, which may overshadow the diversity of principles advanced by respective national constitutional or supreme courts

[6] Giuseppe Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts,* European Journal of International Law, Volume 23, no. 2, 401 – 424, at 423.

[7] *Supra note* 14, at 184

[8] Seat of the German Federal Constitutional Court

[9] *Supra note* 18*,* at 215

[10] For some discussion about the constraints caused by the methodological challenges facing the question see: Arthur Dyevre, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?* – European Constitutional Law Review, issue 9, 2013, 139 - 168

[11] For discussion see: Malcolm Langford and Sakiko Fukudo-Parr, *The Turn to Metrics,* Nordic Journal of Human Rights Vol 30, No. 3 (2012), pp 222 – 238. Or consider the initiative of Tallinn University Law School, Oslo University Norwegian Centre for Human Rights, Iceland University Law Institute and Tampere University initiative to establish European Human Rights Index, announced at the 2014 Human Rights Research Institutes Conference in Copenhagen.

[12] For discussion about the various doctrines of courts' judicial legitimacy, see: Christopher McCrudden and Brendan O'Leary, *Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements,* European Journal of International Law, 2013, volume 24, no. 2, 477 – 501, at 500-501

divergence on the matters of human rights and fundamental freedoms. The article will not, mainly for practical purposes due to the enormousness of the task, seek to analyse to what extent Russian ordinary courts apply the European Convention for the Protection of Human Rights and Fundamental Freedoms[13] (the ECHR) and the standards established by the ECtHR jurisprudence. The article will also not address the question of general compliance by the Russian Federation with obligations emerging from various human rights protection documents, mainly the ECHR and its Protocols.

2. The context of ECtHR perception in Russia

Recently Anatoly Kovler, the former judge from Russia at the European Court of Human Rights has pointed to a delicate balance in Russia when it comes to recognizing the Court's judgments and case-law[14]. He and Olga Chernishova write, *inter alia:* "On the other hand, voices in the professional community are calling for 'judicial sovereignty' which would allow them to free themselves from any 'outside' control imposed by a foreign body"[15]. This article may indirectly answer the question whether the recent jurisprudence of the European Court of Human Rights demonstrates such 'outside control' at least on the level of constitutional protection within the Russian Federation.

Although the ECtHR's case-law on Russia is significant, some judgments may overshadow the general jurisprudence. On July 03, 2014, the Grand Chamber of the European Court of Human Rights delivered its judgment in *Georgia vs Russia (I)*[16], where it held by sixteen votes to one, that in the autumn of 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals was put in place in the Russian Federation which amounted to an administrative practice for the purposes of the ECHR case-law[17]. This judgment interferes deeply into Russian judicial independence and at the same time raises some fundamental questions about the international human rights litigation.

The Court began its reasoning by presenting principles for the assessment of evidence. Having indicated that the applicable standard of assessment is "beyond reasonable doubt", originating from the two inter-state cases decided decades ago[18], it reiterates the concept that the approach of national legal systems that use this standard in criminal cases is not applicable (para 94). The Court establishes the absence of

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[13] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 222

[14] Anatoly Kovler and Olga Chernishova, *The June 2013 Resolution No 21 of the Russian Supreme Court/ A Move Towards Implementation of the Judgments of the European Court of Human Rights,* Human Rights Law Journal, 31 December 2013, Volume 33, No 7-12, 263-266.

[15] *Supra,* page 266

[16] *Georgia v. Russia (I),* application no 13255/07, ECtHR judgment of 03 July, 2014. The judgments and decisions of the European Court of Human Rights are available through http://www.echr.coe.int.

[17] *Georgia v. Russia (I),* page 58

[18] *Ireland v. the United Kingdom*, ECtHR Judgment of January 18, 1978, application no 5310/71, Series A no. 25, para 161 and *Cyprus v. Turkey*, Grand Chamber judgment of May 10, 2001 in case no. 25781/94, ECHR 2001-IV, para 113, in this judgment para 93.

procedural barriers to the admissibility of evidence or predetermined formula for its assessment as follows:

> the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates (para 95).

When analysing the alleged existence of the anti-Georgian administrative practice, the Court reviewed the witness statements and various documents submitted by both parties. It went on to state that it has

> often attached importance to the information contained in recent reports from independent international human-rights-protection associations or governmental sources … In order to assess the reliability of these reports, the relevant criteria are the authority and reputation of their authors, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and whether they are corroborated by other sources (para 138).

It appears that at least some of the reports were submitted by the Georgian government and the Russian government disputed the probative value of information contained in them, alleging *inter alia,* that the HRW report and the report of the PACE Monitoring Committee were to a large extent based on statements by the Georgian authorities or Georgian nationals and uncorroborated by documents or other admissible evidence. The European Court disagreed with Russia, stating that

> having regard to the thoroughness of the investigations by means of which these reports were compiled and the fact that in respect of the points at issue their conclusions tally and confirm the statements of the Georgian witnesses, the Court does not see any reason to question the reliability of these reports (para 139.)

Russian judge Dedov filed a sole dissenting opinion, arguing that international organisations made their overall legal assessment of the events in their reports without providing any documentary evidence to support their conclusions, and the Court has accepted their approach without verifying the actual facts. For the judge it appeared that the Court has accepted the results of the organizations' legal assessment and established the facts on the basis of the reports (page 86). Judge Dedov expressed the opinion that the assessments and conclusions of the international organisations were in the format of value judgments, which the European Court nevertheless accepted without criticism and cited at length (page 85)[19].

[19] Judge Dedov referred to the following expressions contained in the reports as conclusions: "mass expulsion", "mass arrests", "a campaign conducted in such an ostensible manner", "repressive orders targeting Georgians", "arrestees have no right to a lawyer", "production line ... without those concerned by the expulsion orders being present", "collusion between the police and the judicial authorities", "selective and intentional persecution campaign based on ethnic grounds", "visas and registration papers legally obtained were cancelled, people were illegally detained and expelled", "organized persecution of Georgian nationals", "harassment of a specific group of people was a form of inadmissible discrimination", "mass miscarriage of justice", "evidence of collusion between the police and the courts", "[Georgians] were presented as a group before the courts", "deliberate policy of detention and expulsion", "people are being illegally detained and expelled", "flagrant denial of

Given the assumption that the international reports were decisive for the finding of the violations by Russia, the Court has not addressed three important aspects. First, it has not indicated who were the authors of the international reports or how the material was compiled, which leaves open the question whether the relevant criteria for usability of the reports indeed is met. Given that the FIDH report contains opinions of "human-rights and refugees-protection organisations present in Russia" (para 40), it opens the avenue to question if and how their reliability, independence and objectivity was verified. The second aspect is the reason for producing the reports. Interestingly, the *Georgia v. Russia (I)* judgment does not contain – in referral to the standards for assessment of evidence – that the Court can obtain materials *proprio motu*[20], suggesting that the reports were not produced independently from the parties or at least that they were submitted by one of the parties to the Court's attention – the Georgian government. Since the reports were not obtained *proprio motu,* the Court should have explained on whose request the reports were compiled and presented. Third, the Court does not cite the content of the reports, limiting itself to a statement that the investigation was thorough (para 139), but at the same time eliminating the possibility for an outsider to verify this position. Since the criterion of corroboration by other evidence was not met – the content of the reports was only confirmed by the Georgian witnesses, the Court at least should have addressed the question why the statements of the Russian witnesses were unreliable.

The acceptance of the Court's reasoning in the *Georgia v. Russia (I)* judgment depends on accepting the principle *jura novit curia*[21] in procedural context. The case legitimizes a new doctrine in inter-state matters, where the burden of proof is replaced by the principle of *jura novit testimonium.* Such reports appear occasionally as trumps in the European Court's jurisprudence. On the theoretical level the *Georgia v. Russia (I)* case underlines the need to establish clear and foreseeable standards for the usability of reports of international organizations and governments in international litigation, followed by their conservative application in concrete cases. For the respondent state – the Russian Federation – this judgment does not serve the purpose of strengthening the trust of national judiciary in the ECtHR's impartiality.

3. The broader context: matters of judicial activism and compliance

The current academic debate about the relationships between national constitutional courts and the ECtHR takes into account the broader phenomenon of the increasing judicial activity of international courts. At the time of increased political inability to reach international or regional consensus on fundamental human rights matters or issues of fundamental values, the other actors will fill the vacuum. The phenomenon

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justice and circumvention of the procedures", "arbitrary and illegal detention and expulsion", "many were effectively denied the right to appeal", and so on.

[20] This formulation is present in most judgments which discuss how the Court can obtain materials for its assessment – see for example *Saadi v. Italy* para 128.

[21] For the meaning of the principle see: Takane Sugihara, *The Principle of* Jura Novit Curia *in the International Court of Justice: With Reference to Recent Decisions,* Japanese Yearbook of International Law, Volume 55, 2012, 77 – 109.

of judicial activism[22] simply means that when the international political establishment is unwilling or unable to develop human rights or moral standards, the international courts will. Yuval Shany has developed in a recent comprehensive article about the effectiveness of international courts the hypothesis that the study of court effectiveness should be based on the specific goals set for each particular court[23]. Even though there may not be a consensus among the stakeholders that the European Human Rights Court should primarily act as a constitutional court, opponents to the constitutional function approach do not seem to offer alternatives to its constitutional goals. Thus one aspect for the analysis of the relationship which is the topic of this article is whether the Russian Constitutional Court, at least on the basis of the ECtHR case-law, predominantly establishes its own standards on the basis of Russian Fundamental Law (thereby following the pattern of strong national constitutional courts like in Germany and France) or whether it transposes into Russian judicial system the values and principles from the ECtHR jurisprudence.

The international community is increasingly focusing on the matters of state compliance with international human rights obligations, notwithstanding of what the state declares via ratifications, legal norms or judicial practice. The situation where a Constitutional Court is hailed for its achievements in recognizing and formulating principles for securing human and fundamental rights, but at the same time the general human rights protection level at the country remains critical, is not uncommon in the contemporary world. For example, the matter of high level of 'declarative' recognition of human rights and in parallel low compliance with the human rights standards applicable in the respective country is evident from the literature on human rights matters of South Africa. When the South African Constitutional Court is undeniably a beacon of human rights[24], the counter-narrative of the 'constitutional' success focuses on evidence showing obstacles in the realization of human rights and the controversy of chosen strategies[25]. Therefore possible doctrinal convergence between the ECtHR and the Russian Constitutional Court does not automatically signify practical and daily implementation of the standards established by these courts in administrative practice of the jurisprudence of ordinary courts.

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[22] For discussion about the raising trend of judicial activism see: Daniele Amoroso, *The Judicial Activity of the International Court of Justice in 2012: A Year of Human Rights Cases,* The Italian Yearbook of International Law, 223 – 243.

[23] Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-based Approach,* The American Journal of International Law, volume 106, 2012, 225 – 270, at 270

[24] The South African Constitutional Court has introduced various significant standards, which are not present in the country's constitutional of ordinary level legislation, like the prohibition of death penalty, allowing same gender marriage, recognizing the general obligation of the state to direct policy towards realising socio-economic rights, particularly for those in desperate need; for context also see: Philip Alston, *Foreword,* in: Social rights jurisprudence: Emerging trends in International and comparative law, Cambridge University Press 2008, at ix

[25] For context see: *Socio-economic Rights in South Africa. Symbols or Substance?* Edited by Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi, Cambridge University Press 2014

II. The judgments

1. Reliance on the Constitutional Court's position regarding domestic law

The first category are judgments where the ECtHR endorses the position of the Russian Constitutional Court on a specific question regarding the protection of human rights. For example, in the case *Davydov v. Russia*[26] the Court was faced with a request from the Russian Government to strike out the application, since the Government had acknowledged the Convention violation. The applicant did not agree with the request, since the applicant's principal goal was to achieve the reopening of the domestic proceedings after the establishment of the Convention violation. Having stated, that the Court is not bound by the parties' position, the Court the referred to the Constitutional Court's explanation about the grounds for reopening of domestic proceedings:

> As the Constitutional Court stated in its judgment of 26 February 2010 No. 4-P, "it is the competent court which decides on the possibility to reconsider a judicial decision relying on full and comprehensive examination of the applicant's arguments and the circumstances of the case". The Court finds this approach to be in line with the general principles governing the implementation of the Court's judgments[27].

Having endorsed the Constitutional Court's view, the ECtHR was critical of the unclarity of the position of the Plenary of the Supreme Court of the Russian Federation on the same matter:

> The recent Resolution of the Plenary Supreme Court of the Russian Federation, which refers to Recommendation No. R (2000) 2, cited above, did not clarify whether an acknowledgement of a violation of the Convention by the Government by means of a unilateral declaration constitutes a basis for reopening the proceedings. Thus, there is a substantial risk that a decision to strike out the present application might bar the applicant's request for re-examination of his case at the national level and thus formally prevent the Russian courts from considering the issue of the appropriateness of reopening the proceedings in his case. Result: declined the Government's request to strike the case out. Because only ECtHR judgment can serve as the basis of domestic reopening and not the striking out of the case on the basis of Government's unilateral declaration[28].

As a result, the Government's unilateral declaration was rejected and the Court issued a judgment of the merits.

Another example of how the Constitutional Court's position is endorsed by the ECtHR concerns the question whether it is justified to restrict the close relatives of a terrorist, whose body is under the control of the authorities, to participate in the burial.

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[26] *Davydov v. Russia,* ECtHR judgment of 30 October 2014, application no 18967/07
[27] *Supra,* para 30
[28] *Supra,* para 31

The Court analysed this question under the provisions of Convention article 8[29] – whether the right to family life was respected. The Court used the usual methodology applied in similar cases: the first question is whether there is a legal basis for the restriction, the second whether the restriction had a legitimate goal and the third whether such restriction was necessary in a democratic society.

Having established that the restriction upon applicants in the case *Sabanchiyeva and others v. Russia*[30] to have knowledge of the place and time or even participate at the burial was based of the provisions of domestic law - the Interment and Burial Act and Decree no. 164 of 20 March 2003, the Court cited at length the analysis of the Constitutional Court about the question of the legitimate goal for the restriction:

> "the interest in fighting terrorism, and in preventing terrorism in general and specific terms and providing redress for the effects of terrorist acts, coupled with the risk of mass disorder, clashes between different ethnic groups and aggression by the next of kin of those involved in terrorist activity against the population at large and officials, and lastly the threat to human life and limb". It also mentioned the need to "minimise the informational and psychological impact of the terrorist act on the population, including the weakening of its propaganda effect". Furthermore, the Constitutional Court stated that the "burial of those who have taken part in a terrorist act, in close proximity to the graves of the victims of their acts, and the observance of rites of burial and remembrance with the paying of respects, as a symbolic act of worship, serve as a means of propaganda for terrorist ideas and also cause offence to relatives of the victims of the acts in question, creating the preconditions for increasing inter-ethnic and religious tension"[31].

Having regard to these explanations, the Court was satisfied that the measure in question could be considered as having been taken in the interests of public safety, for the prevention of disorder and for the protection of the rights and freedoms of others. Exactly the same position under same referral to the Constitutional Court's practice has become repetitive – for example the case *Arkhestov and others v. Russia.*[32]

These judgments indicate that, in the views of the European Court of Human Rights, in many matters once the Russian Constitutional Court has formulated the opinion about a specific matter while interpreting Russian Constitution, there is no reason for an international court to disagree.

2. Reliance on the substantive arguments of the Russian Constitutional Court

The second category of judgments are the ones where the views of the Russian

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[29] ECHR article 8 (1) provides: „Everyone has the right to respect for his private and family life, his home and his correspondence".

[30] Sabanchiyeva and others v. Russia, ECtHR judgment of 06 June 2013, application no 38450/05

[31] Supra, para 128

[32] Arkhestov and others v. Russia, ECtHR judgment of 16 January 2014, application no 22089/07, para 83

Constitutional Court serve as the principal argument for the Court's judgment. The doctrine of the comparable human rights protection[33] is evident in these judgments, although in a somewhat different setting, since the doctrine was not developed for vertical relationships between national and supranational courts. Some examples are the following.

In the case brought to the ECtHR by a two Russian citizens concerned about the communal services the Court was faced with the question whether such services are of public nature and therefore the companies providing such services need to be treated differently during insolvency proceedings[34]. The European Court of Human Rights noted that relations arising from the management of communal infrastructure of vital importance were considered by the Constitutional Court of the Russian Federation as public in nature[35] and therefore the duties performed were public duties[36].

Russian Constitutional Court's position regarding insolvency matters was decisive also for a case where the applicant complained of access to court right violation since the domestic courts refused to hear the complaint, citing lack of jurisdiction[37]. When establishing the access to court violation, the ECtHR repeated the findings of the Constitutional Court:

> the Constitutional Court only stated that where a commercial court refused to examine a complaint by an individual creditor for lack of jurisdiction, such creditors could turn to the courts of general jurisdiction. At the same time, the Constitutional Court emphasised that the provisions of the Insolvency Act did not contain "any clause that would prevent commercial courts from giving decisions that enable[d] the persons concerned to secure in full their right to judicial protection in the context of insolvency procedures"[38].

Relying on the Russian 'counterpart's position, the ECtHR's Grand Chamber established Convention article 6 (1)[39] violation.

In the *Tereshchenko v. Russia*[40] the applicant complained that while he was held in pre-trial detention, the trial judge refused to consider as valid his counsel's status in the criminal proceedings and consequently refused visiting rights. The Court noted, that the case-law of the Constitutional Court provided clear protection of the right to privacy under ECHR article 8 such situations:

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[33] The doctrine of 'comparable' protection is developed by the ECtHR towards cases where the applicant has already turned to some international organization or court for protecting the human rights. In the event where this institution, court or applicable human rights document provides protection at least to the same level as the ECHR does, then the Court will not conduct its own analysis of the particular circumstances and will accept at face-value the findings.

[34] *Liseytseva and Maslov v. Russia,* ECtHR judgment of 09 October 2014, application no 39483/05 40527/10

[35] *Supra,* para 209

[36] *Supra,* para 210

[37] *Kotov v. Russia,* ECtHR Grand Chamber judgment of 03 April 2012, application no 54522/00

[38] *Supra,* para 124

[39] ECHR article 6 (1) provides general fair trial guarantees

[40] *Tereshchenko v. Russia*, ECtHR judgment of 05 June 2014, application no 33761/05

> the Constitutional Court clarified the situation, albeit in 2008, in favour of the continuous validity of status as counsel in the course of criminal proceedings[41].

Access to defence counsel was also the focus point of the case *Shekhov v. Russia*[42], where the authorities claimed that the applicant had waived the right to be represented by a counsel. Although the Court doubted that the applicant unequivocally waived the defence rights, the authorities were under the obligation to provide an attorney on the basis of the Constitutional Court's jurisprudence. The Court noted:

> Article 51 of the Code of Criminal Procedure, as interpreted by the Russian Constitutional Court, laid down a mandatory requirement for the legal representation of defendants who faced criminal charges of that gravity[43]

Since no legal representation was secured, there was violation of defence rights[44].

It is evident from the first and second categories of cases, that the Russian Constitutional Court through its case-law provides at least comparable protection with the ECtHR. Since the Constitutional Court does not apply the ECHR, but the Russian Constitution, it would not be correct to call the Constitutional Court a 'Convention court- but rather argue that the Russian Constitutional Court is also a strong human rights court.

3. Matters of domestic compliance with the Constitutional Court's jurisprudence

The third and perhaps most numerous category contains cases where the Russian Constitutional Court has established clear standards for securing human rights, but these standards remain unimplemented in the practice of administrative authorities or even in the case-law of ordinary courts. The matter which emerges is non-compliance within domestic judicial system with the highest constitutional authority.

As the country with the largest territory in the world, the Russian judicial system has to deal consistently with the question of expelling immigrants and detaining them in the process of expulsion. There appears an administrative practice, where someone facing extradition is detained without the authorities dealing with the case diligently and not extending effective protection of the right to liberty. For example in the case of *Kim v. Russia*[45] the Court noted the following:

> The domestic authorities do not appear to have taken any initiative to accelerate the progress of the removal proceedings and to ensure the effective protection of his right to liberty, although the decision by the Constitutional Court of 17 February 1998 may be read as expressly

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[41] *Supra,* para 131
[42] *Shekhov v. Russia,* ECtHR judgment of 19 June 2014, application no 12440/04
[43] *Supra,* para 43
[44] ECtHR established Convention articles 6 (1) and 6 (3) „c" violations
[45] *Kim v. Russia,* Judgment of 17 July 2014, application no 44260/13

> requiring them to do so. As a consequence, the applicant was simply left to languish for months and years, locked up in his cell, without any authority taking an active interest in his fate and well-being[46].

There are many judgments concerning similar situations. In some the Court has additionally indicated, that contrary to the Russian Constitutional Court's position the detention of someone facing expulsion should be applied as the 'preventive' measure as opposed to the 'punitive' measure. Holding someone in detention facing extradition in order to 'punish' the person is not normal[47].

There appears a structural problem[48] in Russia regarding the non-enforcement of domestic judgments requiring some public authority to make financial payments or extend some other material benefits, as well as in the absence of a domestic remedy to obtain compensation for the delays in enforcement[49]. The case is noteworthy, because both in establishing the structural problem, then applying the pilot-judgment principle[50] and thereafter requiring under ECHR article 46 general measures[51] the Court referred decisively to the Constitutional Court's practice. Thus when establishing the structural nature of the problem, the Court noted:

> In the Constitutional Court's view, … the public authorities could abuse their special position resulting from the impossibility of seizure of their budgetary funds through enforcement proceedings; the proper enforcement of such judgments should therefore be ensured through other means, such as the establishment of appropriate procedures for liability and effective remedies in accordance with Article 13 of the Convention[52].

Although the Court noted the Constitutional Court's position that it cannot take over the role of the legislator *(ibid.*), the Russian authorities were directed to take into account the Constitutional Court's jurisprudence when planning the execution of the Court's requirement to apply general measures: "Any legislative exercise would benefit from the Constitutional Court's case-law[53]". Interestingly the Constitutional Court enters legislative function through international court judgment.

The matter of the Constitutional Court's legislative interference emerged in the case where the applicants – Jehovah's Witnesses - complained against the disruption

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[46] *Supra,* para 54

[47] See for reference, *Rakhimov v. Russia,* ECtHR judgment of 10 July 2014, application no 50552/13 para 137; and *Egamberdiyev v. Russia,* ECtHR judgment of 26 June 2014, application no 34742/13, para 63

[48] The doctrine of a 'structural problem' was developed by the ECtHR within the last decade. The Court defines as 'structural' a problem which may affect hundreds of individuals, given that many applications alleging similar violation are pending and the Court has already issued judgments in many comparable cases

[49] *Gerasimov and others v. Russia,* ECtHR judgment of 01 July 2014, application no 29920/05 and others

[50] In a pilot judgment the Court establishes certain general principles which the respondent country needs to implement in order to avoid the repetition of similar violations

[51] Under ECHR article 46 the Court can request the respondent government to apply certain general measures, which sometimes means the change of laws or administrative or court practices

[52] *Gerasimov and others v. Russia,* para 97

[53] *Supra,* para 224

of their religious service, held in a facility not designated under law as a place for religious service, by force and their subsequent detention in a police station extending for several hours[54]. The Constitutional Court in 05 December 2012 judgment no 30-P, issued as a result of a complaint by the Russian Ombudsman on behalf of two Jehovah's witnesses, directed the federal legislature to amend the federal legislation and make necessary amendments to the procedure for conducting public divine services, other religious rites and ceremonies, including prayers and religious assemblies, that are being held in places other than those listed in paragraphs 1 to 4 of section 16 of the Religions Act[55]. It appears that the legislature had not followed the Constitutional Court's directive and therefore the ECtHR simply gave additional vigour to the Russian constitutional position by establishing the violation of the right to religious freedom[56]:

> The intervention of armed riot police in substantial numbers with the aim of disrupting the ceremony, even if the authorities genuinely believed that lack of advance notice rendered it illegal, followed by the applicants' arrest and three-hour detention, was disproportionate for the protection of public order[57].

Freedom of religion was at the heart of the application in the case *Biblical Centre of the Chuvash Republic v. Russia*[58], where the applicant organization was dissolved by the domestic court judgment as a result of not fulfilling certain requirements of the Religions Act. This Act provides that the only sanction which Russian courts can use against religious organisations found to have breached the law is forced dissolution. The Act does not provide for the possibility of issuing a warning or imposing a fine. The Constitutional Court has held this practice is incompatible with the constitutional meaning of the relevant provisions as early as 2003. Despite this clear constitutional interpretation, the Russian courts in this case did not apply the constitutional case-law. The ECtHR denounced this practice:

> In pronouncing the applicant organisation's dissolution, the Russian courts did not give heed to the case-law of the Constitutional Court or to the relevant Convention standards and their decision-making did not include an analysis of the impact of the applicant organisation's dissolution on the fundamental rights of Pentecostal believers. As it happened, their judgments put an end to the existence of a long-standing religious organisation and constituted a most severe form of interference, which cannot be regarded as proportionate to whatever legitimate aims were pursued[59].

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[54] *Krupko and others v. Russia,* ECtHR judgment of 26 June 2014, application no 26587/07
[55] *Supra,* para 29
[56] The ECtHR established ECHR article 9 violation, which protects freedom of thought, conscience and religion
[57] *Krupko and others v. Russia,* 56
[58] *Biblical Centre of the Chuvash Republic v. Russia,* ECtHR judgment of 12 June 2014, application no 33203/08
[59] *Supra,* para 61

Due to the failure of the domestic courts to uphold the Constitutional Court's jurisprudence, the ECtHR established ECHR articles 9 and 11 violations[60].

There are also cases where the Government in the proceedings at the ECtHR acknowledges that the domestic authorities have failed to uphold the Constitutional Court's jurisprudence. Thus in the case *Chuprikov v. Russia*[61] the Court established ECHR article 5 (4) violation[62] since the domestic authorities did not allow the applicant to exercise the right to appeal against detention. This was despite the ruling of the Constitutional Court of 02 July 1998, clearly establishing that any judicial decision pertaining to the examination of the parties' requests for a change of preventive measure was amenable to appeal and that the merits of such an appeal should have been examined by an appeal court[63].

Although the ECtHR has refrained from questioning whether there is a structural problem in the Russian legal system of enforcing the Constitutional Court's position once some matter has been interpreted, there indeed appears such a pattern.

4. Occasional criticism towards the Russian Constitutional Court

Fourth, the relationship between the ECtHR and the Russian Constitutional Court does not always mean international endorsement of domestic views. The ECtHR has also issued critical judgments, but in the author's view these are not overshadowing the pattern of internationally strengthening the role of the Constitutional Court as a human rights court. For 'balancing' this article, three examples of the ECtHR criticism are provided.

In *Avanesyan v. Russia* the applicant was not satisfied with the scope of judicial review of operational activities of the search of premises[64]. The Court indicated, that although the Constitutional Court recognized the individual's right for judicial review of the actions of state officials of the way in which they acted while opening an operative file against the individual concerned and took operational-search measures, such review does not touch upon the validity of the underlying judicial authorisation of such measures[65]. The ECtHR's criticism is about the failure of the Constitutional Court to broaden the scope of judicial review of the search.

In *Akram Karimov v. Russia* the applicant complained that the procedural rules governing detention violated human rights since they did not require the courts to state grounds for detention, nor set a time-limit[66]. The Court was critical of the Constitutional Court for not providing legal clarity on the matter:

> Furthermore, in its decision of 19 March 2009 specifically concerning Article 466 § 2 the Constitutional Court, whilst finding that the impugned

[60] ECHR article 11 protects freedom of assembly and association
[61] *Chuprikov v. Russia,* ECtHR judgment of 12 June 2014, application no 17504/07
[62] ECHR article 5 (4) provides: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".
[63] *Chuprikov v. Russia,* para 84
[64] *Avanesyan v. Russia,* ECtHR judgment of 18 September 2014, application no 41152/06
[65] *Supra,* para 56
[66] *Akram Karimov v. Russia,* ECtHR judgment of 28 May 2014, application no 62892/12

> provision did not violate a person's constitutional rights by not establishing any grounds or procedure for ordering detention pending extradition or time-limits for such detention, did not explain which legal provisions in fact governed such a procedure or what time-limits were to be applied in situations covered by Article 466 § 2 (of the Code of Criminal Procedure)[67]

A case on the table of the Grand Chamber concerned the constitutionality of the absence of the possibility of military servicemen to get parental leave, as opposed to 3-month leave to arrange for taking care of the child[68]. The Court notes, that it can be seen from the Constitutional Court's jurisprudence that 3-month leave is not a substitute for normal parental leave because its purpose is to give the serviceman a reasonable opportunity to arrange for the care of his child and, depending on the outcome, to decide whether he wishes to continue the military service.[69] The Court is critical of the Constitutional Court not establishing the violation of the right to peaceful family life in this legal context.

III. Conclusions

The situation in Russia regarding the European Court of Human Rights jurisprudence perception appears different from the emerging pattern within many Council of Europe Member states. In several countries ordinary courts act as 'Convention courts' and the highest court of the country may be hesitant of integrating into their judgments the standards established by the ECtHR. On the basis of the recent judgments of the ECtHR opens up a 'structural' problem whereby the Russian courts and administrative authorities do not always apply the clear standards established by the Russian Constitutional Court. In judgments towards Russia dealing with the constitutional questions the ECtHR relies to a significant extent on the interpretation of Russian law by the Constitutional Court. This article argues that in the view of the ECtHR the Russian Constitutional Court provides comparable protection of human and fundamental rights in comparison with the scope of protection provided by the European Convention on Human Rights, although the protection in Russia originates predominantly from the Russian Constitution and laws in general. The article demonstrates that the Russian Constitutional Court is acting as a national human rights court and the European Court of Human Rights recognizes this function by endorsing the standards established by the Constitutional Court. There is a pattern of convergence of standards originating from the Russian Constitution and the ECHR, although this convergence does not necessarily lead to compliance on behalf of the ordinary courts and administrative authorities.

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[67] *Supra,* para 149

[68] *Konstantin Markin v. Russia,* ECtHR Grand Chamber judgment of 22 March 2012, application no 30078/06

[69] *Supra,* para 145