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**THE ROLE OF ECHR DECISIONS IN RUSSIAN CRIMINAL PROCEEDINGS**

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**Abstract**

The article is devoted to the influence of the decisions of the European Court of Human Rights [ECHR] on the criminal procedure legislation of the Russian Federation [RF]. The legal basis for the activities of the ECHR is the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and its Protocols. According to Article 15 of the Constitution of the RF and Article 1 of the Code of Criminal Procedure of the RF, the Convention of 1950 is an integral part of the criminal procedure legislation of Russia and has priority in the event of a conflict of international and national law. However, according to the latest changes that took place in 2020, it is unacceptable to apply the rules of international treaties ratified by the Russian Federation in their interpretation that contradicts the Constitution of the RF. The identification of these contradictions is entrusted to the Constitutional Court of Russia. The study defines the role and place of the ECHR decisions in the system of sources of Russian criminal procedure law; the forms of their use in criminal proceedings in the context of constitutional reform, taking into account the existing gaps in the criminal procedure legislation of Russia; the range of influence of the Constitutional Court of the Russian Federation on the execution of the ECHR decisions and their further implementation in the national criminal procedure legislation.

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*Keywords:* Execution, implementation reasoning, gap, reform, the ECHR decision



## 1. Introduction

In 2020, Russia ceased to lead in the number of its citizens' appeals to the ECHR; however, it was on our citizens' complaints that most of the decisions were made, namely 8,923 out of overall 41,700 decisions made in this year (European Court of Human Rights, 2020). On average, 2/3 of them seek to uphold the rights in criminal proceedings and, most often, are aimed to protect against unjustified refusals to institute criminal proceedings, unjustified detention, and the infringement of the right to a reasonable sentence when a preventive measure is applied, in violation of the right to a fair trial. The aforementioned makes it imperative to address the issues of the impact of the ECHR decisions on Russian national legislation.

The role of the ECHR decisions in Russian criminal proceedings is determined by the forms of their use in law-making (the implementation of the ECHR legal positions in the national criminal procedure legislation) and law enforcement activities (interpretation of the legal positions expressed in them; enforcement of decisions against Russia; reasoning in the decisions made by national courts when resolving criminal cases on the merits; prejudice; decision-making by national courts when resuming proceedings due to new or newly discovered circumstances). The problems of filling and eliminating gaps in criminal procedure legislation can be solved through the use of the ECHR decisions in law-making and law enforcement (Table 01).

**Table 1.** Forms of using the decisions of the ECHR in Russian criminal proceedings

Law-making		Law enforcement			
Implementation	Interpretation	Enforcement	Reasoning	Prejudice	Resuming proceedings due to new discovered circumstances
Filling gaps	Eliminating gaps				

## 2. Problem Statement

The vectors of constitutional reform are aimed at strengthening the state sovereignty of Russia and the priority of national legislation over international law. In pursuit for these goals, large-scale amendments were made to the Constitution of the Russian Federation [hereinafter – the RF Constitution], to article 1 of the Criminal Procedure Code of the Russian Federation [hereinafter – RF CCP] and to Federal Constitutional Law No. 1-FCL “On the Constitutional Court of the Russian Federation” of 21.07.1994 [hereinafter – the FCL “On the RF Constitutional Court”]. These amendments limit the enforceability of the ECHR decisions in cases specified by law, and may create constraints for Russian citizens in exercising their right to apply for international protection in the ECHR, if their rights in criminal procedure are violated.

### **3. Research Questions**

The matters under study include: the norms of national constitutional and criminal procedure legislation that establish the rules for the implementation of generally recognized principles and norms of international law and international treaties in the Russian Federation, the practice of their application; the legal nature of the ECHR decisions, as well as their place in the system of sources of Russian law and the possibilities for their use in the law-making and law-enforcement process, including for the purpose of eliminating and overcoming gaps in Russian criminal procedure.

### **4. Purpose of the Study**

The purpose of the study is to define the role of the ECHR decisions in Russian criminal procedure in the context of the constitutional reform; to describe their use, including the order of their implementation in Russian criminal procedure legislation; to identify the limits of the ECHR decisions' enforceability and the possibilities for using them as a means of eliminating and overcoming gaps in the criminal procedure law of Russia.

### **5. Research Methods**

Formal legal and comparative legal methods of research were used.

### **6. Findings**

#### **6.1. Lawmaking. Implementation**

The ECHR decisions based on the norms of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter – the Convention] and its Protocols are generally binding; they are subject to official publication and contain, in addition to the resolution of a particular legal dispute, an interpretation of the norms of the Convention and its Protocols (Gareth, 2018; Spano, 2021). Unlike the Convention, the ECHR decisions based on it are not a source of criminal procedure law, since they are recognized as precedents (Partlett & Krasnov, 2019). Therefore, the legal positions expressed in the ECHR decisions can become a part of Russian legislation only through implementation. The implementation of the ECHR legal positions may be required to eliminate and overcome gaps in the Russian criminal procedure legislation.

As a result of the ongoing constitutional reform, the role of the RF Constitutional Court in implementing the ECHR legal positions (art. 3, art. 104.1 of the FCL “On the Constitutional Court of the Russian Federation”) has been strengthened. When the Court declares a rule of the RF CCP unconstitutional, a legal vacuum is created; such vacuum is filled by the legal position of the RF Constitutional Court, which is actually a new legal norm - the «constitutional judicial norm». At the same time, as a rule, the RF Constitutional Court is governed by the ECHR legal positions, which is indicative that the latter are instrumental in constitutional judicial rulemaking (Dani, 2017). The RF Constitutional

Court “transposes” the legal regulation established in the ECHR decision into the constitutional judicial norm, which is subsequently to be incorporated into the criminal procedural legislation. The aforementioned makes it possible to affirm that the rulemaking of the RF Constitutional Court, which is guided by the ECHR legal positions, is an effective means of filling gaps in criminal procedure law. An example can be found in the implementation of the ECHR legal position, formulated in the decision in the case “Bourdov v Russia” (2), which became the starting point for the introduction into the RF CCP of article 6.1, establishing the requirement of compliance with reasonable time limits for criminal proceedings.

## **6.2. Law enforcement. Execution, interpretation, reasoning, prejudice, revision**

Amended as a result of the constitutional reform, the provisions of the RF Constitution (par. b of Part 5.1 of Article 125), as well as the norms of Articles 104.1, 104.2, 104.3 of the FCL “On the RF Constitutional Court”, in essence, allow a “soft” revision of the postulate that the ECHR decision is generally binding and unconditionally enforceable. This means that if there is a corresponding request from authorized persons and bodies, the RF Constitutional Court reviews the ECHR decisions in terms of the provisions presumably leading to their incompatibility with the norms of the RF Constitution. Even before the current constitutional reform, it was possible in Russia to abandon the requirement of the binding nature and unconditional enforceability of the ECHR decisions. Thus, the FCL of December 14, 2015 No. 7-FCL “On Amendments to the Federal Law “On the Constitutional Court of the Russian Federation” authorized the RF Constitutional Court, if the request of the authorized body is made, to rule on the enforceability of the decision made by an interstate body for the protection of human rights and freedoms, if a conflict between the ECHR interpretation of the Convention norms and the RF Constitution provisions arises. An example of such a conflict is found in the judgment of the RF Constitutional Court No. 12-P of April 19, 2016, in the case of “Anchugov and Gladkov v. Russia”, in which the ECHR decision of July 4, 2013 was ruled to be unenforceable.

The described situations of non-enforcement of the ECHR decisions are exceptions, which do not, in general, detract from the importance of the ECHR legal positions in law enforcement (Šadl & Wallerman, 2019). The resolution of the Plenum of the RF Supreme Court No. 21 of June 27, 2013 draws attention to the generally binding nature of the ECHR legal positions which are contained in its final judgments not only in respect of the Russian Federation, but also in those regarding other States-Parties to the Convention, if the circumstances of the case before them are similar to those considered by the ECHR.

Nevertheless, the issue of the non-enforceability of the ECHR decisions is implicitly linked to the new regulation of the subject matter under consideration by the RF Constitutional Court. In accordance with Article 97 of the FCL “On the RF Constitutional Court”, the subject matter under consideration will now include complaints from citizens whose constitutional rights and freedoms are violated by the norms applied in a particular criminal case, if all other domestic remedies have been exhausted. This means that participants in criminal proceedings, whose constitutional rights and interests were violated in the course of the proceedings, having passed the cassation and supervisory review procedure, will now first need to apply for protection of their rights to the RF Constitutional Court, and only after that step has been

undertaken, it will be possible to appeal to the ECHR. At the same time, the possibility of divergence between the legal positions of these courts cannot be excluded entirely.

Moreover, as can be seen from the discussions held for the development of civil society, the prospect of creating a "special" human rights court in Russia is not excluded. Russian President Vladimir Putin, following a meeting with members of the Human Rights Council in December 2020, instructed the Chairman of the Supreme Court of the Russian Federation V. Lebedev and the Minister of Justice K. Chuichenko to consider the feasibility of creating a Russian court of human Rights and to prepare a report on this issue by June 1, 2021. It is impossible to predict what legal consequences the creation of this court will entail for the participants of the criminal process, how wide the subject of its consideration will be, whether it will include foreign judges.

## 7. Conclusion

The role of the ECHR decisions in criminal proceedings in the context of constitutional reform and their place in eliminating and overcoming gaps in the criminal procedure law of Russia are determined by the forms of their use (rule-making and law enforcement). The direct use of the ECHR decisions within these forms is impossible, insofar as it is dependent on a number of conditions:

1. The ECHR decisions are precedents and cannot be included in the system of sources of criminal procedure law.

2. The ECHR decisions affect the Russian rule-making process indirectly, through the implementation procedure with a compulsory preliminary review of these decisions' enforceability by the RF Constitutional Court, initiated by the relevant state bodies and officials. Although the compulsory nature of this review is not regulated by law, as the implementation procedure itself, it can be inferred that, based on the general meaning of the RF Constitution norms and of the RCL "On the RF Constitutional Court" establishing the limits of generally recognized principles and norms of international law and international treaties on the territory of the Russian Federation, the legislator cannot incorporate the ECHR legal provisions into national legislation without passing this test.

3. In deciding on the conformity of the criminal procedure law norm with the Constitution, in case if the norm is recognized as unconstitutional, the RF Constitutional Court, establishes a new legal regulation, instead of the one of no force, being guided by the legal positions of the ECHR in its decision, thereby transferring them to the RF Constitutional Court norm. This norm is thereafter subject to inclusion in the criminal procedure legislation through rule-making process.

4. The decisions of the ECHR are generally binding, with the exception of restrictions on their enforceability on the grounds established by the Russian legislator.

5. Interpretative clarifications of the ECHR are used in law enforcement when they are accepted by the Supreme Court of the Russian Federation, while national courts, following the relevant clarifications of the Plenum of the RF Supreme Court, refer to specific ECHR rulings when grounding a judgment in a criminal case. These clarifications can help resolve a specific legal dispute when the decision is not obvious due to the lack of proper legal regulation or its ambiguity, inconsistency, and incompleteness. In other words, the interpretive clarifications of the Convention provided in the ECHR decisions serve as a means of overcoming the gap in the law of criminal procedure in a particular case.

6. The decisions of the ECHR should have a pre-judicial significance for the Russian law enforcement officer. It seems that the rule on prejudice established in Article 90 of the Code of Criminal Procedure of the Russian Federation should be applied to the decisions of the ECHR made in respect of Russia, that is, the circumstances established in this decision should be taken on faith without additional verification, if this decision was not found unenforceable.

7. Changes related to the extension of the subject matter under consideration of the RF Constitutional Court increase the guarantees of safeguarding the rights of participants in criminal proceedings. However, the amended procedure for judicial review may lead to the situation when applying to the ECHR for the protection of their rights by participants in criminal proceedings becomes senseless, since the possibility of a discrepancy between the legal position of the RF Constitutional Court and the legal position of the ECHR in its interpretation of the Convention norms cannot be excluded.

8. The use of ECHR decisions for the purpose of eliminating and overcoming gaps in criminal procedure law can be illustrated by the following algorithms:

8.1. Making an ECHR ruling that imposes obligations on Russia → checking the enforceability of the ECHR decision by the Constitutional Court of the Russian Federation at the request of authorized bodies and officials → implementation (rule-making based on the legal position of the Constitutional Court of the Russian Federation, which has accepted the legal position of the ECHR) → eliminating the gap;

8.2. Making a ruling of the ECHR against Russia or another member state of the Council of Europe → explanations of the Plenum of the Supreme Court of the Russian Federation based on the ruling of the ECHR → application of the legal positions of the ECHR by the Russian court in resolving a criminal case on the merits → bridging the gap.

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