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Implementation of Judgments of the European Court of Human Rights on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

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The article deals with the problem of implementation of judgments of the European Court of Human Rights, being viewed under a particular angle – with respect to Article 8 of the Convention. The author attaches weight to the fact that in many cases where the Court finds violation of this Article, the reasons, underlying the violation, are of deep and profound character. In order to redress such violations the respondent State can be required to adopt the so-called general measures so that to prevent, with diligence, further similar violations. Thus, a judgment finding a violation may have an impact going beyond the dispute concerning the parties before the Court.

The author further scrutinizes various examples of adoption of the above general measures by the contracting States: publication and dissemination of the judgment of the European Court; amendment of the domestic legislation; interference of the constitutional judiciary; change of domestic case-law. In the closing part the author focuses on several problem areas, which appeared in the recent years between the ECtHR and the Russian government in connection with the implementation of the Court's judgments under Article 8 of the Convention.

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The topic indicated in the title of this article is, in essence, a field of mutual contact between two completely independent spheres of study, each of which, taken separately, is of considerable interest itself.

First of all, in what way can Article 8 of the Convention draw attention? Due to its extremely extensive scope of application, the boundaries of which are, moreover, constantly expanded by the European Court of Human Rights (hereinafter

also the ECtHR, the Court), this article embraces a wide range of problematic private issues that arise in the field of private life.

In a generalized form these are the so-called “Four interests”, four areas, the inviolability of which is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR, the Convention): private and family life, housing and correspondence. Each of these spheres, in turn, is not mutually exclusive and can hardly be considered in isolation from each other in the Court practice. In many cases, the aforementioned interests are in close contact and intertwined in a way that it is difficult or impossible to distinguish one from the other.

In addition to the obvious, traditional problematic issues, such as, for instance, reputation, eviction, paternity, **secrecy** of correspondence, etc., this article recently covers, among others, issues of artificial insemination¹ and gender identity, various aspects of the private life of prisoners (the place of serving punishment² and visits from relatives³), parental leave⁴ and aircraft noise⁵, the collection and storage of fingerprints⁶, and much, much more.

As for the issue of implementation of the ECtHR judgments, it is an integral part of the even greater task of perceiving the convention standards and effective implementation of the Convention norms into the national legal system. With this in mind, the proper implementation of the Court’s decisions and judgments is of key importance.

First of all, due to these decisions and regulations, the norms of the Convention are constantly filled with new content, since it is known that the Convention is considered as a “living instrument” and is to be interpreted and applied in the light of today’s realities (the so-called “dynamic” interpretation of the Convention). In this sense, it is possible to speak

of any decisions and judgements in respect of any states parties, since it is in them the interpretation of the provisions of the Convention, in the way the Court understands and applies it, is contained.

Therefore, speaking more broadly, the perception of approaches and standards developed in the Court’s practice virtually acts as *conditio sine qua non* for the proper implementation of its decisions and judgements. In this regard, there are examples where countries presupposing potential presence of violations in their jurisdiction proactively respond to the legal positions expressed in the judgments of the Court in relation to other countries. This, in particular, was the reaction of some states to the ECtHR judgement on *Marckx v. Belgium* (no 6833/74, 13 June 1979, Series A no. 31) in 1979, which addressed the issue of discrimination against “illegitimate” children. In the Netherlands, for example, this led to a rapid change in civil law⁷.

With regard to the Russian legal reality, it should be noted that the Constitutional Court of the Russian Federation has repeatedly relied on the legal positions of the ECtHR in cases considered on complaints against other states⁸.

And not so long ago the Supreme Court of the Russian Federation in its explanations directly navigated the courts to take the positions of the ECtHR into account in the process of justice implementation. At that, they were referring not only to the positions of the Court formulated in the cases against Russia, but against other states as well⁹.

The precise execution by the defendant state of the Court judgements, in which the violation of the rights of a particular applicant by the State was found, is even of more importance.

The reaction of the state to such judgement should be application of various response measures and, in this connection, it is traditionally customary to distinguish between the so-called individual and general measures.

Here, first of all, we will leave aside the issue of payment of fair compensation for violation of rights, appointed by the Court on the basis of Article 41 of the Convention. The payment of such compensation does not require additional efforts from the authorities and usually does not cause any other difficulties, except for financial ones. Thus, this is the easiest way to implement the judgements of the ECtHR.

However, monetary payment is only a compensation measure aimed at smoothing out the harm already done, but not eliminating the root causes that led to the violation of rights. Individual measures that require the competent state bodies to carry out procedural or other necessary targeting actions aimed at restoring the rights of a particular applicant (*restitutio in integrum*)¹⁰, as a rule, also have the similar effect.

Thus, the payment of fair compensation and the adoption of other individual measures with respect to the situation of a particular applicant are certainly important, but, at the same time, if the situation as a whole remains unchanged, it is unlikely to prevent potential violations of the rights of other individuals who are in the similar to the applicant's position. And if we talk about the specific features of the cases under Article 8 of the Convention, then, seemingly, a significant part of the violations identified under this article are based precisely on the causes of the underlying nature.

Therefore, in this case it is much more important to consider the adoption of such measures, which are essentially aimed at changing the situation qualified by the Court as a violation of conventional rights. In the latter case, we are talking about the so-called measures of general nature aimed at rectifying the situation that led to the violation of human rights and prevention of the similar controversial situations in the future. These are such measures that will be discussed further.

Perhaps the most typical and natural of all the conceivable measures of general nature is publication and dissemination of the judgments of the European Court. Indeed, information about the established violation of human rights should be brought to the attention of the public and, in the first instance, the professional community.

Thus, as for the implementation of judgment on case of *Van Hannover* (no. 59320/00, 24 June 2004), the Committee of Ministers of the Council of Europe emphasized¹¹ that the judgment was published and widely discussed by the legal community in Germany. The availability of the judgment on the Internet site of the Federal Ministry of Justice (through a link to the Internet resource of the Court), as well as the fact that this judgment was sent to the courts and other interested law-enforcement agencies, was noted separately.

However, information distribution is only the first step, which in itself can hardly lead to violation elimination.

Here it should be noted that traditionally the Court did not prescribe any general measures to the state. The need for their adoption was only implied, proceeded from the meaning of the judgement, but the Court did not specify directly what they should be. As an example, it is possible to provide the case of *Fadeyeva v. Russia* (no. 55723/00, ECHR 2005-IV), in which the Court concluded that the State had not fulfilled its positive obligations under Article 8 of the Convention regarding the security and safety of inviolability of the applicant's home and private life from harmful emissions from the metallurgical smelter. At the same time, with all evidence that many other persons who lived in the territory within the sanitary zone were in the situation similar to the applicant's, the Court refrained from indicating specific measures to remedy the situation¹².

In this regard, it is important to bear in mind the fact that among the States Parties to the Convention, the establishment of a specific procedure for the adoption of common measures is not a compulsory practice.

For example, in France, the implementation of the judgement relies on a preliminary assessment of the authorities and in the future may affect any of the three branches of government. The law does not establish a special procedure. And regarding the common measures, the decision is made on the basis of the various bodies' interaction.

In Germany, there is also no legally binding procedure for general measures. As soon as the ECtHR judgement becomes final, the relevant body of the Ministry of Justice, representing the state at the European Court, examines it for the need for general measures implementation and, if required, initiates specific steps, as appropriate.

The similar picture of the absence of a universal, detailed procedure, designed to implement the ECtHR judgments in terms of general measures, is typical for many other States Parties to the Convention, and in particular for Russia¹³.

Absence of the detailed regulation can be explained in different ways. Firstly, not every decision requires the adoption of general measures and, quite often, for its implementation the measures of an individual nature are enough. Secondly, regardless of the existence or absence of a special procedure, the obligations assumed by the state under the Convention must be fulfilled in accordance with the principle of *pacta sunt servanda* (and here it is not only about the implementation of specific judgements, but also about compliance with the provisions of the Convention as a whole). And, finally, thirdly, it is a kind of unpredictability and the variety of judgements requiring general measures.

And here the above mentioned versatility of Article 8 of the Convention manifests itself in full. Due to this, implementation of the Court judgements under this article can take various forms: changes to legislation, conducting consultations, approving action plans, etc. So, in the example above with the case of *Fadeyeva v. Russia*, as a general measure, not only legislative changes, but also other actions, for example, the adoption of federal programmes providing resettlement of the residents outside such zones of alienation and rehabilitation of the victims of pollution are conceivable.

Eventually, the necessity of adopting certain measures is determined by the peculiarities of the specific case. However, this does not exclude grouping of the most frequent examples. Having set such an objective, we will see that the implementation of common measures can be carried out in at least three main directions: the modification of national legislation; interference of constitutional justice bodies and changes in the court practice of the State Party.

Changes to national legislation can perhaps be referred to typical cases, since often the causes of violations of the rights guaranteed by Article 8 of the Convention should be searched in legislation. Accordingly, the examples, when states make such changes are not solitary.

Thus, in response to the Court's finding of insufficient guarantees against abuses in the **use** of secret **surveillance** measures (*Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, 28 June 2007), the Bulgarian authorities had to undertake a number of legislative reforms.

In the French case of *M.K. c. France* (no. 19522/09, 18 avril 2013), where the investigation of the theft of the book ended with the judgement to stop the prosecution, was the reason for the collection and subsequent storage of the applicant's fingerprints, the Court found violation

of Art. 8 of the Convention, and the Committee of Ministers noted that the draft amendment to the existing legislation submitted by the authorities was an adequate response to the ECtHR judgment.

In Germany, the ECtHR judgment caused a number of changes in the field of family law. For example, in the case of *Anayo v. Germany* (no. 20578/07, 21 December 2010) the Court found a violation of Article 8 of the Convention in refusing the biological father the right to contact his children, because at the time of their birth their mother was married to another person. The situation was changed due to the legislative reform carried out in 2013.

However, sometimes it is not possible to get specific legislative changes from the legislator due to the absence of the necessary consensus. As a rule, this reflects the absence of the corresponding consensus in the society itself, which is not uncommon in the issues covered by Article 8 of the Convention such as, for example, the simplification of the procedure for gender change (see, for example, the case of *B. v. France*, no. 13343/87 ECHR, March 25, 1992, Series A).

With reference to Russia, it is possible to provide an example of the high-profile case of *Konstantin Markin v. Russia* (no. 30078/06 [GC], ECHR 2012 (extracts)), which addresses the issues that sparked a massive public outcry and the legislative initiative on which is currently, apparently, not possible.

Interference of the constitutional justice bodies can also take place within the framework of application of general measures. Such interference can block application of the provisions of legislation that violate human rights by national courts.

One of the recent examples is the Italian case on access to medical care and reproductive technologies for people suffering from genetic diseases. The European Court of Justice in the judgment in the case of *Costa and Pavan v.*

Italy (no. 54270/10, Judgment 28 August 2012 [Extracts]) pointed out the inconsistency of legislative regulation incompatible with the provisions of the Convention in this area. The provisions of the controversial national legislative act were challenged in the Constitutional Court and were declared unconstitutional. Accordingly, since the publication of the judgment of the Constitutional Court, they have lost force.

An illustrative example in Germany is the case of *Görgülü v. Germany* (no. 74969/01, 26 May 2004). This is the case of the father of a child born out of wedlock and given to adoption by the mother without his consent. The National Court denied the applicant the right to have custody and rights of access to the child, deciding that the child had already integrated into the new family. The ECtHR found violation of Article 8 of the Convention, but even after that, the domestic courts refused to grant the applicant the required rights, considering that the ECtHR judgments are binding only for the executive authorities, but not for the national courts. The Federal Constitutional Court, reversing the judicial decisions, noted that the obligations of the state under the Convention are not limited to the duties of the executive authorities¹⁴.

There are frequent examples where the intervention of the Constitutional Court is only the first step in taking general measures and anticipating legislative changes.

Thus, in the judgment on the case of *Zaunegger v. Germany* (no. 22028/04, 3 December 2009) the ECtHR declared that the practice existing in Germany when the establishment of joint custody of a child born out of wedlock against the will of his mother *prima facie* was considered not to be in the interests of the child, contradicting Article 14 of the Convention in conjunction with Article 8.

First, the Federal Constitutional Court found the corresponding norm unconstitutional,

and then, two years later, the German Civil Code was supplemented by the provisions granting the fathers right to demand joint or sole custody¹⁵.

In the case of *Godelli v. Italy* (no. 33783/09, Judgment 25 September 2012 [Extracts]) the court found the disproportionate nature of the national legislation, which denied the child left immediately after birth, access to the data of his biological mother and did not presume to take into account the opinion of the mother herself.

Subsequently, the Constitutional Court of Italy recognized the corresponding provisions of national legislation as unconstitutional¹⁶. And after that, a draft law, aimed at eliminating violations was prepared.

A similar role was fulfilled by the Constitutional Court of the Russian Federation after making judgement on the case of *Shtukaturov v. Russia* (no. 44009/05, 27 March 2008), in which the applicant, who suffered from a mental illness, was declared incompetent in his absence.

After that, the Constitutional Court declared unconstitutional Article 284 of the Code of Civil Procedure of the Russian Federation, which allowed not to summon persons whose capacity is the subject of consideration in a court hearing on such potentially broadly interpreted grounds as their state of health, which made it possible to make decisions on recognizing citizens as legally incompetent only on the basis of medical opinion without giving citizens themselves an opportunity to participate. In addition, further appeal against the judgement was also excluded¹⁷. As a result, Federal Law no. 67-FZ of April 6, 2011¹⁸ introduced appropriate changes to the procedural legislation.

However, strictly speaking, these steps only led to the correction of the violation of procedural safeguards. As for the violation of Article 8 of the Convention, its elimination had to wait for the start of a large-scale reform of civil legislation.

Recall that the essence of the violation, according to the Court, was that the Civil Code in force at that time only distinguished full legal capacity and total incapacity, providing for borderline cases in the form of so-called “limited legal capacity” only for people who put their family in a difficult situation due to the abuse of alcohol or drugs. Thus, in relation to the situation of an applicant suffering from a mental illness, within the existing civil law regulation, the national judge did not have another alternative, but to decide whether to recognize incapable or to refuse such recognition. As a result, as the Court pointed out, the applicant’s rights were limited more than it was necessary.

The amendments to the legislation were introduced by Federal Law No. 302-ФЗ¹⁹ of December 30, 2012, and Article 30, paragraph 2 of the Civil Code was amended to provide the possibility of restricting (but not depriving) the capacity of a citizen who, due to a mental disorder, can understand the meaning of his actions or manage them only with the help of others. Now such a citizen can be placed under guardianship.

In addition to the changes in domestic legislation and verification of constitutionality, for the national authorities it is also possible to apply **other legal measures** that cannot be fully attributed to either category. In particular, in the case of *Eremia and Others v. Moldova* (no. 3564/11, 28 May 2013), where the subject of examination was domestic violence and lack of effective measures on the part of the State, violation of Article 8 of the Convention was determined. The legislative and institutional measures taken received a conservative and optimistic assessment of the Committee of Ministers, and the Moldovan authorities were invited to consider the possibility to sign and ratify the Istanbul Convention on preventing and combating violence against women and domestic violence. Thus, in this case, the Committee of

Ministers considered that such a step would have the proper effect with regard to eliminating the situation leading to human rights violation.

Changes in the judicial practice of the respondent state can also be considered as general measures. Such changes may occur as a result of compulsory explanations of higher courts or be the result of revision of some landmark decision. Thus, in 1990 in France the Supreme Court refused to recognize the right of transsexuals to change the civil status and name. The European Court recognized this as contradictory to Article 8 of the Convention (*B. v. France*, no. 13343/87, March 25, 1992), and later on that basis the Plenum of the Supreme Court made decision to change its approach.

In Russia, following the Grand Chamber judgement on the case of *Bykov v. Russia* (no. 4378/02 [GC], 10 March 2009), where it was the question of insufficiency of guarantees for persons whose conversations were tapped in the framework of investigative actions²⁰, the Constitutional Court, although confirmed the constitutionality of the legal provisions allowing for such tapping by security services, but, at the same time, emphasized that it is permissible only if there is an appropriate court authorization, which can be given only in exceptional cases and under conditions of following procedural safeguards. In support of these conclusions, the Constitutional Court of the Russian Federation mentioned, among other things, the case of *Bykov v. Russia*. Thus, the Constitutional Court of the Russian Federation corrected the judicial practice taking into account the legal position of the ECtHR²¹.

However, the most positive example of implementing the approaches of the European Court in relation to Article 8 of the Convention in the Russian judicial practice are, perhaps, cases of defamation. This example is all the more interesting, as it is connected not only with the

protection of the rights guaranteed by Article 8, but related to the balance of interests under Articles 8 and 10 of the ECHR.

Earlier in the cases of *Grinberg v. Russia* (no. 23472/03, 21 July 2005) and *Zakharov v. Russia* (no. 14881/03, 5 October 2006) the ECtHR found that Russian courts do not distinguish between statements of facts and value judgments, opinions and beliefs. In response to this in 2005 the Supreme Court of the Russian Federation formulated corresponding explanations (Resolution of the Plenum of the Supreme Court of the Russian Federation no. 3)²². Due to these explanations, the judicial practice was substantially amended.

This circumstance is, in particular, is indicated in the annual report of the Committee of Ministers for 2015.

In one the recent judgements on unacceptability, the ECtHR expressed satisfaction with the actions of national courts in defamation proceedings (*Dzhugashvili v. Russia* (dec.), no. 41123/10, 9 December 2014). The European Court declared the application inadmissible as manifestly ill-founded, noting in particular that the national courts in reviewing the applicant's complaints, strictly followed the approaches developed in the Court's practice and did not violate the balance of private and public interests.

And in 2016, the Supreme Court of the Russian Federation issued a review of practice²³ with numerous references to the precedents of the European Court.

Speaking about the adoption of general measures by the states-participants in response to the Court's finding the violations of Article 8 of the Convention, it is impossible to ignore the contradictions arising from the failure of the national authorities to accept legal positions of the Court.

Thus, turning to the Russian experience, it should be noted that, despite the existence of examples, when the state adjusted its legislation

or judicial practice, such contradictions certainly exist.

This is, in particular, the case with the execution of the judgment on the case of *Konstantin Markin*. It is noteworthy that, the disputable paragraph 13 of Article 11 of the Federal Law “On the Status of Military Servicemen”, providing granting the maternity leave following pregnancy and childbirth, as well as for the care of a child only to female servicemen, has not changed. Thus, at least, at the first approximation, there is no visible progress in this case.

However, should we assume that the possibility of positive interaction in this case is lost? In one of his speeches, the Chairman of the Constitutional Court of the Russian Federation V.D. Zorkin admitted the possibility of dialogue, believing that in the resolution of the Grand Chamber, in contrast to the earlier resolution, the ECtHR took into account Russia’s position and proposed a compromise, refraining from direct regulatory control and from the assessment of the previously formulated positions of the Constitutional Court on the issue under consideration, and focusing on the fact that restrictions for male servicemen are established solely on the basis of gender, but not on the nature of the activities carried out by them. In his opinion, this should be seen as the readiness of the ECtHR to recognize, as a fulfillment of its decision, granting the parental leave for servicemen, not depending on their gender, but depending on the category of the position held and the function performed (for example, to grant the leave to all servicemen occupying posts of auxiliary staff). “If do not turn the case of *Markin* into a “stumbling block” ... then you can make the proposed compromise to solve this constitutional-legal and, at the same time, conventional problem”²⁴.

It would seem that a compromise is still possible. Yet, the statements quoted here refer

to 2013, and since then there have been some changes in the ECtHR-Russia relations, which are worth mentioning.

First of all, we cannot ignore the Constitutional Court’ ruling no. 21-Π²⁵, which appeared in 2015, in which the Constitutional Court of the Russian Federation, in particular, indicated that Russia can, as an exception, deviate from fulfilling its obligations, when such a deviation is the only possible way to avoid violation of the fundamental principles and norms of the Constitution. This ruling caused mixed reaction in the legal community. And, most importantly, it certainly set a certain vector both in the relations between Russia and the ECtHR as a whole, and in the discussion on the problem of the execution of the judgments of the Court.

Against this background, not only the probability of settling existing contradictions is reduced, but, in addition, it is possible to predict the emergence of new potentially problem areas.

If do not get distracted from the issues of execution of the judgments of the Court as applied to Article 8 of the Convention, the judgement adopted by the Grand Chamber in December 2015 on the case of *Roman Zakharov v. Russia* (no. 47143/06 [GC], 4 December 2015) can be provided as an example. This, perhaps, is one of the most significant judgements of the year under Article 8 of the Convention, in which the Court studied Russian legislation in the field of regulating covert surveillance measures. The case was based on a complaint by the head of the St. Petersburg non-governmental organization monitoring the freedom of the media, which in 2003 had a number of unsuccessful lawsuits against mobile operators, whom he accused of providing secret services with information about his telephone conversations and demanded dismantling of the equipment installed in accordance with special legislation.

The national courts refused the applicant, citing the lack of evidence that his telephone conversations had been tapped and that the protected information had, in fact, been handed over to somebody by the operators.

Accordingly, above all, the European Court confirmed that the applicant had victim status, indicating that the contested provisions of the national legislation created a system in which any mobile user using the services of Russian operators was at risk of their telephone conversations tapping without any notification and, therefore, this system potentially affected the rights of all the users of mobile communications of Russian operators.

Having examined the merits of the case, the Court concluded that the provisions of the Russian legislation governing the tapping of negotiations do not comply with the standards of the “quality of the law” and are incapable of ensuring the situation where the measures of covert surveillance are applied only when they are “necessary in a democratic society”.

The Court specifically noted that the law allowed “automatic saving of absolutely irrelevant information” and did not contain sufficiently clear provisions for the storage and destruction of this information.

What general measures are considered in this case as the most appropriate ones? In essence, the ruling noted the existence of the serious problem affecting the rights of an indefinite range

of persons and requiring appropriate legislative intervention. There followed certain changes in the legislation in this area, but they were hardly aimed at eliminating the violation established in the case of Roman Zakharov.

Instead, at the end of June 2016, an anti-terrorism law that tightened the requirements for telecom operators was passed²⁶. The new law obliges communication operators to keep records of all conversations and messages for six months²⁷, and the so-called metadata (information on the fact of connection, reception, processing and transmission of information, phone numbers, IP-addresses, data on base stations, etc.) for three years, and provide the specified information to the authorized state bodies in cases established by federal laws.

Earlier, within the system criticized by the European Court, tapping was carried out by the authorized bodies only with the assistance of telecom operators. In addition, such tapping could have been carried out only within the framework of operational-search activities or within the framework of an already existing criminal case²⁸. And although the latter rule, addressed to the bodies that carry out operational-search activity, formally retains its effect today, it, as it seems, due to the above innovations, is losing its significance to a considerable extent. It seems that in the current situation, the prospects for enforcing the judgement on the case of Roman Zakharov are likely to acquire a skeptical assessment.

¹ See, for instance: *Evans v. the United Kingdom* (no. 6339/05 [GC], ECHR 2007-I), where the subject of judicial consideration was an opportunity to use frozen embryo without ex partner's consent.

² See, for instance: *Khodorkovskiy and Lebedev v. Russia* (no. 11082/06 and 13772/05, 25 July 2013), where, among others, the issue of absence of comprehensible and predictable method for prisoners' allocation to **correctional facilities was raised**.

³ See, for instance: *Khoroshenko v. Russia* (no. 41418/04 [GC], ECHR 2015) concerning restrictive limitations on meetings with relatives in the first decade of life sentence.

⁴ This, naturally, in the first instance concerns high profile case of *Konstantin Markin v. Russia* (no. 30078/06 [GC], ECHR 2012 (extracts)) on impossibility to grant parental leave to male servicemen. This case will be mentioned hereafter.

⁵ Two British cases concerning noise from Heathrow airport are of interest here: *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172, p. 18); *Hatton and Others v. the United Kingdom* (no. 36022/97 [GC], ECHR 2003-VIII).

⁶ See, for instance, the case of *S. And Marper v. the United Kingdom* (no. 30562/04 and 30566/04 [GC], ECHR 2008), where the subject of appeal was the fact of fingerprints and other personal data storage after the criminal prosecution termination.

- ⁷ Kuijer M. (2015). *Guaranteeing International Human Rights Standards in the Netherlands: The Parliamentary Dimension*, in: *Parliaments and Human Rights: Redressing the Democratic Deficit* Ed.: Murray Hunt, Hayley Hooper, Paul Yowell Oxford and Portland, Oregon: Hart Publishing (Bloomsbury Publishing), 299-300, Fn. 21.
- ⁸ See, for instance: Determination of the Constitutional Court of the Russian Federation dated 04.12.2003 no. 508-O "On the refusal to accept for consideration the complaint of citizen Vladimir Arkadyevich Shlafman on violation of his constitutional rights by paragraph 7 of Article 152 of the Civil Code of the Russian Federation".
- ⁹ "For the purpose of effective protection of human rights and freedoms, courts take into account the legal opinions of the European Court set out in **the final judgements adopted in respect of other States Parties** to the Convention. At the same time, the legal position is taken into account by the court if the circumstances of the case under consideration are analogous to the circumstances that became the subject of analysis and conclusions of the European Court" (see Resolution no. 21 of June 27, 2013, "On the Application by the Courts of General Jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols to it", paragraph 2).
- ¹⁰ One of the most problematic issues associated with the adoption of ad hoc measures is the issue of the need to review the fulfilled judicial acts of the national courts. In this regard, the Recommendation of the Committee of Ministers of the Council of Europe of 19.01.2000 N R (2000) 2 on re-examination of cases and resumption of proceedings of the case at the domestic level in connection with the judgments of the European Court of Human Rights is of importance (Recommendation N R (2000) 2 of the Committee of Ministers to states parties on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights).
- ¹¹ See: Resolution of the Committee of Ministers (CM/ResDH(2007)124, Von Hannover v. Germany), dated 31 October 2007.
- ¹² For more detailed information see, for instance: Dikov, G.V. (2015). "Pravovaia priroda predpisaniy Evropeiskogo Suda v ramkakh pilotnoi protsedury" [The Legal Nature of the Orders of the European Court of Justice in the Framework of the Pilot Procedure] in *Realizatsiia Evropeiskoi Konventsii o zashchite prav i osnovnykh svoobod cheloveka sudebnymi sistemami: opyt Italii i Rossii* [Implementation of the European Convention on the Protection of Human Rights and Fundamental Freedoms by National Judicial Systems: the Experience of Italy and Russia], Strasbourg: CECJ, 197. Further in the article it is said that the appearance of pilot judgements in the Court's practice, in which the Court began directly indicate what actions it expects from the state was a kind of turning point in regard to the situation with the common measures application. However, the issue of pilot judgements lies beyond the scope of this study.
- ¹³ In Russia, the regulation of the implementation of the ECtHR judgements is carried out at the sublegislative level. See, for example, Presidential Decree no. 310 of March 29, 1998 "On the Authorized Representative of the Russian Federation at the European Court of Human Rights – Deputy Minister of Justice of the Russian Federation". The duties of the Commissioner include, inter alia, ensuring interaction of the national authorities in the execution of the judgments of the Court and the decisions of the Committee of Ministers of the Council of Europe.
- ¹⁴ For more detailed information see, for instance: Mueller S., Gusy Chr. (2013). The interrelationship between domestic judicial mechanisms and the Strasbourg Court rulings in Germany, *In The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy*, Edinburgh University Press, 38.
- ¹⁵ Gesetz zur Reform der elterlichen Sorge nicht miteinander verheirateter Eltern vom 16.04.2013 (BGB I. I S. 795).
- ¹⁶ See: La Corte Costituzionale, Sentenza N. 278/2013 (18 Nov. 2013). Available at: www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=278
- ¹⁷ See Judgement of the Constitutional Court of the Russian Federation no. 4-II of 27.02.2009 "On the Case on Verification of Constitutionality of a Number of Provisions of Articles 37, 52, 135, 222, 284, 286 and 379.1 of the Civil Procedure Code of the Russian Federation and part four of Article 28 of the Law of the Russian Federation "On Psychiatric Assistance and Guarantees of Citizens' Rights in Its Delivery" in connection with complaints of citizens Yu.K. Gudkova, P.V. Shtukaturov and M.A. Yashina" // PF, no. 45, 18.03.2009.
- ¹⁸ Federal law of 06.04.2011 no. 67-ФЗ "On Amendments to the Law of the Russian Federation "On Psychiatric Assistance and Guarantees of Citizens' Rights in Its Delivery" and the Civil Procedure Code of the Russian Federation" // PF, no. 75, 08.04.2011.
- ¹⁹ Federal law of 30.12.2012 No. 302-ФЗ "On Amendments to Chapters 1, 2, 3 and 4 of Part One of the Civil Code of the Russian Federation" // PF, no. 3, 11.01.2013.
- ²⁰ Let us remind that in this case the applicant's conversations were tapped with the help of a radio transmitter located at the interlocutor, i.e. formally, these were not telephone conversations, for the tapping of which there were certain rules and restrictions in the law. The European Court paid particular attention to this circumstance.
- ²¹ Judgement of the Constitutional Court of the Russian Federation of 9 June 2011 no. 12-II "On the Case of Verification of Constitutionality of the Provisions of Paragraph 7 of Article 16 of the Law of the Russian Federation "On the Status of Judges in the Russian Federation" and part one of Article 9 of the Federal Law "On Operative Investigative Activity" in connection with the complaint of citizen I.V. Anosov" // PF, no. 132, 22.06.2011.
- ²² Resolution of the Plenum of the Supreme Court of the Russian Federation of 24 February 2005, no. 3 "On Judicial Practice in the Cases of Protection of Honor and Dignity of Citizens, As Well As Business Reputation of Citizens and Legal Entities".
- ²³ Review of practice of courts consideration of the cases on disputes on protection of honor, dignity and business reputation (Approved by the Presidium of the Supreme Court of the Russian Federation on March 16, 2016).
- ²⁴ Zorkin, V.D. Vzaimodeistvie natsional'nogo i nadnatsional'nogo pyzovy i ravnosudiia: novye vyzovy i perspektivy [Interaction of National and Supranational Justice: New Challenges and Prospects], *In Realizatsiia Evropeiskoi Konventsii* [Implementation of the European Convention] ..., 35, 36.
- ²⁵ Judgement of the Constitutional Court of the Russian Federation of 14.07.2015 no. 21-II "On the Case of Verification of Constitutionality of the Provisions of Article 1 of the Federal Law "On the Ratification of the Convention for the Protection

of Human Rights and Fundamental Freedoms and the Protocols thereto”, Paragraphs 1 and 2 of Article 32 of the Federal Law “On International Treaties of the Russian Federation”, Parts 1 and 4 of Article 11, paragraph 4 of the fourth part of Article 392 of the Civil Procedure Code of the Russian Federation, parts 1 and 4 of Article 13, paragraph 4 of part 3 of Article 311 of the Arbitration Procedural Code of the Russian Federation, parts 1 and 4 of Article 15, Paragraph 4 of Part 1 of Article 350 of the Code of Arbitration **Procedure Code of the Russian Federation** and Paragraph 2 of part four of Article 413 of the Criminal Procedure Code of the Russian Federation in connection with the request of a group of deputies of the State Duma // ПГ, no. 163, 27.07.2015.

²⁶ See: Federal law of 06.07.2016 no. 374-ФЗ “On Amendments to the Federal Law “On Counteracting Terrorism” and separate legislative acts of the Russian Federation regarding the establishment of additional measures to counter terrorism and ensure public safety” // ПГ, no. 149, 08.07.2016. Thus, Article 13 of this law provides introduction of appropriate amendments in Article 64 of the Federal Law of 07.07.2003 No. 126-ФЗ “On Communications”, which in its previous version, along with other interrelated provisions of the Russian legislation, was the subject of consideration in the case of Roman Zakharov.

²⁷ Amendments that oblige to store the records of conversations and messages will go into effect from 1 July 2018 (see Paragraph 2 Article 19 of the Federal Law no. 374-ФЗ).

²⁸ Thus, by virtue of paragraph 3 of Article 8 of the Federal Law no. 144-ФЗ of 12.08.1995 “On Operative-Search Activity”, tapping of telephone and other conversation is allowed only for persons suspected or accused of committing crimes of medium gravity, grave or especially grave crimes, as well as persons, who may have information about these crimes. Phonograms obtained as a result of telephone and other conversations tapping are stored in sealed form in conditions that exclude the possibility of their listening and replication by unauthorized persons.

Исполнение решений Европейского суда по правам человека по ст. 8 Европейской конвенции о защите прав человека и основных свобод

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Спецификой дел по статье 8 Европейской конвенции о защите прав человека и основных свобод является то, что значительная часть нарушений, выявленных по данной статье, имеют в своей основе причины глубинного характера. В связи с этим особый интерес представляют такие ответные действия государства, которые направлены на изменение ситуации в целом и способны предотвратить потенциальные аналогичные нарушения прав других лиц, находящихся в схожем с заявителем положении. Речь идет о так называемых общих мерах, на которых и акцентировано внимание в данной статье.

Автор рассматривает примеры реализации государствами-участниками Конвенции упомянутых общих мер, группируя их по нескольким основным направлениям, таким как, в частности, изменение национального законодательства, вмешательство органов конституционного правосудия и изменения во внутренней судебной практике.

В заключительной части рассматривается ряд дискуссионных вопросов, связанных с исполнением отдельных решений Европейского суда по правам человека против России.

Ключевые слова: права человека, Европейский суд по правам человека, защита частной жизни, исполнение постановлений.

Научная специальность: 12.00.00 – юридические науки.