On The Legal Status of the Russian Extra-Parliamentary Opposition: Making a Good Case Before the European Court of Human Rights?

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Abstract

The article analyses the status of the Russian extra-parliamentary opposition as a subject of dispute between the latter and the Russian government before the European Court of Human Rights (ECtHR). It discusses national strategies, through a concerted action of public authorities, of denying certain opposition groups, namely those lead by Alexey Navalnyy, a clear legal status that would enable them to stand for elections in a meaningful way. Special attention is devoted to the scrutiny of such practices by the ECtHR, before which the Russian extra-parliamentary opposition would routinely seek justice. The article shows that such a recourse to the international judiciary does not guarantee adequate redress due to government's strategy of partial execution in relation to uncomfortable judgments.

Résumé

L'article analyse le statut de l'opposition extra-parlementaire en Russie en tant que sujet de dispute entre cette dernière et le gouvernement russe devant la Cour européenne des droits de l'homme (CEDH). Il met en lumière les stratégies nationales, menées à travers une action concertée des autorités publiques, consistant à refuser à certains groupes d'opposition, notamment ceux affiliés à Alexey Navalnyy, le statut juridique leur permettant une éligibilité effective et sur le pied d'égalité avec les autres forces politiques. L'article revient sur l'examen desdites pratiques par la CEDH devant laquelle l'opposition extra-parlementaire russe avait cherché la justice à multiples occasions. L'article montre qu'un tel recours à la juridiction internationale de protection des droits de l'homme ne se traduit pas en une réparation adéquate au niveau national et ce, en raison de l'exécution incomplète des jugements qui s'avèrent inconfortables au Gouvernement russe.

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1. INTRODUCTION

Barely any television media allows its hosts or guests to swear while in primetime. Barely any television media in Russia allows its hosts or guests to use words "*Alexey Navalnyy*" while in primetime. Only indirect references are tolerated, such as "*the notorious convicted citizen*", "*that personage*", as a skilful exercise of synonym game for "o*ppositionist*"[1]. Insofar, apart from some rare exceptions, arguably the most prominent critic of the current Russian presidency[2] remains *He Who Must Not Be Named* of Russian politics.

This fact was interpreted by the President's press secretary as a mark of the unwillingness to hand Alexey Navalnyy the status of a legitimate competitor, as Vladimir Putin is claimed to be someone "*beyond competition*"[3]. However, such an exclusion of the opposition leader from discursive field seconds and illustrates a tendency to bar entry to actual political competition for certain opposition groups. This is achieved through denying these groups a clear legal status of registered candidates or political parties by a concerted action of public authorities. Such an action triggers various responses from concerned opposition groups, endeavouring to overcome legal restrictions on their political activity, most notably by seeking justice before the European Court of Human Rights (ECtHR). The present article argues that such a recourse to the international judiciary does not guarantee adequate redress due to government's strategy of partial execution in relation to uncomfortable judgments.

A meaningful discussion of the presented argument necessitates several preliminary considerations to be made. Consequently, the introductory section deals with a tentative definition of the extra-parliamentary opposition as applicable in the Russian case (1.1); a basic description of the Russian political regime (1.2); a delimitation of the subject matter (1.3); and, finally, with the research question (1.4).

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[1] M. KUDRYAVTSEVA, "That very personage: how not to call oppositionist an oppositionist", *DP.ru*, April 2017. URL: https://www.dp.ru/a/2017/04/05/Tot_samij_personazh_kak_n (in Russian).

[2] For a synthetic overview of Alexey Navalnyy's activities as an opposition leader, see Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2016)912: Rule 9.1 Comm. from the applicants (12/08/2016) in Navalnyy & Ofitserov v. Russian Federation (Application No. 46632/13), August 12, 2016, particularly p. 2: "*In 2011, the BBC described Navalny as "arguably the only major opposition figure to emerge in Russia in the past five years". In 2012, "The Wall Street Journal" described him as "the man Vladimir Putin fears most", and in 2013 the applicant came in second in Moscow's mayoral elections, losing to Government's appointee*".

[3] M. KUDRYAVTSEVA, "That very personage…", *op. cit*.

1.1. A Tentative Definition of the Russian Extra-Parliamentary Opposition

Various terms have been coined to describe phenomena that emerged from 2011-2012 protest movements across Russia, when the legitimacy of the State Duma election in December 2011, and the United Russia's relative victory were challenged due to numerous electoral fraud accounts, defying conventional observations of "*the void of civic mobilisation in Russia*"[4]. The premises of birth of a new protest movement, – heterogenous, lacking organisation and concerted mainly in Moscow, St Petersburg and other very large cities[5], – are numerous, ranging from ostentatious liberalization postulated by the presidency of Dmitriy Medvedev that was deemed to politicize civil society while fostering public debate and proliferation of independent movements[6], to the emergence of the urban middle class without affiliation to the state sector of the economy[7], as well as the rise of recourse to online media by opposition activists as a means of widening the support of the movement[8].

A complete overview of distinctive features of the Russian extra-parliamentary opposition being beyond the scope of the present article, one should nevertheless mention ideological diversity of various opposition groups once mobilized under the slogan "For Fair Elections"[9], lack of institutionalisation[10], loose

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[4] S. A. GREENE, Moscow in Movement: Power and Opposition in Putin's Russia, Stanford University Press, 2014, p. 3: "Indeed, the idea of the weakness of Russian civil society remains well established and widely accepted. Russians, on the whole, do not organize and are difficult to mobilize, and they do not tend to join movements or participate in public protests".

[5] C. ROSS, "State against Civil Society: Contentious Politics and the Non-Systemic Opposition in Russia", *Europe-Asia Studies*, Vol. 67, No. 2, March 2015, p. 171-176, specifically p. 172-173.

[6] V. GEL'MAN, "Cracks in the Wall. Challenges to Electoral Authoritarianism in Russia", *Problems of Post-Communism*, Vol. 60, No. 2, March-April 2013, p. 3-10. The author argues that "*good intentions*" of Medvedev presidency, although the latter was designed to serve as Putin's interim and confined itself to a "*discursive liberalization*", fostered hope of real social change, both among the elites and the general public, hence triggering the formation of a "*negative consensus*" against the *status quo*. See also V. GELMAN, "Political Opposition in Russia: A Troubled Transformation", *Europe-Asia Studies*, Vol. 67, No. 2, March 2015, p. 177-191.

[7] See for a critical analysis of the claim, E. GONTMAKHER, C. ROSS, "The Middle Class and Democratization in Russia", *Europe-Asia Studies*, Vol. 67, No. 2, March 2015, p. 269-284.

[8] N. BODE, A. MAKARYCHEV, "The New Social Media in Russia", *Problems of Post-Communism*, Vol. 60, No. 2, March-April 2013, p. 53-62; see *a contrario* R. SMYTH, S. OATES, "Mind the Gaps: Media Use and Mass Action in Russia", *Europe-Asia Studies*, Vol. 67, No. 2, March 2015, p. 285-305, stressing the recourse to the online media by government supporters.

[9] V. LASNIER, "Russia's Opposition Movement Five Years After Bolotnaia. The Electoral Trap?", *Problems of Post-Communism*, Vol. 65, No. 5, 2018, p. 359-371.

[10] Apart from notorious case of Republican Party of Russia (RPR-PARNAS) discussed in Part I of the present article and from partial transformation of "Yabloko" political party, the 2011-2012 protest movement did not generate new partisan structures neither did it contribute to proliferation of political associations that would institutionalize its revindications on a national level. An attempt to federate opposition forces in the Coordinating Council of the Opposition (KSO) failed to succeed as a consolidation tool (V. LASNIER, "Russia's Opposition Movement Five Years After Bolotnaia…", *op. cit.*). A notorious exception is Navalnyy's Anti-corruption Foundation, established in 2011, existing as a registered NGO. Several large NGOs that supported the movement to which they pre-existed should also be mentioned: election monitors' association *Golos*, human rights defenders in *Memorial* and *Incarcerated Russia*, as well as political movement *The Left Front*. New citizen groups without registration as association emerged, such as "*Citizen Observer*" (Grazhdanin Nablyudatel'), a renewed "*Open Russia*" movement under the auspices of Mikhail Khodorkovsky, convicted Russian entrepreneur and former chair of Yukos Oil Company, as well as various human rights defenders' initiatives that exist outside established legal framework. The

unity based on a "*negative consensus*" against the Putin regime[11], as well as very little representation – particularly since 2016 State Duma elections – of its leaders in federal or regional State legislatures[12].

From the political science perspective, Ivan Bol'shakov featured "*nonsystemic opposition*", "*extrasystemic opposition*" and "*antisystemic opposition*" as concurrent descriptions of the structures discussed above[13]. The "nonsystemic opposition" is the term used by the majority of the doctrine[14]. Its most encompassing definition is negative, as the "*nonsystemic opposition*" is a political movement not in power[15] characterised by ideological disagreement with the majority that is to be distinguished from a "systemic opposition"[16]. The latter is indeed the parliamentary opposition, being represented in federal and regional parliaments but not in government[17]. To date, it counts three national political parties, namely the Communist Party of Russian Federation (CPRF), Just Russia (JR) and the Liberal Democratic Party of Russia (LDPR). The argument of its inefficiency as a challenger to the majority's policies is a truism in Russian parliamentary law and political science doctrine[18]. It accounts for "*semi-opposition in authoritarian regimes*" of Juan Linz,

present article confines itself to the cases of denial of legal status to emerging political entities by public authorities; the issue of unwillingness of civil society groups to be subject to Russian law on non-profit organizations of 12.01.1996 No. 7-FZ is beyond its scope.

[11] V. GELMAN, "Political Opposition in Russia…", *op. cit*.

[12] The State Duma elections held in September 2016 gave no deputies appertaining to Russian extra-parliamentary opposition, and regional assembly and gubernatorial elections from 2015 to 2017 were secured by the ruling majority of United Russia and "*systemic opposition*" parties. C. ROSS underlines that this was due to several registration denials issued against RPR-PARNAS candidates in regions where they could have gathered substantive support (C. ROSS, "Regional elections in Russia: instruments of authoritarian legitimacy or instability?", *Palgrave Communications Open*, Vol. 75, No. 4, 2018. URL: https://www.nature.com/articles/s41599-018-0137-1.pdf). The 2018 gubernatorial elections, although carried in several regions by candidates other than those nominated by United Russia, resulted in several governors-elect appertaining to the "*systemic opposition*". On reasons of these outcomes, see C. ROSS, "Regional elections and electoral malpractice in Russia: the manipulation of electoral rules, voters and votes", *REGION*, Vol. 3, No. 1, 2014, p. 147–172.

[13] I. BOL'SHAKOV, "The Nonsystemic Opposition", *Russian Politics and Law*, Vol. 50, No. 3, May-June 2012, p. 82-92. The author deems all these terms irrelevant in light of systems approach and calls for a search of new categories. They are particularly to be distinguished from the concept of "anti-system" parties coined by Giovanni Sartori and modified by Giovanni Capoccia, as suggested by M. KUBÁT, *Political Opposition in Theory and Central European Practice*, Frankfurt Am Main, Peter Lang, 2010, p. 74-87.

[14] V. GELMAN, "Political Opposition in Russia…", *op. cit*.; V. LASNIER, "Russia's Opposition Movement Five Years After Bolotnaia…", *op. cit*.; C. ROSS, "State against Civil Society…", *op. cit*.

[15] Although several authors, such as V. LASNIER, R. SMYTH and S.A. GREENE, "Beyond Bolotnaia. Bridging Old and New in Russia's Election Protest Movement", *Problems of Post-Communism*, Vol. 60, No. 2, 2013, p. 40-52, feature civil society groups that do not aim at political competition as parts of non-systemic opposition due to their support for the contestation of Putin regime, discussion of such groups necessitates a separate study.

[16] A distinction explicitly made by C. ROSS, "Regional elections in Russia…", *op. cit*.; V. GELMAN, "Political Opposition in Russia…", *op. cit*; V. LASNIER, "Russia's Opposition Movement Five Years After Bolotnaia…", *op. cit*.

[17] Venice Commission, *Report on the Role of the Opposition in a Democratic Parliament*, CDL-AD(2010)025, 15 November 2010, p. 4.

[18] See C. ROSS (ed.), *Systemic and Non-Systemic Opposition in the Russian Federation. Civil Society Awakens?,* Ashgate, 2015, 219 p.; see also "*loyal opposition*" characterization *in* R. SAKWA, "Whatever Happened to the Russian Opposition?", *Research paper, Chatham House*, May 2014, p. 9. See also P. PANOV, C. ROSS, "Patterns of Electoral Contestation in Russian Regional Assemblies. Between Competitive and Hegemonic Authoritarianism", *Democratizatsiya: The Journal of Post-Soviet Democratization*, Vol. 21, No. 3, 2013, p. 369-400.

referring to "*those groups that are not dominant or represented in the governing group but that are willing to participate in power without fundamentally challenging the regime*"[19]. In Russian case, they are described to "*serve as fellow travellers and junior partners of authoritarian regimes (even though the risks associated with their possible disloyalty are a real possibility)*"[20].

Conversely, a "non-systemic opposition" would openly challenge the *status quo* established by the current majority, i.e. Putin's extended presidency and United Russia's predominance in federal and regional legislatures. It should be stressed that there was little to none involvement of the "systemic opposition" in the protest movement since 2011[21], as it was joined only by few second-rank representatives of the systemic parties[22].

From a legal point of view, the distinction introduced above translates the difference of legal status of the "oppositions" in question. Indeed, while "systemic opposition" is in fact parliamentary one, "non-systemic" opposition would be deprived of such a representation, conditioned both by relatively low levels of nationwide support[23] and by concerted action of public authorities aimed at preventing its access to standing for elections. Only the latter argument is an object of the present discussion. Indeed, not only the "systemic opposition" will be constituted in nationwide political parties eligible to present their candidates for elections without requirements to collect nomination signatures, it also enjoys all the rights, privileges and immunities given to any bearer of the legal status of parliamentary opposition. Conversely, non-systemic opposition, conforming to the legal qualification of extra-parliamentary opposition, would not have such rights, privileges and immunities. In sum, a tentative qualification of extra-parliamentary opposition for the preliminary matter is a negative one, translating a lack of legal status reserved for parliamentary opposition.

A schematic overview of the Russian extra-parliamentary opposition suggests its classification in three main categories. It includes, firstly, already existing political parties not represented in the State Duma and having little to none representation in regional legislatures – PARNAS and Yabloko[24] – that can stand for regional elections or nominate their candidates directly thanks to some municipal representation[25] and needing to collect signatures in order to stand for the State Duma

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[19] J. P. LINZ, "Opposition in and under An Authoritarian Regime: The Case of Spain" *in* R. A. DAHL (ed.), *Regimes and Oppositions*, New Haven and London, Yale University Press, 1973, p. 191.
[20] V. GELMAN, "Political Opposition in Russia…", *op. cit*., p. 178.
[21] R. SAKWA, "Whatever Happened to the Russian Opposition?", *op. cit.,* p. 9.
[22] V. GELMAN, "Political Opposition in Russia…", *op. cit*., p. 182.
[23] See A. EVANS, "Civil Society and Protests in Russia" *in* C. ROSS (ed.), Systemic and Non-Systemic Opposition in the Russian Federation. Civil Society Awakens?, Ashgate, 2015, p. 15-34.
[24] As of August 28, 2019, Yabloko disposes of 5 deputy mandates in regional assemblies out of 3994 existing deputy mandates in all Russian regional assemblies confounded.
[25] According to article 36 of the federal law No. 95-FZ of 11.07.2001 "*On political parties*" and to article 35.1 of the federal law No. 67-FZ of 12.06.2002 "*On fundamental guarantees of electoral rights and rights to participation in referenda of citizens of the Russian Federation*".

elections[26]. It is also comprised, secondly, by political parties lacking State registration – such as Russia of the Future, Democratic Choice, Libertarian Party of Russia – and, therefore, unable to stand for elections or nominate their candidates directly without going through signature collection, also compulsory for individual candidates. Finally, there are numerous opposition activists that can stand for federal and regional elections after having collected a certain number of voters' signatures in favour of their candidacies, a quest that proves to be difficult in electoral authoritarianism. These actors aspire to acquire the legal status of registered candidates or State registered political parties that would enable them to stand for elections, or facilitate such a standing, and eventually participate in competition for political power. This endeavour proves to be difficult due to the Russian political regime's singularity.

1.2. A Basic Description of the Russian Political Regime

Defining democracy exclusively through conduct of "*free and fair*"[27] elections is generally recognized as a reductionist view[28] of political regime based on public participation in administration of government. At the same time, a democracy cannot exist without any meaningful[29] electoral process, the latter remaining, at least for the Council of Europe Member States, "*the irreplaceable core of democratic political life*"[30]. However, a grey zone can be sometimes observed between "*genuine elections*" and "*elections without choice*", comprising diverse variations of tainted elections that would be biased in favour of the ruling majority. They can be described in terms such as "*hybrid regime*", combining traits proper both to democracy and authoritarianism, "*competitive authoritarianism*" or "*electoral authoritarianism*"[31]. They refer to a regime type where alternative elections under universal suffrage are

[26] According to article 44 of the federal law No. 20-FZ of 22.02.2014 "On elections of deputies of the State Duma of the Federal Assembly of the Russian Federation".

[27] The qualification of "*free and fair*" elections refers here to a setting of internationally recognized standards of electoral law, comprising *a minima* generally "*genuine, periodic elections, by universal and equal suffrage held by secret ballot*", as summarized by DAVIS-ROBERTS (A.), CAROLL (D.J.), « Using International Law To Assess Elections », *Democratization*, Vol. 17, no 3, 2010, p. 422. For a detailed account of election standards accepted as such in public international law, see D'ASPREMONT (J.), *L'état non démocratique en droit international*, Paris, A. Pedone, coll. « Publications de la Revue Générale de Droit International Public – Nouvelle série », Vol. 57, 2008, p. 21-30.

[28] See for example Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993 or HRC, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments).

[29] A meaningful electoral process will usually suggest its alternative character (T. CHRISTAKIS, *Le droit à l'autodétermination en dehors des situations de décolonisation*, Paris, La Documentation française, 1999, 676 p.), as opposed to "*elections without choice*" practice (G. HERMET and al. (eds.), *Elections Without Choice*, Palgrave Macmillan, 1978, 250 p.).

[30] PACE, Resolution 800 (1983), "*Principles of Democracy*", 1.07.1983.

[31] S. LEVITSKY, L. A. WAY, *Competitive Authoritarianism. Hybrid Regimes after the Cold War*, Cambridge University Press, 2010, 493 p.; V. GEL'MAN, "The Rise and Decline of Electoral Authoritarianism in Russia", *Democratizatsiya: The Journal of Post-Soviet Democratization*, Vol. 22, No. 4, 2014, p. 503-522.

indeed held, yet electoral rules are grossly violated in favour of the ruling majority[32]. In such regimes, "*governments subject* [elections] *to manifold forms of authoritarian manipulation that violate the liberal-democratic principles of freedom, fairness and integrity*"[33].

Electoral malpractice in Russia under the presidency of Vladimir Putin[34] falls within the latter qualification, as "*elections are marked by an uneven playing field based on formal and informal rules that construct prohibitively high barriers to participation*" as well as various practices of misuse of administrative resources[35]. According to V. GEL'MAN, "*such elections have become a crucial test of survival for electoral authoritarian regimes: rulers must not only defeat their challengers in unfair elections, but also persuade both domestic and foreign audiences to acknowledge such victories and to mute criticisms about electoral unfairness*"[36]. Several key characteristics of Russian electoral law framework corroborate the latter qualification.

With respect to formal rules governing candidate registration, requirements for entry to political competition are lower for political parties than for individual candidates, and even lower for those political parties that already have representation in federal or regional legislatures[37]. Those political parties that lack current representation and individual candidates – those not nominated by political parties – are subject to collection of nomination signatures of citizens. While political parties,

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[32] A detailed definition of competitive authoritarianism proposed *in* S. LEVITSKY, L. A. WAY, "The Rise of Competitive Authoritarianism", *Journal of Democracy*, Vol. 13, No. 2, April 2002, p. 52, underlines that "*In competitive authoritarian regimes, formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority. Incumbents violate those rules so often and to such an extent, however, that the regime fails to meet conventional minimum standards for democracy*".

[33] A. SCHEDLER, "Introduction" in A. SCHEDLER, The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism, Oxford University Press, 2013, p. 2. For S. LEVITSKY and L. A. WAY, "Examples include Croatia under Franjo Tudjman, Serbia under Slobodan Milosevic, Russia under Vladimir Putin, Ukraine under Leonid Kravchuk and Leonid Kuchma, Peru under Alberto Fujimori, and post-1995 Haiti, as well as Albania, Armenia, Ghana, Kenya, Malaysia, Mexico, and Zambia through much of the 1990s", as enumerated in S. LEVITSKY, L. A. WAY, "The Rise of Competitive Authoritarianism", op. cit.

[34] International election observation missions sent by the Office for Democratic Institutions and Human Rights could namely denounce "*an overly controlled legal and political environment marked by continued pressure on critical voices*", "*restrictions on the fundamental freedoms of assembly, association and expression, as well as on candidate registration*" that resulted in "*a lack of genuine competition*" (OSCE/ODIHR, Russian Federation, Presidential Election, 18 March 2018, ODIHR Election Observation Mission Final Report, Warsaw, 6 June 2018, p. 1). A misuse of "*administrative resources*" and "*excessive registration requirements in order to stand for elections*", as well as "*undue advantage to the ruling party*" in media coverage were observed during 2016 State Duma elections (OSCE/ODIHR, Russian Federation, State Duma Elections, 18 September 2016, ODIHR Election Observation Mission Final Report, Warsaw, 23 December 2016, p. 2.).

[35] V. GEL'MAN, "The Rise and Decline…", *op. cit*., p. 504.

[36] Ibidem.

[37] Thus, a political party is dispensed from nomination signatures' collection for State Duma elections if it is already represented in the State Duma or had collected at least 3% of suffrages in last State Duma election or has at least one representative in any regional assembly (Article 44 of the federal law No. 20-FZ). For regional elections, a political party can directly nominate its candidates if it is already represented in a regional assembly concerned by an election or in any of the municipal assemblies in respective region or has collected at least 0,5% of suffrages in last regional assembly election (Article 35.1 of the federal law No. 67-FZ).

in order to nominate their party lists for federal and regional elections under the proportional representation system, must collect signatures of at least 0,5% of the electorate, the percentage is raised to 3% for individual candidates[38]. It remains at 300 000 nomination signatures for candidates for presidency[39]. For federal elections, proportionality requirements apply, as all nomination signatures cannot be collected in the very same region. Russian federal law establishes a rather complex procedure of their verification by electoral commissions, giving the latter a wide margin of appreciation. In this respect, "*members of the "non-systemic opposition" will come under much greater scrutiny than members of the loyal "systemic opposition" when they submit their registration documents to the electoral commissions*"[40]. Admission to stand for elections is "granted" mostly in cases where an independent candidate is more than likely to lose to a government-backed incumbent[41].

Such double standard review triggered mass protests and numerous appeals of the electoral commission's decisions during summer 2019, when after July 6, 2019, Moscow city electoral commission had denied registration to numerous independent candidates from the extra-parliamentary opposition on the grounds of fake nomination signatures or graphic irregularities in subscription lists, challenged as bogus by the candidates concerned[42]. A similar trend can be observed in the law enforcement practice regarding political party registration, a subject that is extensively discussed below.

Notwithstanding double standard review and high barriers for entry to the political competition field, extra-parliamentary opposition groups are willing to overcome the restrictions imposed and to participate in election process, as flawed as it may be. Their objective is to foster regime change by playing by the rules of electoral authoritarianism. Cases of attempts to register as a candidate or as a political party by oppositionists emerge every electoral cycle and comprise numerous attempts of Alexey Navalnyy's team to obtain State registration for "Russia of the Future" political party, to the aforementioned individual candidates that appeal electoral commission refusals on regular basis. However, article format would be inappropriate

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[38] In particular, 200 000 signatures for the State Duma elections, maximum 7 000 of which can be collected in one region, according to Article 44 of the federal law No. 20-FZ. The requirement of 3% applies only on regional scale and is at odds with Venice Commission's guidelines on the matter, prescribing collecting nomination signatures of maximum 1% of electorate if such system is applicable (Rule 1.3 of the *Code of Good Practice in Electoral Matters*, Venice Commission, 18-19 October 2002, CDL-AD(2002)023rev2-cor).

[39] Article 36 of the federal law No. 19-FZ of 10.01.2003 "*On elections of the President of the Russian Federation*" requires collection of 300 000 nomination signatures nationwide, maximum 7500 of which can be collected in one region.

[40] C. ROSS, "Regional elections in Russia…", *op. cit*.

[41] Examples of such cases include Moscow mayoral election of 2013, where Alexey Navalnyy's conviction was suspended in order for him to run for mayor of Moscow, only to come second after Sergey Sobyanin, the incumbent, as well as Kostroma regional election of 2016, where PARNAS' candidates were allowed to compete in a region with little to none support to "*non-systemic opposition*" (Ibidem).

[42] A. BAUNOV, "Moscow's Crisis Is Now Russia's Crisis", *Carnegie Moscow Center*, 8.08.2019. URL: https://carnegie.ru/commentary/79633.

for a comprehensive analysis of all the means being used; a delimitation of the subject matter is therefore required.

1.3. A Narrow Delimitation: Focus on political litigation cases brought before the ECtHR

Given possible drawbacks of electoral justice administration on the national level, a "*reluctance to seek legal redress because of a lack of trust in the legal system and lack of belief that an effective remedy would be provided*"[43] can appear. In this context, a search for external and impartial dispute resolution mechanism in order to vindicate the rights violated would suggest bringing the extra-parliamentary opposition's claims before the ECtHR. Indeed, in numerous Russian cases concerning activities of the extra-parliamentary opposition, the Strasbourg Court ruled in favour of the latter[44], ordering individual redress, as well as calling for comprehensive reforms of Russian laws on the freedom of public association, political party registration, including on due process requirements impacting passive electoral rights. A significant contribution to ECtHR's interference with Russian extra-parliamentary opposition was made by applications lodged by Alexey Navalnyy, that succeeded in Strasbourg Court, as it recognised an ulterior political motive in arrest and detention practices in his respect and to hold the Russian Federation accountable for violation of Article 18 of the ECHR[45]. A subtotal of Navalnyy's interactions includes six applications, mostly collective, five of which have already resulted in the Russian government's condemnations[46]; one application is still pending[47].

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[43] OSCE/ODIHR, Russian Federation, Presidential Election, 4 March 2012, OSCE/ODIHR Election Observation Mission Final Report, Warsaw, 11 May 2012, p. 2; with respect to complaints before electoral commissions, see OSCE/ODIHR, Russian Federation, Elections to the State Duma, 4 December 2011, OSCE/ODIHR Election Observation Mission Final Report, Warsaw, 12 January 2012, p. 15: "*The entire process of resolving complaints at the CEC lacked transparency and did not afford complainants the right to an effective or timely remedy*". An absence of thorough investigation of electoral malpractice was denounced in OSCE/ODIHR, Russian Federation, State Duma Elections, 18 September 2016, ODIHR Election Observation Mission Final Report, Warsaw, 23 December 2016, p. 20).

[44] Most notably *in* ECtHR (section), *Republican Party of Russia v. Russia*, nº 12976/07, Judgment, 12 April 2011; ECtHR (section), *Lashmankin and others v. Russia*, nºs 57818/09 and al., Judgment, 7 February 2017; ECtHR (Grand Chamber), *Navalnyy v. Russia*, nºs 29580/12 and al., Judgment, 15 November 2018.

[45] ECtHR (Grand Chamber), *Navalnyy v. Russia*, nºs 29580/12 and al., Judgment, 15 November 2018; ECtHR (section), *Navalnyy v. Russia (No 2*), nº 43734/14, Judgment, 9 April 2019.

[46] ECtHR (section), *Navalnyy and Yashin v. Russia*, nº 76204/11, Judgment, 4 December 2014; ECtHR (section), *Navalnyy and Ofisterov v. Russia*, nºs 46632/13 and 28671/14, Judgment, 23 February 2016; ECtHR (section), *Navalnyye v. Russia*, nº 101/15, Judgment, 17 October 2017; ECtHR (Grand Chamber), *Navalnyy v. Russia*, nºs 29580/12 and al., Judgment, 15 November 2018; ECtHR (section), *Navalnyy v. Russia (No 2*), nº 43734/14, Judgment, 9 April 2019.

[47] ECtHR (section), *Navalnyy and Ofitserov v. Russia (No 2)*, nº 78193/17, Communicated case, communicated on 21 December 2017.

The article's focus is on the cases brought before the ECtHR by the extra-parliamentary opposition activists in order to secure or to obtain a certain legal status that would enable them to participate in political competition or to conduct political activity. These cases are discussed in broader context of interactions between the national election law and the European law on human rights, with special attention to issues of execution of the judgments analysed.

1.4. The Research Question: A quest for a legal status through political litigation?

A recourse to the Strasbourg Court as an ultimate adjudicator of the quality of Russian electoral competition suggests inquiring on its effectiveness. Indeed, to what extent making a case before the ECtHR constitutes effective strategic litigation for Russian extra-parliamentary opposition in its quest for a legal status under electoral authoritarianism? *Ex post*, an overview of its interactions with the Strasbourg Court and with the Committee of Ministers of the Council of Europe infers a strategy of political litigation and publicising thereof. However, the Russian government, when faced with an unfavourable outcome of international judgment, uses a strategic approach to the issue of their execution within the margin of appreciation, demonstrating an example of "*rational choice between normative constraints*"[48]. Such action relativizes estimated inputs of political litigation before the ECtHR.

The usage of political litigation by the Russian extra-parliamentary opposition can be verified through two main scenarios of development of its legal status. **Part 2** deals with the best yet difficult scenario of gaining legal status under the electoral law for the extra-parliamentary opposition as a collective entity, namely a political party. **Part 3** explores a scenario of the opposition leader – Alexey Navalnyy – as an individual candidate for a public office, scenario that had been made impossible by his several convictions. Finally, the **conclusion** discusses symbolic and political outputs of political litigation and their relevance for the legal status of the extra-parliamentary opposition.

2. THE EXTRA-PARLIAMENTARY OPPOSITION AS A POLITICAL PARTY: AN IMPERFECT VICTORY BEFORE THE STRASBOURG COURT

Under Russian electoral law, using mixed parallel voting system both on the federal and on the regional levels, political parties are of paramount importance. The Russian law on political parties subject the latter to dense regulation, as well as to continuous supervision by public authorities. According to the federal law No. 95-FZ, as amended in 2012, political party creation in Russia is generally free, the only

[48] VON STADEN (A.), Strategies of Compliance with the European Court of Human Rights: rational choice within normative constraints, Philadelphia, University of Pennsylvania Press, 2018, 352 p.

restriction being the ban on parties based on professional, racial, ethnic or religious affiliation[49]. However, its existence is conditioned upon creation of regional branches in at least 43 subjects of the Russian Federation out of 85; moreover, it should count at least 500 members overall[50]. There are no membership requirements for regional branches' establishment. Finally, in order for a political party to stand for elections, it should become a State registered legal entity[51]. Such registration should be automatic upon presentation of respective application form, charter and program of the political party, documents certifying validity of regional branches' creation and their members, publication on the political party's constitutive assembly held prior to its registration, as well as on similar regional assemblies[52]. Once these requirements are fulfilled, political parties are nevertheless subject to monitoring on behalf of "*competent authorities*", namely through triennial verification of political parties' membership and of the regional branches' actual existence[53]. Authorities can also petition for political party's suspension or dissolution in case of lack of "*compliance of political party, its regional branches and other structural units with provisions, aims and objectives provided in the charters of political parties*"[54]. The federal law on political parties goes far beyond financial accountability and requires detailed information on "*the continuation of its activities*", as well as access of federal government's observers to its every public event[55].

At a glance, these regulations offer little relief for the discussed groups of the extra-parliamentary opposition whose support is concentrated in large cities, being rather low nationwide. While there is no explicit legal prohibition of regional parties, nationwide reach is a legal condition of acquisition of the political party's legal statute, as well as of its continued existence. A political party can have its State registration suspended for failure to show compliance with the membership requirements[56].

Prior to the federal law No. 28-FZ of 2 April 2012 that amended the federal law on political parties No. 95-FZ, the latter translated a much more restrictive approach to their formation (2.1). Amendments came with the December 2011 protest movement, as well as with the extensive review of the Russian legislation on political parties by the European Court of Human Rights and by the Venice Commission (2.2). This resulted in hesitant but satisfactory action by the government, particularly by lowering membership requirements (2.3). In general, 2012 amendments facilitated applications by extra-parliamentary opposition groups to constitute political parties, thus enabling them to acquire the necessary legal status in order to stand for elections. However, current law enforcement practice leaves a wide margin of discretion to

[49] Article 9 of the federal law No. 95-FZ, compatible with the Constitution (Constitutional Court of the Russian Federation, No. 18-P, Ruling, 15 December 2004) and the ECHR (ECtHR (section), *Artyomov v. Russia*, nº 17582/05, Judgment, 7 December 2006).
[50] Article 3 § 2 of the federal law No. 95-FZ.
[51] Article 15 of the federal law No. 95-FZ.
[52] Article 16 of the federal law No. 95-FZ.
[53] Article 38 of the federal law No. 95-FZ.
[54] Article 16 of the federal law No. 95-FZ.
[55] Article 27 of the federal law No. 95-FZ.
[56] Article 20 § 1 of the federal law No. 95-FZ.

public authorities in respect of control of administrative formalities. Combined with usage of administrative resource, such law enforcement practice can enable the Ministry of Justice to prevent registration of undesired political parties, notably of "Russia of the Future" party chaired by Alexey Navalnyy (2.4).

2.1. Prologue : new political parties unwelcome

"*Whatever public organisation we create, it turns out to be yet another Communist Party of the Soviet Union*"

Viktor Chernomyrdin, Prime Minister of Russia, 1992-1998

Before the 2014 reform reinstating mixed non-compensatory electoral system, PR system had been exclusively applied for the State Duma elections[57]. It raised drastically the importance of political parties, sole institutions having access to the process of candidate nomination. At the same time, the federal law on political parties clearly aimed at preventing "*the electorate to be disoriented and their votes to be diluted*" due to an "*excessive party fragmentation*"[58], setting rather demanding membership requirements. Starting with 10.000 members in 2001, it came progressively to its peak of 50.000 members between December 2004 and January 1, 2010, to reach 40.000 members after January 1, 2012. In addition, the federal law set matching regional representation requirements, starting from creating regional branches in more than half of the subjects of the Russian Federation, one of which having had to count at least a hundred members, and at least fifty members for each other branch. It raised to five hundred for the head branch and two hundred and fifty members for every other branch in 2010 and gradually decreased to four hundred and one hundred and fifty members respectively after January 1, 2012[59]. In such circumstances, "*only one new political party, the Right Cause, obtained registration in 2009, and could run for the elections*"[60].

Moreover, the law provides for extensive requirements of intra-party democracy. For instance, a political party can be denied registration if its charter does not contain all the elements and descriptions of procedures for intra-party democracy as prescribed by the federal law[61]. Amending party's charter can appear burdensome, as "[c]*hanges made to the charter of political parties are subject to state registration*

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[57] As established by article 3 of the federal law No. 51-FZ of 18.05.2005 "*On elections of deputies of the State Duma…*" (abolished).

[58] *Raison d'être* of Russian law on political parties as explained by V. LAPAEVA, "Criteria for the restriction of the right of citizens of the Russian Federation to create a political party (in the framework of the European standards of the rule of law)" *in* Venice Commission in co-operation with the Constitutional Court of the Russian Federation, *Conference on "Political Parties in a Democratic Society: Legal Basis of Organisation and Activities",* Council of Europe, 27-28 September 2012, p. 55. URL: https://www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2014)003-bil (in Russian).

[59] Article 1, Federal law No. 75-FZ of 28.04.2009 "On introducing amendments to the Federal law "On political parties" due to gradual decrease of minimum membership requirements for political parties".

[60] Venice Commission, *Opinion on the Law on Political Parties of the Russian Federation*, No. 658/2011, 20 March 2012, CDL-AD(2012)003, p. 3.

[61] Article 20 § 1 a) of the federal law No. 95-FZ.

in the same manner and at the same time as the state registration of the political party"[62]. The same applies to the program of political party and changes thereof[63]. The federal law also provides for general procedures of internal decision-making, namely concerning candidate nomination and party's organisational structure[64]. Monitoring obligations were imposed upon parties, submitting thems to annual accountability. The part of the federal law regulating intra-party democracy "survived" after the 2012 amendments.

Criticism of territorial representation and membership threshold as requirements blocking emergence of new political parties that are "*strangled at birth*"[65] became recurrent in the critical Russian constitutional law scholarship[66]. While conceding that there is a legitimate aim to prevent excessive fragmentation pursued by the government, it was suggested that such regime would be at odds with the article 13 § 3 of the Constitution, stipulating that "*In the Russian Federation political diversity and multi-party system shall be recognized*". Such interpretation was not nevertheless backed by the Constitutional Court that upheld previous law on political parties twice.

In the "Baltic Republican Party" case, the Court ruled that the ban on regional parties is legitimate as it is "*necessary for the protection of constitutional values*" according to the limitation clause contained in the Constitution (article 55 § 3)[67]. The ruling underlines a wide margin of discretion on the matter conferred upon the legislator, validating his action as legitimate, as it prevents "*fragmentation of political forces*" and eliminates a potential threat of regional parties to the State's territorial integrity[68]. The Court's *obiter dictum* was deemed however to reassure the reader, as "*such limitation is temporary and should be lifted after disappearance of circumstances presiding introduction thereof*"[69].

The Constitutional Court had another occasion to confirm its stance in the "Russian Communist Labour Party" ruling; the aforementioned *dicta*, however, disappeared from the motivation[70]. Both rulings apply necessity and proportionality test and verify if the legal limitation does not restrict the right to create political parties

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[62] Ibidem, article 21 § 4.
[63] Ibidem, article 22 § 2.
[64] Ibidem, article 25.
[65] Venice Commission, Opinion on the Law on Political Parties of the Russian Federation, op. cit.
[66] See for example O. Yu. PETROVA, Multi-party system in the Russian Federation: aspects of constitutional law, Volgograd, Volgograd MVD Academy, 2004, 259 p.; S. N. DOROFEYEV, Evolution of the legal status of political parties in the Russian Federation and in Germany: comparative legal study, Moscow, MGIMO-University, 2007, 196 p.; on territorial representation requirement, see S. E. ZASLAVSKY, Political parties in Russia: process of legal institutionalization, Moscow, RANEPA, 2004, 405 p.; M. L. LUGOVSKAIA, Legal regulation of participation of political parties in electoral process in the Russian Federation, Moscow, RANEPA, 2003, 187 p. (in Russian).
[67] Constitutional Court of the Russian Federation, "*Baltic Republican Party*", No. 1-P, Ruling, 1 February 2005.
[68] Ibidem, § 3.1.
[69] Ibidem, § 3.3.
[70] Constitutional Court of the Russian Federation, "*Russian Communist Labour Party – Russian Party of Communists*", No. 11-P, Ruling, 16 July 2007.

in a way to annihilate its very existence[71]. The first ruling, however, focuses mainly on prohibition of regional parties as a means for the Russian emerging democracy to defend itself[72]. In turn, the second one dismisses the unconstitutionality claim concerning membership thresholds on the grounds that they "*are not discriminatory as they are not preventing the emergence of various political programs and concern all public associations in equal manner* […], *irrespective of their* […] *ideology*, *aims and objectives*"[73].

The caselaw of the Constitutional Court offered little relief both for small associations willing to stand for elections, as well as for political parties unable to sustain an existence that would be in conformity with the legal requirements. Consequently, dissolutions continued at a steady pace, dropping from 32 parties having State registration in 2006 to only seven in 2011[74].

2.2. First challenge: the case of Republican Party of Russia

One of the parties dissolved in 2007 failed to meet legal requirements while submitting amendments to its charter, changing the party's address and adding several regional branches. Founded back in 1990, the party in question became the "Republican Party of Russia" (RPR) in 2002, aiming to pursue liberal agenda. A general assembly was held in December 2005 in order to make changes in its leadership. Irregularities in reports on regional conferences and their membership, nominating delegates to the party's general assembly, – the only legal means to amend the charter – had proved to be flawed. Hence, the Ministry of Justice – the "*competent authority*" – conducted an investigation on the party's compliance with the federal law[75], an investigation that triggered its dissolution on March 23, 2007. Following upheaval of the dissolution before the Appellate Collegium of the Supreme Court, the RPR lodged an application before the European Court of Human Rights. It resulted in a landmark victory for a party that claimed its dissolution to be motivated by lack of its loyalty towards the Kremlin, as well as opposition activities[76]. Though preceding the rise of the extra-parliamentary opposition in December 2011, the RPR had

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[71] Ibidem, § 3.2; Constitutional Court of the Russian Federation, "*Baltic Republican Party*", No. 1-P, Ruling, 1 February 2005, § 4.

[72] A distant analogy could be drawn with the concept of "*la démocratie apte à se défendre*" or "*militant democracy*", coined after ECtHR (Grand Chamber), *Refah Partisi and Others v. Turkey*, n[os] 41340/98, 41342/98, 41343/98 et al., Judgment, 13 February 2003. See for istance S. TYULKINA, *Militant Democracy : Undemocratic Political Parties and Beyond*, New York, Routledge, 2015, 227 p.

[73] Constitutional Court of the Russian Federation, "*Russian Communist Labour Party – Russian Party of Communists*", No. 11-P, Ruling, 16 July 2007, § 3.3.

[74] "Seven Legals. All the parties will participate in the State Duma elections", *Lenta.ru*, 28 October 2011. URL: https://lenta.ru/articles/2011/10/28/sept/ (in Russian).

[75] "Republican Party of Russia counts on successful re-registration by the Ministry of Justice, *IA Regnum*, 16 September 2005. URL: https://regnum.ru/news/polit/513875.html (in Russian).

[76] State Duma Deputy Vladimir Ryzhkov: "We are not ready to go underground where the authorities want to put us", *Ryzhkov.ru*, 27 March 2007. URL: http://ryzkov.ru/index.php?option=com_content&view=article&id=17023&catid=26:2012-01-24-07-46-59&Itemid=2 (in Russian).

participated in various liberal coalitions, stating their opposition to the presidency of Vladimir Putin.

Contrary to the approach of the Russian Constitutional Court, using mostly rational basis test with some proportionality assessment, the ECtHR traditionally applies strict scrutiny test to the matters relating to dissolution of political parties. Its constant caselaw suggests that "*the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation*"; accordingly, "[d]*rastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases*".[77] The latter occasions would mostly concern imminent threats to democracy posed by a political party's ideology and action[78]. In the RPR case, the Strasbourg Court maintained its approach, refusing "*to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith*" and undertaking to "*look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient*"[79].

The Court first dealt with the requirement to submit, in order to amend the party's charter, the same set of documents that is required upon registration of a new party. As this requirement is worded in the federal law as applying only to new political parties, without precision as to amending procedure, the ECtHR had little trouble establishing the lack of clear basis of such requirement in the domestic law[80]. Discussing, secondly, the issue of intra-party democracy[81], namely the lack of compliance with provisions on regional conferences' tenure, the Strasbourg Court found "*no justification for the registration authority to interfere with the internal functioning of the applicant to such an extent*", with no domestic law regulation for convening regional conferences or electing delegates for the general conference enacted[82].

Turning to the dissolution of the Republican Party, the Court accepted the Government's assessment of legitimate aims pursued by the legislator, the latter's

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[77] ECtHR (Grand Chamber), *Refah Partisi and Others v. Turkey*, n^{os} 41340/98, 41342/98, 41343/98 and al., Judgment, 13 February 2003, § 100.
[78] ECtHR (section), *Herri Batasuna and Batasuna v. Spain*, n^{os} 25803/04 and 25817/04, Judgment, 30 June 2009, § 81-83.
[79] ECtHR (section), *Republican Party of Russia v. Russia*, n^{o} 12976/07, Judgment, 12 April 2011, § 77.
[80] Ibidem, § 85.
[81] The Strasbourg Court accepts interferences with political parties' internal structure provided that they respect the condition of proportionality and are not as far-reaching as to actually enforce party's internal documents upon it. See, for instance, for violation of the article 11 found in respect of party dissolution on the grounds of breaches of legal requirements on the internal management, particularly related the issue of equal representation of local branches in party's general assembly: ECtHR (section), *Tebieti Muhafize Cemiyyeti and Israfilov v. Azerbaijan*, n^{o} 37083/03, Judgment, 8 October 2009, §§ 73-78.
[82] ECtHR (section), *Republican Party of Russia v. Russia*, n^{o} 12976/07, Judgment, 12 April 2011, § 88.

argumentation following the same reasoning as established in the caselaw of the Russian Constitutional Court. The ECtHR observed however, in application of its constant jurisprudence, that nothing in the circumstances of the case precluded qualifying RPR as democratic insofar as it constituted no threat to democracy and to "*rights and freedoms of others*"[83]. Turning to the legitimacy of dissolution on the grounds of noncompliance with membership requirements, the Strasbourg Court was not convinced with justifications advanced by the government, as excessive party fragmentation could be prevented by 7% threshold applied in the State Duma election combined with nomination signatures requirement for parties not represented in the Duma. Therefore, an extra restriction in federal law on political parties would be unnecessary[84].

While criticising Russian law on political parties, the Court delved into comparative law exercise, noting that the regime discussed is one of the most restrictive among the Council of Europe Member States. The aim to foster emergence of large-scale parties did not convince the majority of the judges either, as "*the voters' choice must not be unduly restricted and different political parties* [– even minority ones –] *must be ensured a reasonable opportunity to present their candidates at elections*"[85]. The same reasoning applied to audit obligations, pointing that "[i]*f these annual inspections are aimed at verifying whether the party has genuine support among the population, election results would be the best measure of such support*" [86]. Finally, the Strasbourg Court rejected the government's claim as to the ban on regional parties as a means of protecting territorial integrity. Not only the comparative law exercise does not corroborate the Russian approach with similar examples, but the very "*democratic transition*" claim was deemed to be unsustainable since 2001, long after the actual democratic transition in the early 1990s. Concluding its vigorous criticism, the Court's majority stated that "[t]*he present case is illustrative of a potential for miscarriages inherent in the indiscriminate banning of regional parties, which is moreover based on a calculation of the number of a party's regional branches. The applicant, an all-Russian political party which never advocated regional interests or separatist views* […] *was dissolved on the purely formal ground of having an insufficient number of regional branches. In those circumstances the Court does not see how the applicant's dissolution served to achieve the legitimate aims cited by the Government* […]"[87].

The judgment, rendered in the State Duma election year, is of paramount importance for the extra-parliamentary opposition groups whose prospects of gaining the legal status of a political party were previously upset by the demanding federal law. A disproportionate burden put on associations in order to gain the legal status of a political party had been recognised explicitly. At the same time, although dealing with such extensive requirements for the first time, the Strasbourg Court exercised its

[83] Ibidem, § 103.
[84] Ibidem, § 113.
[85] Ibidem, § 114.
[86] Ibidem, § 115.
[87] Ibidem, § 130.

review according to its constant caselaw and standards that had been established in previous cases.

2.3. *The Government's Response: a hesitant execution*

Although warmly welcomed by the opposition activists, the Republican Party of Russia judgment caused initial hesitations, as it found violation of the article 11 in the enforcement of requirements that were deemed constitutional twice[88]. Former Constitutional Court judge B.S. Ebzeyev denounced an "*extremely tendentious interpretation by the ECtHR of fundamental bases of our legal life and of our social and political reality, questioning Russia's sovereignty*" and attaining the Russian Constitution even "*on plausible pretext*"[89]. He even suggested a procedure of constitutional review of ECtHR's judgments by the Constitutional Court, something that would be implemented in 2015[90]. This position was backed by the President of the Constitutional Court, Valery Zorkin, suggesting that, when facing such "*political*" cases, "*Russia has the right to develop a defence mechanism against these decisions*"[91]. Back in April 2010, after the case was communicated, the State Duma deputy and vice-president of the law committee A. Moscalets even stressed that "*ECtHR's judgment is not the reason we should change the law on parties. We have our own Constitution, our own legal field. Our electoral law is much more advanced, beyond comparison*"[92].

However, the December 2011 protests urged the government to make a step forward the demands formulated by the non-systemic opposition groups[93]. Radical change of the government's attitude towards the case "*in the wake of mass protest demonstrations*"[94] suggests that the judgment's execution had been triggered by domestic political context. Lack of coherence in authorities' action seems to corroborate such understanding. For instance, December 16, 2011, the Ministry of

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[88] This was the second case where the ruling on constitutionality of the federal legislation by the Russian Constitutional Court was followed by the ECtHR judgment finding breach of the Convention. See ECtHR (section), *Konstantin Markin v. Russia*, nº 30078/06, Judgment, 7 October 2010, later referred to the Grand Chamber (ECtHR (Grand Chamber), *Konstantin Markin v. Russia*, nº 30078/06, Judgment, 22 March 2012).

[89] B.S. EBZEYEV, "Judgment of the European Court of Human Rights in the case of "Republican Party of Russia v. Russia", or forfeited illusions of harmonious continuity of pan-European legal standards", *Journal of Russian Law*, Vol. 180, No. 12, 2011, p. 545-555.

[90] Federal constitutional law No. 7-KFZ of 15 December 2015 amending the federal constitutional law No. 1-FKZ "On the Constitutional Court of the Russian Federation". For a commentary, see Venice Commission, *Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation*, No. 832/2015, 15 March 2016, CDL-AD(2016)005, 26 p.

[91] Cited *in* Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2012)25, Rule 9.1 Comm. from the applicants (14.12.2011), Communication from the applicant's representative (memorandum) in the case of Republican Party of Russia against Russian Federation (Application No. 12976/07), 14 December 2011, p. 2.

[92] "Endeavouring sovereign arbitrariness", *Vedomosti*, 20 May 2011. URL: https://www.vedomosti.ru/opinion/articles/2011/05/20/morkov_i_moral (in Russian).

[93] D. BATTY, "Russian election protests – Saturday 10 December 2011", *The Guardian*, 10 December 2011. URL: https://web.archive.org/web/20130114235300/http://www.guardian.co.uk/global/2011/dec/10/russia-elections-putin-protest.

[94] C. ROSS, "Regional elections in Russia…", *op. cit*.

Justice maintained its refusal to reinstate RPR's registration[95], following Minister of Justice's position that, in order to acquire political party status, it should "*undergo the entire procedure administered at a state registration of a newly established political party*"[96]. At the same time, its non-registration triggered action from the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, requesting, on December 15, 2011, the Venice Commission to issue an opinion on the Russian law on political parties[97]. On December 22, 2011, President Dmitry Medvedev announced further liberalisation of the law on political parties, giving way to the opposition's demands[98]. His propositions were later reflected in April 2012 amendments.

As for international pressure, it is not until the spring of 2012 that the consultation process between the Venice Commission and the Russian government had commenced. The former's opinion formulated in March 2012 prior to the amendments' introduction followed the criticism expressed by ECtHR. It advocated for lowering membership requirements considerably, as well as for reduction or abandonment of the territorial representation requirements, as "*not all Russian regions are of equal size and accessibility. Failure of a party to win support in every region is therefore not always necessarily due to regional considerations. In most political systems, support for most parties will not be evenly distributed throughout the country*"[99]. In practice, whereas numeric requirements had been lowered significantly, a political party still has to register its regional branches in at least ½ of subjects of the Russian Federation.

The Commission also criticised substantive regulation of intra-party decision-making and articles on "*control over activity of political parties*", establishing annual accountability obligations. For the Commission, "[t]*he bureaucratic control over the political parties, as well as the submission of documents including details about every member of the political party to the Minister of Justice, may have a chilling effect on individual membership and on the registration of political parties*"[100]. Consequently, it recommended a substantive reduction of accountability obligations and transfer of the supervision competence to an independent authority. However, apart from replacing annual audit by triennial accountability, requirements concerning internal functioning of political parties remained practically intact.

Finally, the Commission proposed liberalising the federal law as per effects of lack of relevant documentation, suggesting an "*opportunity to complement the*

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[95] Cited *in* Supreme Court of the Russian Federation, case No. GKPI07-293, Judgment, 23 January 2012.
[96] Cited *in* Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2012)25, Rule 9.1 Comm. from the applicants (14.12.2011), Communication from the applicant's representative (memorandum) in the case of Republican Party of Russia against Russian Federation (Application No. 12976/07), 14 December 2011, p. 2.
[97] Venice Commission, *Opinion on the Law on Political Parties of the Russian Federation*, No. 658/2011, 20 March 2012, CDL-AD(2012)003, p. 2.
[98] "President's address to the Federal Assembly", *Official website of the President of the Russian Federation*, 22 December 2011. URL: http://kremlin.ru/events/president/news/14088 (in Russian).
[99] Venice Commission, Opinion on the Law on Political Parties of the Russian Federation, op. cit., p. 6.
[100] Ibidem, p. 11.

required documents in case they have been found deficient"[101]. The latter provision had been reflected in amendments proposed to the article governing State registration of political parties, granting the latter, if a lack of documentation was observed by the Ministry of Justice, a deadline of three months to complete their respective application forms[102]. Whereas compliance with the Venice Commission's recommendations was clearly imperfect, the reform, as well as individual redress, constituted a full execution of the ECtHR's judgment as required by article 46 § 1 ECHR[103].

Even if prevented from participation in the 2012 presidential election due to protracted adoption of individual measures[104], the RPR still remains the only extra-parliamentary opposition party that has secured its legal status through action before the ECtHR. On 23 January 2012, the Supreme Court quashed its 2007 judgment on the party's dissolution and finally reversed it on 19 April 2012; on 5 May 2012, the Ministry of Justice reinstated RPR's State registration[105]. Thanks to liberalised legislation, more political parties could emerge: at least 30 parties could obtain State registration during summer 2012[106]. Nevertheless, several parties were denied State registration on various grounds. The party of Alexey Navalnyy, currently existing as public association "Russia of the Future", is a true champion of State registration denials on various grounds, having received negative answers for nine times[107]. The case of "Russia of the Future" underlines several drawbacks of enforcement practice of the law on political parties that makes possible a *de facto* ban on undesired opposition parties.

2.4. What Has Been Left Behind: restrictive law enforcement practice

A liberalised framework for State registration of political parties can however be applied restrictively in cases when particularly undesirable extra-parliamentary opposition groups seek to obtain the legal status of political party. The grounds for denials in case of Alexey Navalnyy's party, whose first xxgeneral assembly dates back to December 2012, are numerous and seek both deterring political party registration through exposing the latter to burdensome appeals, as well as preventing its registration as such by using extensive administrative resources.

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[101] Ibidem, p. 13.
[102] Article 15 of the federal law No. 95-FZ.
[103] Committee of Ministers (Council of Europe), Resolution CM/ResDH(2017)354, Execution of the judgment of the European Court of Human Rights, Republican Party of Russia against Russian Federation, Adopted by the Committee of Ministers on 17 October 2017 at the 1297th meeting of the Ministers' Deputies.
[104] The possibility of protracted adoption of general measures was envisioned in applicants' communication to the Council of Ministers, urging the latter to exercise pressure on the Russian government. See Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2012)25, Rule 9.1 Comm. from the applicants (14.12.2011), Communication from the applicant's representative (memorandum) in the case of Republican Party of Russia against Russian Federation (Application No. 12976/07), 14 December 2011.
[105] Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2017)874, Communication from the Russian Federation concerning the case of REPUBLICAN PARTY OF RUSSIA v. Russian Federation (Application No. 12976/07), Updated Action Report, 17 August 2017.
[106] V. PETRISCHEV, "New political parties and electoral process", *Journal on elections*, No. 4, 2012, p. 33-36.
[107] As counted by Navalnyy himself, see "They won't steal Russia of the Future from us", *Navalnyy Official Website*, 27 May 2019. URL: https://navalny.com/p/6141/ (in Russian).

Nevertheless, no strategic litigation before the ECtHR has been initiated after the 2012 reform.

First, contrary to the European Court's ruling in the *RPR* case on interference with intra-party decision making process, first refusal to deliver State registration, issued on July 5, 2013, was grounded in the party's failure to comply with the exact terms of its charter concerning nomination of regional delegates to the general assembly of the organisation[108]. This decision had not however been appealed.

As for deterring political party registration, its suspension with the possibility to complete the application had been used extensively throughout registration process of Navalnyy's party, then "Party of Progress". While it was indeed registered as a political party on February 19, 2014, on April 2, 2014, the Ministry of Justice issued a warning observing irregularities in the regional branches' registration. As article 15 of the federal law on political parties establishes a deadline of six month in order to remedy such irregularities for an already registered political party, the "Party of Progress" had until August 25, 2014, to complete regional branches' registration. However, Navalnyy's party faced more than 150 denials of regional branches' registration by regional representations of the Ministry of Justice on bureaucratic or even typographic grounds, such as misuse of inter-word spaces or irregularities in passport data of the applicants[109]. The appeals before regional courts, at least 70 at the beginning of August 2014, buried the registration procedure in litigation[110], extending the deadline and culminating in annulment of the State registration by the Ministry of Justice on the basis of article 15 § 6 of the federal law on April 28, 2015. No application to the ECtHR had been filed pursuant the refusal, even if the possibility was largely discussed among party members[111].

Finally, lowering barriers for political parties' registration facilitated creation of micro-parties by political managers deemed close to the President's Administration, most notably by the professional party creator A. V. Bogdanov[112]. Such opportunity was used to generate a practice of the literal "name stealing" of parties chaired by Alexey Navalnyy. This explains frequent change of the party's name. For instance, the second refusal to register Navalnyy's party was grounded in the existence of another party with the same name, "Popular Alliance", as a micro-party "Homeland", chaired by A. V. Bogdanov, rapidly adopted it in November 2013.

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[108] "On denial of State registration of all-Russian political party "Popular Alliance", *Popular Alliance Official Website*, 12 July 2013. URL: https://web.archive.org/web/20131128043346/http://peoplesalliance.ru/press/news/ob_otkaze_v_gosudarstvennoj_registracii_vpp_narodnyj_alyans/# (in Russian).

[109] V. DERGACHYOV, D. ROZANOV, "Party of Progress relies on the ECtHR", *Gazeta.ru*, 8 August 2014. URL: https://www.gazeta.ru/politics/2014/08/08_a_6167777.shtml?updated (in Russian).

[110] Ibidem. On the specificity of Russian system of administration of justice, see K. HENDLEY, "Telephone Law" and the 'Rule of Law': The Russian Case", *Hague Journal on the Rule of Law*, Vol. 1, No. 2, 2009, p. 241-262.

[111] V. DERGACHYOV, D. ROZANOV, "Party of Progress relies on the ECtHR", *Gazeta.ru*, 8 August 2014. URL: https://www.gazeta.ru/politics/2014/08/08_a_6167777.shtml?updated (in Russian).

[112] "Impeding opposition parties is just a business", interview with Marina Litvinovich, *Kommersant FM*, 28 November 2013. URL: https://www.kommersant.ru/doc/2354562 (in Russian).

Such change was promptly reflected in the record of Ministry of Justice[113]. The manoeuvre was repeated in March 2018, when Bogdanov's "Civic position" filed an application to constitute a new political party on its basis, under the name "Party of Progress", used by Navalnyy's association from 2014 to 2018. Consequently, the seventh general assembly, scheduled in March 2018 was disrupted[114]. Finally, after having adopted "Russia of the Future" name, Navalnyy's party faced denial for the ninth time, on May 27, 2019, due to the existence of a political party registered under the same name[115]. In sum, general measures pursuant the execution of *Republican Party of Russia v. Russia* judgment, could not in themselves offer any significant relief for the extra-parliamentary opposition.

3. THE EXTRA-PARLIAMENTARY OPPOSITION AND ITS LEADER: SECURING INDIVIDUAL CANDIDACY THROUGH LITIGATION BEFORE THE ECtHR?

Lacking affiliation a with political party, opposition activists can still stand for elections as individual candidates. They can do so upon presentation of the required nomination signatures[116]. However, different restrictions to individual candidacies apply, particularly those related to citizen's criminal conviction and records. For instance, Russian framework federal law on electoral rights and freedoms of 12 June 2002 denies the right to vote and to stand for elections for persons lacking legal capacity and for convicted prisoners[117]. These restrictions were completed in 2012 by blanket and perpetual interdiction for citizens that had been previously convicted for felony to stand for elections[118], a measure deemed however too harsh by the Constitutional Court[119]. Hence, 2014 amendments provide for restriction on the right to stand for elections for convicted felons – imprisoned or on probation – whose criminal record is not yet stricken[120]. Moreover, after the end of the term for striking of criminal record, convicted felons remain ineligible for ten more years; in case of particularly grave felony, ineligibility term is extended up to fifteen years.

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[113] "Ministry of Justice suspended the registration of Navalnyy's "Popular Alliance", *Lenta.ru*, 20 January 2014. URL: https://lenta.ru/news/2014/01/20/stop/ (in Russian).
[114] "Ministry of Justice registered a "lookalike" of Navalnyy's party", *RBK*, 22 March 2018. URL: https://www.rbc.ru/politics/22/03/2018/5ab36c6f9a79477c15478531?from=main (in Russian).
[115] "They won't steal Russia of the Future from us", *op. cit*.
[116] Cf. *supra*.
[117] Article 4 § 3 of the federal law No. 67-FZ. The blanket ban on active voting rights is at odds with ECtHR's interpretation of article 3 of the first additional protocol to the ECHR since ECtHR (Grand Chamber), *Hirst v. United Kingdom No. 2*, n° 74025/01, Judgment, 6 October 2005. On Russian ban on prisoners' voting rights, see ECtHR (section), *Anchugov and Gladkov v. Russia*, n°s 11157/04 and 15162/05, Judgment, 4 July 2013. However, States' margin of appreciation is significantly larger in respect of restrictions on the right to stand for elections, suggesting compatibility of such restrictions with ECHR, see an overview of ECtHR's caselaw on the matter *in* ECtHR (Grand Chamber), *Zdanoka v. Latvia*, n° 58278/00, Judgment, 16 March 2006.
[118] Article 2 of the federal law No. 40-FZ of 2 May 2012.
[119] Constitutional Court of the Russian Federation, No. 20-P, Ruling, 10 October 2013.
[120] Article 4 § 3 a) of the federal law No. 67-FZ.

The present paper focuses on questioning the efficiency of strategic litigation of the Russian extra-parliamentary opposition groups before the ECtHR in order to obtain or secure more favourable legal status. In this respect, the case of Alexey Navalnyy, probably the most prominent opposition leader of 2010s as per his influence within the opposition's supporters, is one that generated substantive dialogue on the issue of his candidacy between Russian authorities and the Council of Europe. To date, according to domestic law, Alexey Navalnyy is indeed a convicted felon serving his probation. His first conviction was a sentence of five years for felony of a large-scale embezzlement in the "Kirovles" case by the Leninsky District Court of Kirov on July 18, 2013; it was replaced by a suspended sentence by an appellate jurisdiction on October 16, 2013[121]. Navalnyy was convicted, together with P. Yu. Ofitserov, former director of a timber sales company, for complicity in order to dissipate the assets of "Kirovles", State timber enterprise, by means of a loss-making contract between the two enterprises. Navalnyy was at a time an advisor to the Governor of Kirov region. The director of "Kirovles" faced the charge of embezzlement but concluded a plea-bargaining agreement and had his case disjoined in order to be considered in accelerated proceedings.

He was also convicted, together with his brother, on December 30, 2014 by the Zamoskvoretsky district court for 3,5 years of suspended sentence for felonies of defrauding two companies and money laundering in the "Yves Rocher" case. The sentence was upheld by the Moscow city court on February 17, 2015[122]. It involved a company, GPA, that was set by Navalnyy brothers – Alexey and Oleg – in 2008. The latter provided delivery and printing services to two private legal entities. These services were deemed to be carried out in bad faith by the prosecution, as they resulted in material losses for legal entities contracting with Navalnyye's company. The charge of fraud was also pressed, as Navalnyye's company used subcontractors for execution of its agreements, retaining the difference between the remuneration from its clients and the price of subcontractors' services. This margin was deemed to constitute the amount of stolen money from the clients.

During criminal investigations into his activity, as well as during criminal procedures, Navalnyy was actively releasing materials online of his own investigations into several public officials. At time when his conviction in the "Kirovles" case has not yet become final, he participated in Moscow mayoral elections, losing to the incumbent after having secured 27% of the votes.

These convictions were challenged by Alexey Navalnyy before the ECtHR on various grounds. He denounced the aforementioned judgments as motivated by political purposes, namely used as a means of denying him the right to stand for elections. Despite three victories in the Strasbourg Court related to his criminal

[121] "Navalnyy got suspended sentence", *Vedomosti*, 16 October 2013. URL: https://www.vedomosti.ru/politics/articles/2013/10/16/sud-v-kirove-zamenil-prigovor-navalnomu-na-uslovnyj-srok (in Russian).
[122] "Moscow City Court upheld the sentence of Navalnyye brothers in the Yves Rocher case", *Interfax*, 17 February 2015. URL: https://www.interfax.ru/russia/424711(in Russian).

convictions (3.1), Alexey Navalnyy remains ineligible due to partial execution of the ECtHR's judgments in his respect (3.2).

3.1. An extensive list of violations in Navalnyy's criminal convictions

To date, Strasbourg Court has considered three out of four applications lodged by Navalnyy against his criminal convictions, two of which relate to the "Yves Rocher" case[123] and one to the "Kirovles" case[124]. The fourth application that is still pending relates to the latter and was communicated on December 21, 2017[125]. The ECtHR found violations of article 6 § 1 in both cases (3.1.1) and of articles 5 and 7 in the "Yves Rocher" case. Although the Court dismissed all complaints under article 18 in initial cases, it recognized its violation in the case related to Navalnyy's house arrest (3.1.2).

3.1.1. Punishment without law or lack of fair trial? A comparative analysis of original cases

The cases of *Navalnyy and Ofitserov v. Russia* and *Navalnyye v. Russia* feature both the claim of arbitrary application of criminal law that led to the applicants' convictions, "*without precedent or basis in domestic law and unforeseeable*"[126] or with "*the charges and the resulting judgments*" not containing "*the essential elements of the offences in question*"[127]. They maintained that they had been convicted for activities that are indistinguishable from that of "*a commercial intermediary*"[128] or "*the ordinary conduct of business*"[129]. These claims were supported by the Strasbourg Court.

In the first case, it considered itself "*confronted with a situation where the acts described as criminal fell entirely outside the scope of the provision under which the applicants were convicted and were not concordant with its intended aim*"[130]. The Court also reminded that initially, Navalnyy and Ofitserov were prosecuted for deception or abuse of trust of Kirovles' director in order to defraud the State company, but the charges were dropped due to the absence of *corpus delicti*; only then was pressed the charge of conspiracy in order to facilitate embezzlement of public funds through transactions between P. Yu. Ofitserov's company and Kirovles itself[131]. The application of the embezzlement charge to the applicants, in light of the facts of commercial transaction in question, however loss-making it could be for the Kirovles

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[123] ECtHR (section), *Navalnyye v. Russia*, nº 101/15, Judgment, 17 October 2017; ECtHR (section), *Navalnyy v. Russia (No 2*), nº 43734/14, Judgment, 9 April 2019.
[124] ECtHR (section), *Navalnyy and Ofisterov v. Russia*, nºs 46632/13 and 28671/14, Judgment, 23 February 2016.
[125] ECtHR (section), *Navalnyy and Ofitserov v. Russia (No 2)*, nº 78193/17, Communicated case, communicated on 21 December 2017.
[126] ECtHR (section), Navalnyy and Ofisterov v. Russia, § 95.
[127] ECtHR (section), *Navalnyye v. Russia*, § 50.
[128] ECtHR (section), Navalnyy and Ofisterov v. Russia, § 95.
[129] ECtHR (section), *Navalnyye v. Russia*, § 49.
[130] ECtHR (section), Navalnyy and Ofisterov v. Russia, § 115.
[131] Ibidem, § 111.

company, was considered arbitrary by the ECtHR. Indeed, "*the criminal law was arbitrarily and unforeseeably construed to the detriment of the applicants, leading to a manifestly unreasonable outcome of the trial*"[132]. This circumstance, along with other violations discussed below, was deemed constitutive of the violation of Article 6 § 1 of the ECHR.

The second case bears several resemblances with the first one. However, *Navalnyy and Ofitserov* Court started the examination of the claim of arbitrary and unforeseeable application of domestic law under the Article 6 § 1 – right to fair and public hearing – only to dismiss as unnecessary the claim under the Article 7 § 1 – no punishment without law[133]. Yet while examining whether the incriminated acts indeed "*fell within a definition of a criminal offence which was sufficiently accessible and foreseeable*"[134] in the *Navalnyye* case, the Court commenced its assessment with the discussion of possible violation of Article 7 § 1. This seems to have a possible explanation in the fact that Alexey and Oleg Navalnyye maintained inapplicability of the Criminal code provision defining commercial fraud that constituted a basis of their conviction – in force at the material time of case's events but repealed since. Whereas the Court concluded on the applicability of the aforementioned provision, it "*was extensively and unforeseeably construed to their detriment*" by the prosecution. For the Strasbourg Court, "*such an interpretation could not be said to have constituted a development consistent with the essence of the offence*", as "*it was not possible to foresee that the applicants' conduct* […] *would constitute fraud or commercial fraud*". At the same time, "*it was equally unforeseeable that GPA's profits would constitute the proceeds of crime whose use could amount to money laundering*" under another provision of the Russian Criminal code[135]. These observations lead the Court to the conclusion of violation of Article 7 § 1 ECHR. However, the violation of Article 6 § 1 was also observed in respect of "*arbitrary application of criminal law*"[136], and particularly for the failure of national courts to address the objections linked to the prosecution's arbitrary and unforeseeable interpretation of the criminal law[137].

Whether these qualifications may seem to be synonymous to the reader, the Strasbourg Court considered the arbitrary and unforeseeable interpretation and application of the criminal law to be a violation of Article 6 § 1 alone on February 23, 2016, and a violation of both articles 6 § 1 and 7 § 1 ECHR on October 17, 2017. Although the distinction of the Court's qualification is rather subtle, as "*similar considerations apply*"[138], the ECtHR seems to draw it in citing the *Navalnyy and Ofitserov* case in the *Navalnyye* case. In the first case, the arbitrary interpretation stemmed from the flawed judicial assessment and from the lack of free trial, or from "*manifest factual or legal error committed by the domestic court*"[139]. The lack of fair

[132] Ibidem, § 115.
[133] Ibidem, § 127.
[134] ECtHR (section), *Navalnyye v. Russia*, § 58.
[135] Ibidem, § 68.
[136] Ibidem, § 81.
[137] Ibidem, § 83.
[138] Ibidem.
[139] ECtHR, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb), 30 April 2019, § 165.

trial in *Navalnyy and Ofitserov case* was observed in the way the judgment against the director of Kirovles, whose accelerated proceedings were disjoined, "*had a prejudicial effect on the criminal proceedings against the applicants*"[140] because of absence of necessary safeguards. In *Navalnyye* case, in addition to procedural drawbacks constitutive of a separate violation of Article 6 § 1, the Court seems to examine the interpretation of substantive elements of criminal offences by domestic courts as they extensively failed to match legal definitions with facts of the case[141], adding substantive errors to procedural ones[142]. Yet, this difference was stressed rather succinctly and *ex post* by the Court in *Navalnyye* case while citing its *Navalnyy and Ofitserov* judgment. Despite these subtle differences, that can also find their tentative explanation in the political impact of recognition of the breach of Article 7 ECHR, both judgments insist on arbitrary nature of Alexey Navalnyy's criminal convictions. However, their qualification as politically motivated has proven to be difficult under the law of the ECHR.

3.1.2. A difficult recognition of politically motivated rights' restriction

Throughout his interactions with the Strasbourg Court on the matter of his criminal convictions, as well as arrests and detentions, Alexey Navalnyy systematically raised the claim of violation of the Article 18 ECHR prohibiting restrictions of human rights for unauthorized purposes. He argued that measures taken against him by the Russian government were aimed at preventing him "*from pursuing his public and political activities*"[143], "*brought about for political reasons and* […] *those ulterior motives had affected every aspect of the* [*Navalnyye*] *case*"[144]. While challenging his seven arrests in 2012-2014 for participation in unauthorised public events as politically motivated, he maintained that they had as purpose to "*punish him for his political criticism and took steps to discourage his supporters*" and that he had been "*harassed precisely because of his active engagement in political life and the influence that he had on the political views of the Russian people*"[145]. Finally, in respect of his house arrest pending the completion of the criminal investigation in the Yves Rocher case from February 2014 to January 2015, he argued that the detention in question "*had pursued political ends, had served to obstruct his participation in public life and to impede the publication of his investigations*" by means of particularly strict enforcement of the concomitant ban on public comments, use of Internet, radio and television[146].

The quest for recognition of political motivation is of paramount importance for Alexey Navalnyy's submissions to the ECtHR. The Article 18 was "*brought to*

[140] ECtHR (section), Navalnyy and Ofisterov v. Russia, § 108.
[141] ECtHR (section), *Navalnyye v. Russia*, § 64-67.
[142] Ibidem, § 83.
[143] ECtHR (section), Navalnyy and Ofisterov v. Russia, § 128.
[144] ECtHR (section), *Navalnyye v. Russia*, § 87.
[145] ECtHR (Grand Chamber), *Navalnyy v. Russia*, n^{os} 29580/12 and al., Judgment, 15 November 2018, § 155-156.
[146] ECtHR (section), *Navalnyy v. Russia (No 2)*, n^{o} 43734/14, Judgment, 9 April 2019, § 89.

life" only recently[147], and recognition of misuse of power through rights' restriction governed by ulterior, most notably political motives, is as rare as it generates a wide-scale publicity and doubles the pressure on national authorities. The very purpose of Article 18 being "*to prevent the resurgence of undemocratic regimes in Europe*"[148], its violation can be interpreted as a symptom of severe threat to democracy and to rule of law posed by national authorities' action. Thus, it can constitute a formal recognition of ineligibility of the opposition leader precisely because of a concerted action of the government that would use criminal convictions only as a pretext.

The guide for examination of complaints under Article 18 was set out by the Court's majority in the *Merabishvili v. Georgia*[149] case that provided an overview of its caselaw as well as envisioned new developments. Generally, "*Article 18 could only be applied in conjunction with another Article of the Convention but could be breached even if there was no breach of that other Article taken alone*"[150]. Moreover, "*a breach could only arise if the right at issue was qualified, that is, subject to restrictions permitted under the Convention*"[151]. In the past, in order to decide that there was indeed a violation of Article 18, an applicant must have shown an "*incontrovertible and direct proof*"[152] of bad faith, namely "*that the real aim of the authorities had not been the same as that proclaimed*"[153]. A rather lengthy clarification of the Strasbourg Court's caselaw on Article 18 corresponded to a need to clarify the conditions of its applicability[154].

However, the *Merabishvili* judgment drifts apart from the Court's traditional approach as per requirement of special standard of proof, insisting on the applicability of its general approach[155]. Moreover, since 2017, examination of a complaint under Article 18 if a respective claim "*appears to be a fundamental aspect of the case*"[156]. Finally, a "*predominant purpose*" test was set by the judgment in respect of cases with a plurality of purposes[157]. These developments were intended to normalise its

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[147] F. TAN, "Guest Blog on Grand Chamber Judgment in Navalnyy v Russia", *ECHR Blog*, 27 November 2018. URL: http://echrblog.blogspot.com/2018/11/guest-blog-on-grand-chamber-judgment-in.html.
[148] ECtHR (section), *Navalnyy and Ofisterov v. Russia*, joint partly dissenting opinion of judges Nicolaou, Keller and Dedov, § 2.
[149] ECtHR (Grand Chamber), *Merabishvili v. Georgia*, nº 72508/13, Judgment, 28 November 2017.
[150] Ibidem, § 271.
[151] Ibidem.
[152] Ibidem, § 276.
[153] Ibidem, § 275.
[154] See W. A. SCHABAS, "Article 18. Limitation on use of restrictions on rights/Limitation de l'usage des restrictions aux droits" *in* W. A. SCHABAS, *The European Convention on Human Rights: A Commentary*, Oxford University Press, 2015, p. 623 *sq*., stressing a "*simmering dispute among members of the Court about the evidentiary requirements*" and describing the case-law on Article 18 as "*exceedingly sparse*". A lack of clarity of *travaux préparatoires* as per its effects was stressed both by W. A. SCHABAS and by P. SANTOLAYA, "Limiting restrictions on rights. Art. 18 ECHR (a generic limit on limits according to purpose) *in* J. GARCIA ROCA, P. SANTOLAYA (eds.), *Europe of Rights: A Compendium on the European Convention of Human Rights*, Brill-Nijhoff, 2012, p. 527-536.
[155] Ibidem, § 316.
[156] Ibidem, § 291.
[157] Ibidem, § 305. This solution was however criticized as lacking clarity *in* ECtHR (Grand Chamber), *Merabishvili v. Georgia*, Joint concurring opinion of judges Yudkivska, Tsotsoria and Vehabovic and Concurring opinion of judge Serghides

application by the ECtHR[158], raising the issue of its adaptation to the emergence of illiberal democracies.

For the purposes of the Part II, one particular contentious point as per Article 18 application to *Navalnyy* cases should be stressed. In both *Navalnyy and Ofitserov* and *Navalnyye* cases, complaints under Article 18 taken in conjunction with Articles 6 and 7 were raised as a new questioning for the Court. The ECtHR majority declared such complaints inadmissible as incompatible *ratione materiae* with the Convention. "*In so far as relevant to the present case*[s]", this incompatibility is explained by the fact that Articles 6 and 7 were deemed not to contain any explicit or implied restrictions. Thus, the Court seems to refuse to address the issue of "*potential political motivation of the criminal proceedings as a whole*"[159]. Yet this succinct justification, while failing to provide a satisfactory guidance on the matter, leaves the question open by limiting the inadmissibility observation's scope to "*the circumstances relevant to that case*"[160]. A meaningful explication of the matter occurred neither in *Merabishvili* judgment nor in *Ilgar Mammadov v. Azerbaijan (No. 2)*, where the Court considered the question to be still open[161].

However, a reassuring point in *Navalnyy and Ofitserov* was included in the Court's assessment under Article 6 § 1 taken alone, as it addressed the failure of domestic courts to allow a due examination of allegations of political persecution raised by the applicants[162]. The ECtHR considered this point to be noteworthy due to discomfort caused by Navalnyy's political activity to public authorities and a possible link between his investigation into business activities and properties of the Chief of the Investigative Committee of the Russian Federation and the insistence of the latter that the inquiry be completed in favour of Navalnyy's indictment[163]. Finally, the conviction was presumed to be suitable for the government, as, since its entry into force, Navalnyy "*has been ineligible to stand for elections*"[164]. A subtle recognition of a link between his ambitions for public office and his criminal convictions seems to have been made in the Court's *obiter dictum*.

The upheaval of its constant caselaw[165], based on grammatical interpretation of Article 18[166], was challenged by dissenting judges, for whom its interpretation should have been different due to its drafting history as a general guarantee against

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[158] F. TAN, "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?", *Goettingen Journal of International Law*, Vol. 9, No. 1, Special Ed. Holterhus, 2018, p. 109-141.
[159] F. TAN, "The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?", *op. cit*., p. 124.
[160] Citing *Navalnyy and Ofitserov v. Russia in* ECtHR (section), *Ilgar Mammadov v. Azerbaijan (No. 2)*, nº 919/15, Judgment, 16 November 2017, § 261.
[161] Ibidem.
[162] ECtHR (section), Navalnyy and Ofisterov v. Russia, § 116.
[163] Ibidem, § 118.
[164] Ibidem, § 117.
[165] Since EComHR, *Kamma v. the Netherlands*, no. 4771/71, Commission's report of 14 July 1974.
[166] Later upheld and explained *in* ECtHR (Grand Chamber), *Merabishvili v. Georgia*, § 293.

rule of law backslides[167]. Indeed, its application scope could have been broadened by an alternative reading of the *Kamma* report of the European Commission of Human Rights that refused to apply Article 18 in conjunction with an *absolute* right. Consequently, for dissenting members of the Court, "*as per its* ratio conventionis*, it applies to limitations on all Convention rights, with the exception of those absolute rights that do not permit limitation and to which it therefore cannot logically apply, for example those under Article 3*"[168]. Given the majority's finding that the law was arbitrarily and unforeseeably construed in Navalnyy's case, the claim that it could have been amounted to "*singling out of dissidents in order to silence them by means of criminal proceedings – is precisely the sort of abuse from which Article 18 is intended to provide protection*"[169]. The opinion persisted in judges' Keller and Dedov dissenting opinion in *Navalnyye* case, raising the issue of whether the abusive criminal proceedings in question "*may have served an illegitimate and undemocratic purpose: to silence a government critic and prevent him from engaging in political activities*"[170].

In subsequent cases dealing with Navalnyy's detentions following arrests for participation in demonstrations, as well as with eleven months of his house arrest, the ECtHR recognised violations of Article 18 taken in conjunction with Article 5 in both cases and with Article 11 in the first case. The *Navalnyy v. Russia* judgment denounced two episodes of his arrest and detention as a means to "*suppress that political pluralism which forms part of "effective political democracy" governed by "the rule of law*" and to "*bring the opposition's political activity under control*"[171]. It relied to a "*converging contextual evidence […] that the authorities were becoming increasingly severe in their response to the conduct of the applicant, in the light of his position as opposition leader*"[172]. His house arrest with severe restrictions on communication pending completion of criminal investigation in the "Yves Rocher" case was deemed by the Court to be pursuing "*the aim of curtailing his public activity, including organising and attending public events*"[173].

Attempts made by Alexey Navalnyy to restore his rights as an opposition leader through making a case before the ECtHR triggered an extensive criticism of various means employed by the electoral authoritarianism to diminish the impact of activity of the extra-parliamentary opposition. Yet the Strasbourg Court did not support – at list in terms of recognising a violation of Article 18 – the central argument made by Navalnyy, namely that the criminal convictions in question had been construed precisely in order to prevent him from standing for elections. Overall, the

[167] ECtHR (section), *Navalnyy and Ofisterov v. Russia*, joint partly dissenting opinion of judges Nicolaou, Keller and Dedov.
[168] Ibidem, § 4.
[169] Ibidem, § 7.
[170] ECtHR (section), *Navalnyye v. Russia*, joint partly dissenting opinion of judges Keller and Dedov, § 11.
[171] ECtHR (Grand Chamber), *Navalnyy v. Russia*, §§ 173-175.
[172] Ibidem, § 172.
[173] ECtHR (section), *Navalnyy v. Russia (No 2*), § 97. To date, the application is still pending before the Grand Chamber.

Court's judgments posed a challenge to Russian authorities in respect of ways of resolving this complex problem.

3.2. Limited impact of ECtHR's critiques on Navalnyy's candidacy prospects

The Government's choice of execution measures, namely the reopening of the proceedings following the ECtHR's judgment, (3.2.1) has been deemed unsatisfactory by the Committee of Ministers, the latter having narrowed the margin of appreciation of Russian authorities on the matter (3.3.2). This disagreement has resulted in an altercation between the respondent Government and the Committee, an altercation premonitory to the present attitude of Russian authorities towards execution issues regarding "political" cases (3.3.3).

3.2.1. The Government's response: an unsatisfactory reopening of the proceedings following the Navalnyy and Ofitserov judgment

In *Navalnyy and Ofitserov* and *Navalnyye* cases, the Government reassured the Court that a reopening of the proceedings would take place in case a violation is found[174]. Thus, it seemed to have stated its eagerness to remedy to the lack of fair trail and punishment without law observed in the second case. Indeed, as for the first case, the Government had confirmed its practice of "*prompt payment of "just satisfaction"*"[175] by discharging its duty under Article 41 ECHR in full, exceeding however the three-months deadline[176]. Following this undertaking, as well as the Committee of Ministers' constant practice of requiring a reopening of the proceedings as a supplementary individual measure[177], on November 16, 2016, the Supreme Court quashed the judgment and the appeal ruling that led to *Navalnyy and Ofitserov* case "*with remittal of the case for a fresh examination*"[178]. Yet in the new trial, held in the very same District Court on February 8, 2017, with different sitting judges, the court reached the same conclusions as in its initial ruling[179]. The new ruling was upheld on

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[174] ECtHR (section), *Navalnyy and Ofisterov v. Russia*, § 137; ECtHR (section), *Navalnyye v. Russia*, § 93-96.

[175] J. LAPITSKAYA, "ECHR, Russia, and Chechnya: Two is Not Company and Three is Definitely a Crowd", *International Law and Politics*, Vol. 43, No. 2, 2013, p. 490.

[176] According to the first Action report of the Russian government, the applicants were fully paid the compensation awarded by the Court on November 25, 2016, while the judgment entered in force on July 4, 2016. Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2017)865, Communication from the Russian Federation concerning the case of NAVALNYY AND OFITSEROV v. Russian Federation (Application No. 46632/13), Action report, 17 August 2017, p. 1.

[177] As a matter of its settled practice, as for substantive violations, "the Committee of Ministers is not content with deciding to reopen the proceedings but takes into consideration the outcome achieved at domestic level before pronouncing the case closed". However, at the same time, "whether the new trial was consistent with the requirements of the Convention [is] a matter for the Court alone and not for the Committee of Ministers". See E. LAMBERT ABDELGAWAD, The execution of judgments of the European Court of Human Rights, Council of Europe, 2nd ed., 2008, p. 21. The ECtHR can also request a retrial "with a view to helping the respondent State to fulfil its obligations under Article 46" in its motivation, as stressed in ECtHR (Grand Chamber), Ocalan v. Turkey, nº 46221/99, Judgment, 12 May 2005, § 210.

[178] Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2017)865, Communication from the Russian Federation concerning the case of NAVALNYY AND OFITSEROV…, *op. cit*.

[179] "The Court convicted Navalnyy in the Kirovles case", *Interfax*, 8 February 2017. URL: https://www.interfax.ru/russia/549001 (in Russian).

appeal on May 3, 2017, giving Navalnyy a new five-years suspended sentence[180]. Thus, the period of his ineligibility was extended until 2032. A volunteer community network "Dissernet", conducting plagiarism expertise of doctoral and habilitation theses defended in Russian universities, found that 55 out of 56 pages of the new sentence plagiarized the 2013 ruling, with almost complete identity on 17 pages of the fresh ruling[181]. On November 17, 2017, the cassation appeal was refused to the applicants[182].

The *Navalnyy and Ofitserov* judgment generated a controversy as to whether it was indeed executed by the Russian government. The latter maintained that, relying on the previous guidance of the Committee of Ministers, the payment of just satisfaction – as required by the *dispositif* or judgment – and the fact of reopening of domestic proceedings – as required by the Committee of Ministers' constant practice[183] – would constitute adequate individual measures in order to remedy violations found by the Court[184]. In its updated Action report, it emphasized general measures of disseminating the judgment, harmonizing of law enforcement practice and providing guidance from higher domestic jurisdictions[185]. It further insisted on the incompetence of the Committee of Ministers to assess the new proceedings' compliance with the right to fair trial, the Strasbourg Court being the sole competent body to pronounce on the matter[186]. It should be noted that it is not the first case of reopening of the proceedings where Russian domestic courts reach essentially the same conclusion on the merits that the one obtained with procedural violations[187].

Yet, as for June 3, 2019, the case is still featured in the table of cases under enhanced supervision of the Committee of Ministers[188]. The latter found that the reopening of the proceedings "*did not remedy or otherwise provide any tangible redress for the violations established*"[189]. Furthermore, whereas the Court had not

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[180] Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2017)865, Communication from the Russian Federation concerning the case of NAVALNYY AND OFITSEROV…, *op. cit*.

[181] Compared tables of coincidences between the text of the sentence of A. A. Navalnyyy in Kirovles case 2017 (judge Vtyurin A. L.) and the text of the sentence in Kirovles case 2013 (judge Blinov S. V.), *Dissernet*, 17 February 2017. URL: http://wiki.dissernet.org/wsave/Kirovles.html (in Russian).

[182] Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2017)1354, Rule 9.1 Communication from the applicant (30/11/2017) in the case of NAVALNYY AND OFITSEROV v. Russian Federation (Application No. 46632/13), 4 December 2017.

[183] Committee of Ministers, Recommendation No. R (2000) 2 of the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, 19 January 2000.

[184] Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2017)865, Communication from the Russian Federation concerning the case of NAVALNYY AND OFITSEROV…, *op. cit*.

[185] Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2017)1326, Communication from the Russian Federation concerning the case of NAVALNYY AND OFITSEROV v. Russian Federation (Application No. 46632/13), Action report, 23 November 2017.

[186] Ibidem.

[187] Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2016)871, Communication from the Russian Federation in the cases of Khodorkovskiy and Lebedev and Pichugin (Klyakhin group) against Russian Federation (Applications No. 11082/06, 38623/03), Updated action plan, 2 August 2016.

[188] Secretariat of the Committee of Ministers (Council of Europe), DH-DD(2019)636E, Table of cases and groups of cases under enhanced supervision, 3 June 2019, No. 144.

[189] Committee of Ministers, Ministers' Deputies, Supervision of the execution of the European Court's judgments, CM/Del/Dec(2017)1294/H46-25, 1294th meeting, 19-21 September 2017 (DH), H46-25

made a direct link between Navalnyy's conviction and his undesirability as an eligible candidate, the Committee of Ministers stressed Navalnyy's ineligibility as the main consequence of the lack of adequate redress. Thus, it recommended that the ban on standing for elections be lifted in Navalnyy's case as an urgent individual measure[190].

3.2.2. A genuine restitutio in integrum : narrowing the subsidiarity principle in "political cases"

In general, Article 41 ECHR establishes that the consequence of violation may take the form of payment of just satisfaction indicated in the judgment, while Article 46 provides for binding force of judgments between parties and vests the Committee of Ministers with supervision of their execution. Once the respondent State's responsibility is established, the Convention does not provide for ordering precise measures of reparation in municipal legal order[191]. The Court however stresses that execution obligations go beyond payment of just satisfaction[192]. The latter is indeed a subsidiary obligation. In principle, the Court interprets Article 46 ECHR in light of general international law as implying *restitutio in integrum* as the most suitable measure[193], requiring a respondent State to "*make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach*"[194]. It remains to the discretion of a respondent State to "*choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects*"[195]. Incidentally, "*with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic situation it has found to exist*"[196]. Restitution obligations stem in principle from judgments finding breach of ECHR. In case of "*a total or partial failure to execute a judgment of the Court*", the respondent State's international responsibility can be engaged[197].

Navalnyy and Ofitserov v. Russian Federation (Application No. 46632/13), § 2; Committee of Ministers, Ministers' Deputies, Supervision of the execution of the European Court's judgments, CM/Del/Dec(2017)1302/H46-24, 1302nd meeting, 5-7 December 2017 (DH), H46-24 *Navalnyy and Ofitserov v. Russian Federation* (Application No. 46632/13), § 1.

[190] Committee of Ministers, Ministers' Deputies, Supervision of the execution of the European Court's judgments, CM/Del/Dec(2017)1294/H46-25, 1294th meeting, 19-21 September 2017 (DH), H46-25 *Navalnyy and Ofitserov v. Russian Federation* (Application No. 46632/13), § 3.

[191] A.-C. FORTAS, La surveillance de l'exécution des arrêts et décisions des Cours européenne et interaméricaine des droits de l'homme, Paris, A. Pedone, 2015 p. 74.

[192] ECtHR (Grand Chamber), *Stanev v. Bulgaria*, n° 36760/06, Judgment, 17 January 2012, § 254; ECtHR (Grand Chamber), *Navalnyy v. Russia*, n°s 29580/12 and al., Judgment, 15 November 2018, § 182.

[193] F. SUDRE, "La reparation" *in* F. SUDRE and al., *Les grands arrêts de la Cour européenne des Droits de l'Homme*, 8e ed., Paris, PUF, p. 927.

[194] ECtHR (section), *Papamichalopoulos and others v. Greece (Article 50)*, n° 14556/89, Judgment, 31 October 1995, §§ 34-36, citing PCIJ, *Factory at Chorzów*, Merits, Series A, n° 17, Judgment, 13 September 1928, p. 47.

[195] ECtHR (Grand Chamber), *Stanev v. Bulgaria*, no 36760/06, Judgment, 17 January 2012, § 254; ECtHR (Grand Chamber), *Navalnyy v. Russia*, § 182.

[196] Ibidem; ECtHR (Grand Chamber), *Ocalan v. Turkey*, § 210.

[197] ECtHR (Grand Chamber), *VgT v. Switzerland (No. 2)*, n° 32772/02, Judgment, 30 June 2009, § 85.

The discretion in the choice of means of achieving *restitutio in integrum* is one of the many expressions of the subsidiarity principle. Yet it is sometimes narrowed in the Committee of Ministers' review of execution measures. The latter's practice features cases of autonomous legal qualifications that are added to that of the Court or even result in a quasi-judicial review of execution measures' conformity with ECHR's requirements[198]. In the uncontestably political case of *Navalnyy and Ofitserov*, implicating Russian opposition leader, the Committee of Ministers seems to assess the compatibility of the new trial with the requirements of Article 6 ECHR. It thus refuses to radiate the case on the grounds that an execution measure chosen by the respondent State does not "*afford the authorities of the respondent State the opportunity to abide by the conclusions and the spirit of the Court judgment being executed, while complying with the procedural safeguards in the Convention*"[199]. Overall, the measure chosen did not constitute a genuine *restitutio in integrum* appropriate for the applicant. A derogatory lift of the ban to stand for elections proposed by the Committee in its first decision[200] was featured as an alternative restitution measure. The Committee's refusal to confine itself to purely formalistic approach to judgment's execution was extensively criticized as being *ultra vires* and biased in the statement of the Russian Ministry of Justice[201].

3.2.3. Committee's inefficient pressure on the Russian government: partial (in)execution of subsequent cases

Alexey Navalnyy brought another fair trial violation claim before the ECtHR in respect of his new trial and conviction[202]. It remains thus to be seen if the Committee of Ministers' reaction would be upheld by an explicit recognition of partial execution by the Strasbourg Court finding a new violation. Yet the Committee of Ministers' pressure is not convincing Russia to proceed with the genuine restitution. This adds up to current political tensions between Russia and the Council of Europe, threatening to deprive Russian nationals of the ECtHR's jurisdiction and thus hindering essential guarantees of human rights protection[203]. In such a context, it would not be opportune

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[198] L. HENNEBEL, H. TIGROUDJA, *Traité de droit international des Droits de l'homme*, Paris, A. Pedone, 2016, p. 1450. Such practice of review appears to be well-established in several Committee's decisions, see for example *Supervision of the execution of judgments of the European Court of Human Rights. 11th Annual Report of the Committee of Ministers – 2017*, Council of Europe, 2018, p. 130.

[199] ECtHR (Grand Chamber), *VgT v. Switzerland (No. 2)*, § 90.

[200] Committee of Ministers, Ministers' Deputies, Supervision of the execution of the European Court's judgments, CM/Del/Dec(2017)1294/H46-25, 1294th meeting, 19-21 September 2017 (DH), H46-25 *Navalnyy and Ofitserov v. Russian Federation* (Application No. 46632/13), § 4.

[201] Ministry of Justice of the Russian Federation, "On the decision of the Committee of Ministers of the Council of Europe on the issue of execution of the judgment of the ECtHR in the case of "Navalnyy and Ofitserov v. Russia", 21 September 2017. URL: https://minjust.ru/ru/novosti/o-reshenii-komiteta-ministrov-soveta-evropy-po-voprosu-ispolneniya-postanovleniya-espch-po (in Russian).

[202] ECtHR (section), *Navalnyy and Ofitserov v. Russia (No 2)*, nº 78193/17, Communicated case, communicated on 21 December 2017.

[203] A. DRZEMCZEWSKI, K. DZEHTSIAROU, "Painful Relations between the Council of Europe and Russia", *EJIL: Talk!*, 28 September 2018. URL: https://www.ejiltalk.org/painful-relations-between-the-council-of-europe-and-russia/.

for the Committee to initiate infringement proceedings under Article 46 § 4 on Navalnyy's behalf[204].

An account of partial execution that can be made in respect of *Navalnyy and Ofitserov* judgment, seconding doctrinal qualifications of the Russian execution measures as "*à la carte compliance*"[205]. The execution of *Navalnyye* judgment, classified by the Committee as repetitive[206], offers a less contentious example of this approach. The judgment was not yet followed by a published action report. While considering the question of reopening the proceedings in municipal jurisdictions, the Presidium of the Russian Supreme Court concluded that the rulings deemed to violate Articles 6 and 7 ECHR by the Strasbourg Court "*shall remain unchanged*"[207]. It explicitly contradicted the ECtHR's qualification, seeing "*no grounds for concluding that the substantive law establishing the criminal nature of their acts, the punishability of those acts and other criminal law consequences was incorrectly applied by the court*"[208]. Whereas no information regarding the payment was received by the Committee[209], Alexey Navalnyy claimed to have received the just satisfaction awarded to him by the Court on August 2, 2018, two months beyond the payment deadline[210]. His candidacy prospects, however, remain upset due to the lack of genuine restitution.

4. CONCLUDING REMARKS

A final remark should be made on the execution of a series of cases concerning extra-parliamentary opposition's freedom to hold meetings and public events. Although unrelated to Navalnyy's ineligibility, their overview completes the question of opposition's status in electoral authoritarianism. Since 2013, Russia faced several clone cases of dispersals of unauthorized public events – mostly peaceful demonstrations – by law enforcement officials. They denounce more or less the same disproportionate measures employed by the police, namely the practice of "*stopping and arresting protestors for the sole reason that their demonstration as such has not*

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[204] Several resemblances can be found between Navalnyy's cases and those of Ilgar Mammadov. The latter's submissions to the ECtHR resulted in two subsequent judgments recognizing fair trial violations and arbitrary detention with ulterior political motives. Azerbaijan's inaction pursuant the judgments triggered the first application of the procedure of Article 46 § 4 and resulted in ECtHR's judgment against Azerbaijan finding violation of Article 46. See ECtHR (Grand Chamber), *Proceedings under Article 46 § 4 in the case of Ilgar Mammadov v. Azerbaijan*, no. 15172/13, Judgment, 29 May 2019.

[205] C. HILLEBRECHT, *Domestic Politics and International Human Rights Tribunals. The Problem of Compliance*, Cambridge University Press, 2014, p. 115-120; J. LAPITSKAYA, "ECHR, Russia, and Chechnya: Two is Not Company and Three is Definitely a Crowd", *op. cit.*, p. 493-495.

[206] Secretariat of the Committee of Ministers, *Navalnyy and Ofitserov v. Russia* Case Description. URL: https://hudoc.exec.coe.int/eng#{"EXECIdentifier":["004-13537"]}

[207] Presidium of the Supreme Court of the Russian Federation, *On the reopening of proceedings in a criminal case in the light of new circumstances*, Case n° 53-P18, Judgment, 25 April 2018.

[208] Ibidem.

[209] Committee of Ministers, Ministers' Deputies, *Supervision of the payment of just satisfaction*, CM/Del/Dec(2019)1348/D-add, 1348th meeting, 4-6 June 2019, p. 14.

[210] "Russia paid more than four million rubles to Alexey Navalnyy as a just satisfaction in the "Yves Rocher" case", *Echo Moskvy*, 2 August 2018. URL: https://echo.msk.ru/news/2251816-echo.html (in Russian).

been authorized"[211], practice qualified as violating Article 11 ECHR by the Court and having real "*potential to deter other opposition supporters and the public at large from attending demonstrations and, more generally, from participating in open political debate*"[212]. The dispersals of manifestations would be usually followed by lengthy and unlawful pre-trial detentions amounting to violation of Article 5 § 1 and convictions of administrative offences[213]. The latter follow from judicial proceedings held with fair trial violations, as jurisdictions concerned would base their judgments mostly or even solely on the version put forward by the police, in violation of *in dubio pro reo* principle[214]. Moreover, according to the qualification of the Strasbourg Court, the domestic law – the Public Events Act governing the conduct of public events and mass demonstrations – dos not meet the "quality of law" requirements prescribed by the convention due to "*the lack of adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive*"[215]. The latter is exercised namely in respect of decisions to refuse or to grant requests to hold public events, as well as strict deadlines for notification of public events[216]. Finally, further restrictions on conducting public events had been introduced in 2012 and 2014, increasing applicable sanctions for organization and participation in an unauthorized public event[217].

With clone cases on mass demonstrations' conduct multiplying against Russia, the respondent government, apart from just satisfaction payment, confined itself to measures of judgments' dissemination, organization of a high-level conference on the matter and of high courts' guidance to lower jurisdictions[218]. As for revising the legal framework deemed to fall below ECHR standards, Russian government envisioned an "*elaboration of the necessity (in view of the Court's findings) to make amendments to the Russian legislation and law enforcement*

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[211] ECtHR (section), *Kasparov and others v. Russia (No. 2)*, nº 51988/07, Judgment, 13 December 2016, § 30. See also ECtHR (section), *Kasparov and others v. Russia*, nº 21613/07, Judgment, 3 October 2013, §§ 92-95; ECtHR (section), *Nemtsov v. Russia*, nº 1774/11, Judgment, 31 July 2014, § 76; ECtHR (section), *Navalnyy and Yashin v. Russia*, nº 76204/11, Judgment, 4 December 2014, § 65; ECtHR (section), *Frumkin v. Russia*, no. 74568/12, Judgment, 5 January 2016, § 140. For extensive review, see ECtHR (section), *Lashmankin and others v. Russia*, nºs 57818/09 and 14 others, Judgment, 7 February 2017, §§ 461-463.

[212] ECtHR (section), *Kasparov and others v. Russia (No. 2)*, nº 51988/07, Judgment, 13 December 2016, § 32.

See also ECtHR (section), *Nemtsov v. Russia*, nº 1774/11, Judgment, 31 July 2014, § 77; ECtHR (section), *Navalnyy and Yashin v. Russia*, nº 76204/11, Judgment, 4 December 2014, § 74; ECtHR (section), *Frumkin v. Russia*, nº 74568/12, Judgment, 5 January 2016, § 141.

[213] ECtHR (section), *Nemtsov v. Russia*, nº 1774/11, Judgment, 31 July 2014, § 103; ECtHR (section), *Navalnyy and Yashin v. Russia*, nº 76204/11, Judgment, 4 December 2014, § 96; ECtHR (section), *Frumkin v. Russia*, nº 74568/12, Judgment, 5 January 2016, § 150.

[214] ECtHR (section), *Kasparov and others v. Russia*, nº 21613/07, Judgment, 3 October 2013, §§ 64-66; ECtHR (section), *Nemtsov v. Russia*, nº 1774/11, Judgment, 31 July 2014, §§ 92-93; ECtHR (section), *Navalnyy and Yashin v. Russia*, nº 76204/11, Judgment, 4 December 2014, § 83; ECtHR (section), *Frumkin v. Russia*, nº 74568/12, Judgment, 5 January 2016, §§ 165-166.

[215] ECtHR (section), *Lashmankin and others v. Russia*, nºs 57818/09 and 14 others, Judgment, 7 February 2017, § 430.

[216] Ibidem, § 456.

[217] Commissioner for Human Rights (Council of Europe), *Follow-up Memorandum on Freedom of Assembly in the Russian Federation*, CommDH(2017)25, 5 September 2017, §§ 8-15.

[218] Secretariat of the Committee of Ministers, DH-DD(2018)420, Communication from the Russian Federation concerning the case of Lashmankin and Others v. Russian Federation (Application No. 57818/09), Action plan, 13 April 2018.

practice"[219]. The reflection envisioned has not yet resulted in a draft reform of the Public Events Act, attracting Grand Chamber's criticism in *Navalnyy* case[220]. Moreover, as of August 2019, numerous criminal proceedings are initiated against several participants of unauthorized protests in Moscow during summer 2019 on the grounds of organization of mass disorders. In this respect, patterns of partial execution concern judgments on virtually every form of extra-parliamentary opposition's activity.

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Strategic litigation before international human rights jurisdictions can be a powerful tool of fostering change in municipal law. In this respect, remedies for human rights violations in the European Convention system, even if declaratory, are incorporated in a comprehensive mechanism that aims at inciting Member States to provide for individual redress and structural changes. Yet such action cannot be deemed as effective in the present case.

Various legal status that Russian extra-parliamentary opposition endeavours to acquire transpire from Strasbourg Court's case-law on the matter. At present however, these endeavours do not match actual qualifications of several opposition activists as administrative offenders and convicts under the Russian law. Although continued applications to ECtHR lodged by opposition activists convinced the latter, as well as other Council of Europe bodies, of the importance of the issue, the same couldn't be said of domestic authorities. The strategy of partial compliance in this respect, combined with challenging Strasbourg Court's rulings in official statements, consists in adopting measures that do not go as far as to question the very foundations of electoral authoritarianism.

Yet he ECtHR judgments concerning the Russian extra-parliamentary opposition, as well as various follow-up procedures explored in the phase of supervision of the execution, make a good case by demonstrating the system's potential (or limits thereof) to react to a concerted action aimed at excluding uncomfortable civil society elements from political competition. The cases in question, being politically sensitive and emanating from a Member State with notorious record of human rights violations[221], generate further concerns from the Council of Europe bodies, thus guaranteeing declaratory relief to the applicants. At the same time, it is the ECtHR's reaction that confers a recognition on opposition activists, as well as a qualification of legitimate actors of Russian political competition.

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[219] Ibidem, § 5.

[220] ECtHR (Grand Chamber), *Navalnyy v. Russia*, n[os] 29580/12 and al., Judgment, 15 November 2018, § 186.

[221] As of 2018, Russia is the biggest purveyor of cases. It has been the respondent State in 248 judgments (Turkey being the second biggest purveyor with 146 cases), with 238 of them finding at least one violation of the Convention. See Council of Europe, *Statistics – Violation by Article and by State*, 2018. URL: https://www.echr.coe.int/Documents/Stats_violation_2018_ENG.pdf.