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The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg

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Abstract

Russia eagerly ratified the European Convention on Human Rights (ECHR) in 1998. Twenty years later, the chair of its Constitutional Court now expresses resentment at the subordination of Russian sovereignty. A new law expands his Court's jurisdiction to deny effect to judgments of the European Court of Human Rights, an unprecedented power that has already been used twice. This article analyses this law and its application in its first two years. Both the claim of 'subordination' and the Russian response to it, in law and practice, rest on weak legal ground. But Russia's action also raises deeper theoretical and practical questions for the ECHR as a 'living instrument' subject to the 'evolutive' interpretations of the Strasbourg Court. If other member states mimic Russia's response to these issues, a European human rights system premised on the final interpretive authority of an international court could come to its end.

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1 Introduction

The European Court of Human Rights (ECtHR) has jurisdiction over 'all matters concerning the interpretation and application' of the European Convention on Human Rights (ECHR).[1] In 1998, Russia agreed 'to abide by the final judgment of the Court in any case' in which it was a party.[2] Since individuals may lodge applications with the Court alleging that a state has violated rights protected by the ECHR, such judgments are not just possible; they are the whole point. Since about 2010, however, Russia's Constitutional Court (RCC) has expressed growing concern that its relationship with the ECtHR is one of 'subordination'. In December 2015, a federal law expanded the RCC's jurisdiction to consider petitions asserting a 'discovered contradiction' between the Russian Constitution and an ECtHR judgment. Finding such a contradiction, the RCC must – not may – forbid compliance with that judgment.

Anton Chekhov wrote: 'Don't place a loaded gun on the stage if no one plans to shoot it'.[3] Like Chekhov's gun, Russia's new law was not intended to lie dormant. More than six months before it was even passed, Russia notified the ECtHR's Department for the Execution of Judgments that 'information on further actions of the Russian authorities' to comply with two judgments 'cannot be provided at present time'.[4] These cases were not randomly selected from the 1,549 then pending cases monitored by the Committee of Ministers.[5] *Anchugov & Gladkov v. Russia* was chosen because it mirrored a case in which the United Kingdom (UK) also resisted Strasbourg, implicitly putting Russia in good company.[6] While that case involved not a kopeck in damages, the second one, *Yukos v. Russia*, required payment of €1.8 billion in a very politically sensitive case.[7] This article analyses this new law, these cases and their implications for the Council of Europe. It first explores how growing tensions in the RCC–ECtHR relationship have catalysed the passage of the new law. It then examines this law in detail, highlighting the Venice Commission's severe criticism of it. Finally, it analyses

[1] Art. 32 ECHR.

[2] Федеральний закон no. 54-ФЗ, 'О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней', Собр. Законод. РФ, 1998, No. 14, Art. No. 1514, at 2939–2940: 'The Russian Federation in accordance with Article 46 of the Convention recognizes ipso facto and without special agreement the compulsory jurisdiction of the European Court of Human Rights concerning the interpretation and application of the Convention and its Protocols in cases of alleged violation by the Russian Federation' (author's translation).

[3] 'Нельзя ставить на сцене заряженное ружье, если никто не имеет в виду выстрелить из него'. Чехов А. П. Письмо Лазареву (Грузинскому) А.С., 1 ноября 1889 г. Москва // Чехов А. П. Полное собрание сочинений и писем: Т. 3. Письма, Октябрь 1888 – декабрь 1889 – М.: Наука, 1976 – С. 273–275.

[4] Communication from the Authorities (16/06/2015) Concerning the Case of OAO Neftyanaya Kompaniya Yukos against Russian Federation (Application no. 14902/04) (*Yukos* communication), Doc. DH-DD(2015)640, 17 June 2015.

[5] Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, Tenth Annual Report of the Committee of Ministers (2017), at 59.

[6] ECtHR, *Anchugov & Gladkov v. Russia*, Appl. nos. 11157/04 and 15162/05, Judgment of 9 December 2013. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

[7] ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Appl. no. 14902/04, Judgment of 15 December 2014.

the rather gentle use of the law in *Anchugov & Gladkov*, followed by its aggressive application to decline to execute the *Yukos v. Russia* judgment.

Other member states have warned of potential conflicts with the ECtHR, but none have so directly denied the *res judicata* effect of its judgments. Russia's motives for limiting the ECtHR's power are hardly pure, but its objection is a serious challenge to fundamental concepts of a 'living' convention subject to 'evolutive interpretation' by the ECtHR. If the ECtHR is no longer the final word on the ECHR's meaning, then the international legal obligations undertaken by the Council of Europe's 47 member states become pie-crust promises: easily made and easily broken. On the other hand, how should domestic courts resolve conflicts between a state's constitution and the ECHR, neither of which are subject to static interpretation?

Russia's law could spark a crisis with real consequences. The day after the RCC upended the *Yukos* judgment, the Council of Europe's human rights commissioner warned that the action 'threatens the very integrity and legitimacy of the system of the European Convention on Human Rights, because it sends the signal that the standards of democracy, human rights and the rule of law a State subscribes to when joining the Council of Europe can be disregarded at will'.[8]

2 Early Tensions

Russia's 1993 Constitution rejected the Soviet Union's dualist approach to international law. Article 15(4) declares:

> The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Anatoly Kovler, formerly Russia's judge on the ECtHR, emphasized that this 'is not in the "small print" of the constitutional text but at the heart of the most central chapter' of Russia's Constitution.[9] He believed that Russia had 'sent a clear signal that as a signatory to the Convention the Russian Federation [it] recognises the jurisdiction of the European Court of Human Rights (ECtHR) as binding in matters of interpretation and application of the Convention and the Protocols'.[10] *Markin v. Russia* was a turning point for these commitments and the RCC's fraying relationship with the ECtHR.

[8] N. Muižnieks, Commissioner Concerned about Non-Implementation of a Judgment of the European Court of Human Rights in Russia, 20 January 2017.

[9] Kovler, 'Russia: European Convention on Human Rights in Russia: Fifteen Years After', in I. Motoc and I. Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (2016) 351, at 353.

[10] *Ibid.*, at 351. Sergey Marochkin perceives a 'Rubicon' moment in 2007 when the Russian Constitutional Court (RCC) signalled support for this view. Marochkin, 'ECtHR and the Russian Constitutional Court: Duet or Duel?', in L. Mälksoo and W. Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (2017) 93, at 95. For a general overview of earlier Russian positions in comparison with other countries, see Сергей Будылин, 'Конвенция или конституция?', 12 *Закон* (2013) 64, at 75–79.

A *The Precursor Case: Markin v. Russia*

Konstantin Markin sought parental leave to care for his children after his divorce. His employer, the Russian military, only provided such leave to women. In 2009, the RCC judged such discrimination reasonable in light of military personnel considerations and thus found no violation of Markin's constitutional rights.[11] (Russia's Constitution accords motherhood, not fatherhood or parenthood, special protection.)[12] In 2010, the ECtHR held that this discrimination violated the ECHR, a judgment its Grand Chamber confirmed, and recommended legislative changes.[13] Since the RCC had already issued its judgment, however, the ECtHR was essentially instructing the RCC to reverse itself. This was a first; prior cases had arrived in Strasbourg without first passing through the RCC's limited jurisdiction.[14]

Shortly thereafter, RCC Chairman Valery Zorkin published a blistering essay entitled 'The Limits of Compliance'.[15] Zorkin criticized zealous internationalists who heedlessly 'strive to realize their doubtful project of accelerated globalization – at any cost, with any cost'. Zorkin presented himself as a moderate between the dangers of irresponsible abnegation of national sovereign interests and nationalist isolationism, praising Russia's participation in the ECHR and the RCC's constructive role 'adapting the approaches and positions of the European Court to the realities' of Russian life. 'Until recently', Zorkin wrote, 'there had not been any kind of contradiction between these positions of the European Court and the role and aims of the Russian Constitutional Court, regarding the defense of constitutional and conventional values' that these courts protected. Then Zorkin's tone darkened: 'This dialogue was always in both directions. Here there cannot be a one-way street'. In *Markin*, for the first time, the ECtHR 'in rigid legal form subjected to doubt' a RCC decision, despite interpreting a ECHR right to respect for private and family life that was 'far from unambiguous'. Zorkin believed his court deserved more deference:

> The better knowledge by the national authorities of their society and its needs means that these powers in principle hold a priority position, in contrast to international courts, to say what is the public interest. This is the general meaning of the principle of subsidiarity, on the basis of which the European Court should act.

Zorkin found support for his view in a 2004 judgment of Germany's Bundesverfassungsgericht (BVerfG), the so-called *Görgülü* case.[16] Referring to that

[11] Определение Конституционного Суда РФ no. 187-О-О от 15 января 2009 г.

[12] Russian Federation Constitution, 12 December 1993, Art. 38(1). The next clause injects ambiguity: 'The care of children and their upbringing shall be the equal right and duty of parents.'

[13] ECtHR, *Markin v. Russia*, Appl. no. 30078/06, Judgments of 7 October 2010 (First Section) and 22 March 2012 (Grand Chamber). A marked difference in tone, though not in result, should be noted between these two judgments, which bookend RCC Chair Zorkin's strongly worded article, discussed below. *Cf.*, e.g., paras 48 and 57 (First Section judgment) to para. 145 (Grand Chamber judgment).

[14] Pomeranz, 'Uneasy Partners: Russia and the European Court of Human Rights', 19 *Human Rights Brief* (2012) 17, at 17–21.

[15] Валерий Зорькин, 'Предел уступчивости', *Российская газета* – Фед. выпуск No. 5325 (246), 29 October 2010.

[16] BVerfG, *Görgülü*, Order of the Second Senate, 2 BvR 1481/04, 14 October 2004.

court's judgment, he argued that 'it does not contradict adherence to international law if the legislator, by way of exception, does not observe the law of international treaties in circumstances when this is the only possible means to avoid violation of fundamental constitutional principles'.[17] He extrapolated a rule:

> Each decision of the European Court is not only a legal, but also a political, act. When such decisions are taken to benefit human rights in our country, Russia will always rigorously comply with them. But when decisions of the Strasbourg Court are doubtful from the point of view of the essence of the European Convention itself and all the more directly affect national sovereignty, fundamental constitutional principles, Russia has the right to work out a defensive mechanism against such decisions. Namely it is through the prism of the Constitution that the problem of the correlation of judgments of the Russian Constitutional Court and the European Court should be decided.

Of course, that 'prism of the Constitution' was singularly the RCC's lens to interpret into, or out of, conflict with the ECHR. Which authority divides ECtHR judgments between those 'taken to benefit human rights' and those that do not? What did it mean to describe an ECtHR decision as 'doubtful from the point of view of the essence of the European Convention,' beyond identifying an interpretive disagreement between judges in Strasbourg and St Petersburg?

The RCC, adopting Zorkin's perspective, instructed lower-level courts to seek its guidance when facing such asserted conflicts of law.[18] When Markin petitioned to reopen proceedings in light of the ECtHR Grand Chamber's judgment, a lower court did so, noting that 'within the domestic legal framework decisions of the [RCC] and [ECtHR] appeared to be "equal," thus creating a situation of *non liquet* if those decisions were at odds with each other'.[19] Although the RCC did not articulate a standard for deciding what to do, it decided which institution should have the final word: the RCC itself. As one knowledgeable observer remarked, 'the Court's reasoning is purposely open-ended and leaves the Court free to embrace the law of the European Convention of Human Rights just as much as to deviate from it, depending on the circumstances of future cases'.[20]

B *The Catalyst Case: The Duma Deputies' Advisory Opinion*

Five months prior to the new law's entry into force, the RCC issued an advisory opinion sought by deputies of the State Duma.[21] As the Venice Commission observed,

[17] *Görgülü* is discussed in subpart 3.B.

[18] Постановление Конституционного Суда Российской Федерации от 6 декабря 2013 г. no. 27-П по делу о проверке конституционности положений статьи 11 и пунктов 3 и 4 части четвертой статьи 392 Гражданского процессуального кодекса Российской Федерации в связи с запросом президиума Ленинградского окружного военного суда.

[19] Vaypan, 'Acquiescence Affirmed, Its Limits Undefined: The *Markin* Judgment and the Pragmatism of the Russian Constitutional Court vis-à-vis the European Court of Human Rights', 2 *Russian Law Journal* (2014) 130, at 132 (citing Определение президиума Ленинградского окружного военного суда от 30 января 2013 г.).

[20] *Ibid.*, at 131 (internal abbreviation omitted).

[21] Constitutional Court of the Russian Federation, Judgment no. 21-P/2015, 15 July 2015 (translation provided to the European Commission for Democracy through Law (Venice Commission), Doc. CDL-REF(2016)019, 23 February 2016). For a critical overview of this judgment, see Александр Бланкенагель и Илья Левин, 'В принципе нельзя, но можно! ... Конституционный Суд России и дело об обязательности решений Европейского Суда по правам человека', 108 *Сравнительное Конституционное Обозрение* (2015) 152, at 152.

'the great majority, arguably all, of the provisions in the subsequent law of December 2015 are drawn directly from the Constitutional Court's judgment' in that opinion.[22] Indeed, the filing of the deputies' case led Russia to suspend updates on compliance with the *Anchugov & Gladkov* and *Yukos* judgments since its resolution would be 'determinative for the procedure and possibility of execution of the above judgments'.[23] The deputies sought review of legislation that prioritized international treaties over Russian law 'even in the case when it contradicts the Constitution of the Russian Federation'.[24] Such phrasing suggests the preferred answer: that contradiction was not tolerable in a state in which democratically elected legislators established state policies under constitutional law.

The Duma deputies' concern is not easily dismissed. A central tenet of rule-of-law democracy is respect for the supreme law of the land. But preferring a domestic constitution's supremacy over an international treaty may really just obscure a preference for a domestic court over an international tribunal (which is harder to control) as the final interpretive authority. Even assuming a constitution's prioritization, how does one know when an international treaty contradicts domestic constitutional law? Such contradictions may not be obvious. In Markin's case, for example, was equal treatment of military men and women forbidden by the Russian Constitution or just one possible reading of it? What beyond the *ipse dixit* of a court from which there is no appeal should justify a legal conclusion of contradiction? The RCC answered this question mainly by drawing on the international and comparative law forms of argument analysed below. Unsurprisingly, the RCC agreed with the deputies that it should have the final word.

1 International Law Arguments

The RCC's opinion acknowledges the ECHR as 'an integral part of its legal system', citing Article 15(4) of the Constitution. Citing other constitutional provisions, however, the Court asserts 'the priority of the Constitution' in this relationship.[25] The emphasis is resolutely on the sovereignty of a Russian state that:

> concludes international treaties and participates in inter-state associations, transferring some of its powers to them, which, however, does not mean its renunciation of state sovereignty, belonging to the foundation of the constitutional system and contemplating supremacy, independence and self-sufficiency of the state power, fullness of legislative, executive and judicial powers of the state on its territory and independence in international relations....[26]

[22] Venice Commission, Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, Doc. CDL-AD(2016)016, 10–11 June 2016, para. 59.

[23] See *Yukos* communication, *supra* note 4.

[24] Judgment no. 21-P/2015, *supra* note 21, para. 1.

[25] *Ibid.*, para. 2.2. The Court cited Arts 4(1) (on state sovereignty), 15(1) ('supreme juridical force' of the Constitution) and 79: 'The Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.'

[26] *Ibid.*, para. 2.2 (internal citations omitted).

This recitation is a *non sequitur* since, by ratifying the ECHR, Russia accepted the role of the ECtHR to interpret the convention. Thus, there is no *prima facie* 'renunciation of state sovereignty' in voluntary accession to the convention. Treaty ratification is an *exercise* of sovereignty. It therefore seems too late to assert the 'supremacy, independence and self-sufficiency' of state power. Halfway through its opinion, the Court answered this 'late-in-the-day' critique:

> It is not excluded, however, that an international treaty, which at the moment of accession of the Russian Federation to it both from its literal meaning and the meaning attributed to it in the course of application by an interstate body, authorized to do it by the international treaty itself, was in conformity with the Constitution of the Russian Federation, subsequently by means of interpretation alone (particularly at sufficiently high degree of abstract character of its norms, inherent, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms) was rendered concrete in its content in the way that entered into contradiction with the provisions of the Constitution of the Russian Federation....[27]

In other words, Russia agreed to be bound by the ECHR as it was understood in 1998 (when it was ratified). The convention conformed with Russian constitutional law at that time. Subsequently, however, the ECtHR's evolutive interpretations changed the convention's meaning in ways that Russia could not have accepted – because it was in conflict with its law – at the relevant time of agreement.

Did not Russia agree to this interpretive approach? Article 32 of the ECHR provides that the ECtHR's jurisdiction 'shall extend to all matters concerning the interpretation and application of the Convention'. Article 46 provides that the parties 'undertake to abide by the final judgment of the Court in any case to which they are parties'.

The RCC cited two articles of the Vienna Convention on the Law of Treaties (VCLT) to argue that Russia's acceptance was not unconditional.[28] First, the RCC implied that the ECtHR has not always (in the words of Article 31) 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'. If it had done so, presumably, the ECtHR would not have 'subsequently ... rendered concrete [the ECHR's] content in the way that entered intro contradiction with the provisions of the Constitution of the Russian Federation'.

This argument gets at the heart of a dispute not just in ECHR law but also in the jurisprudence of many constitutional courts and interpretive bodies. The ECHR is a 'living instrument', by which is meant that it can and should gradually change in meaning to reflect (and not grow disconnected from) the changing natures of the societies it serves.[29] But the ECHR is also very much an international legal document, a contract agreed between sovereign states. Assuming there is agreement on the meaning of its terms when it is ratified, can the parties remain bound to a different interpretation at a later time? Are there any limits to this power to expand (or, perhaps, contract) the

[27] *Ibid.*, para. 3.

[28] Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

[29] This doctrine has long roots. See, e.g., ECtHR, *Tyrer v. United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978, para. 31.

meaning of the terms to which it agreed? On the other hand, this critique oversimplifies the process of agreeing to, and abiding by, often capaciously crafted international legal instruments.[30] What meaning could the ECHR have if the 47 Council of Europe members confined its reach to boundaries that their own courts set under their own laws? That may be a reason why the VCLT itself states, in relevant part: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'[31]

The RCC's second legal argument from the VCLT is much less powerful. The RCC cited Article 46, which provides a narrow ground to invoke internal law to invalidate consent to a treaty. That basis is limited only to a 'manifest' (meaning 'objectively evident') violation of an 'internal law regarding competence to conclude treaties' that 'concerned a rule of its internal law of fundamental importance'. The Court bootstrapped this argument to the previous one, concluding that it 'is, undoubtedly, manifest' (as that term is understood in Article 46) that Russia could not have meant to consent to the 'unconditional execution by Russia of the decisions of an interstate body, adopted on the basis of such international treaty in the interpretation not conforming to the Constitution of the Russian Federation'.[32] Since this non-conformity can only be revealed on a case-by-case basis, 'the issue in such cases is not validity or invalidity of the international treaty for Russia as a whole, but it is only impossibility to fulfil obligation to apply its norm in the interpretation, attributed to it by an authorized interstate body within the framework of consideration of a specific case'.[33]

2 *Comparative Law Arguments*

The RCC cited opinions by high courts in Germany, Austria, Italy and the UK to support its claimed right to authorize '[d]eviation from judgments' of the ECtHR upon discovering their contradiction with the Russian Constitution. Compared to the section of the judgment advancing international law arguments, this section is more cursory and conclusory, amounting to little more than three pages.

(i) Germany

The RCC identified Germany as providing 'the most emblematic' practice, citing the well-known *Görgülü* case for its 'principle of priority' of the German Basic Law over the ECHR as interpreted by the ECtHR. The Venice Commission severely criticized this interpretation (described in detail later in this article), concluding that the case was both factually and legally distinguishable from the more extreme power the RCC claimed.

The RCC also cited the BVerfG's famous *Solange-I* judgment.[34] It did so *en passant* in a brief, closing sentence alluding to the '[s]imilar attitude' expressed in it about the

[30] *Ibid.*, at 330 (observing that 'negotiated treaties, "general principles" and "customary international law" are vague, often deliberately left indeterminate by the negotiating state parties').

[31] VCLT, *supra* note 28, Art. 27.

[32] Judgment no. 21-P/2015, *supra* note 21, para. 3.

[33] *Ibid.*

[34] See BVerfG 37, *Solange-I*, Order of the Second Senate, 2 BvL 52/71, 29 May 1974.

Court of Justice of the European Union (CJEU). But there was nothing similar in that opinion to the RCC's confrontational rejection of 'subordination'. Rather, *Solange-I* highlighted the German court's concern that 'so long as' the European Community (EC) lacked, *inter alia*, 'a codified catalogue of fundamental rights' as reliably fixed as Germany's Basic Law, the German high court must retain the power to interpose a judicial review of rulings of the CJEU to guarantee the protection of fundamental rights. But Russia had approved such a 'codified catalogue' – the ECHR as well as a judicial mechanism built into that human rights system.

Interestingly, the RCC made no mention of *Solange-II*, which modulated the earlier criticism with a new and well-known 'solange' clause. In that case, the BVerfG stepped back from its theoretical need to provide protection against the infringement of fundamental rights in the German Basic Law by legislative acts of the EC. 'As long as' the EC gave fundamental rights 'effective protection … substantially similar' to that required by the German Basic Law, the German court would *not* exercise its jurisdiction.[35] This reticence, coupled with the merely theoretical expression of any disharmony in relations with the CJEU, was a thin reed for the RCC to rest its claim of a 'practice' of deviation from ECtHR judgments by member states of the Council of Europe.

(ii) Italy

The RCC referenced two opinions of the Italian Constitutional Court. The first, Case no. 238/2014, involved the application of a pension benefits law to Italians working in Switzerland. The ECtHR had found a violation of the right to a fair trial (but no violation of substantive property rights) for the timing and manner in which Italy's Parliament altered the pension law; lawsuits underway were, in a concrete sense, pre-decided by changing the law.[36] The Italian judgment cited by the RCC concerned whether the substance of the Italian property law itself (that is, not the fair trial issue decided by the ECtHR) was unconstitutional under either Italian constitutional principles or ECHR principles made part of Italian constitutional law. The Italian court considered this question to be groundless and allowed the pension law to remain in place.[37] The RCC considered the Italian Court to have 'disagreed with the conclusions of the European Court of Human Rights', implying that there was conflict between the ECHR and Italian constitutional law.

This holding, as described by the RCC, might appear to snub the ECtHR's earlier judgment, but this is misleading. The ECtHR was concerned with the timing and retroactive application of the Parliament's change to its law during ongoing litigation, not with the substance of the law itself. The ECtHR held that the right to a fair trial was violated by legislative interference with pending litigation.[38] No merit was found in the petitioners' claim to pension calculations other than prescribed by the new law.[39]

35 BVerfG 73, *Solange-II*, Order of the Second Senate, 2 BvR 197/83, 22 October 1986, para. 132.

36 ECtHR, *Maggio and Others v. Italy*, Appl. no. 46286/09, Judgment of 31 August 2011.

37 Italian Constitutional Court, Judgment no. 264, 19 November 2012, para. 3.

38 *Maggio*, *supra* note 36, paras 43–50.

39 *Ibid.*, paras 60–64.

Since the Italian court had accepted the merit of the fair trial violation in the ECtHR's *Maggio* judgment, there was no conflict to resolve.[40]

The second opinion that the RCC referenced was a 2014 judgment concerning a ruling of the International Court of Justice.[41] This case was also not on point. The RCC claimed the right to reject an international court's judgments interpreting treaty obligations that Russia had ratified. But the Italian Court struck down several domestic statutes for violating Italian constitutional principles. There was no claim (because there was no issue) of any subordination of domestic courts by international ones:

> First, it should be noted that the referring judge excluded from the subject-matter brought before this Court any assessment of the interpretation given by the ICJ on the norm of customary international law of immunity of States from the civil jurisdiction of other States. The Court, indeed, cannot exercise such a control. International custom is external to the Italian legal order, and its application by the government and/or the judge … must follow the interpretation given in its original legal order, that is the international legal order.[42]

Interestingly, the RCC made no mention of two Italian cases from 2007 that were much more on point (but contrary to the RCC's point of view).[43] In the first case, the Italian Court rejected the same VCLT argument advanced by the RCC in 2015. Litigants before the Italian court argued: 'The Strasbourg Court's claim to produce binding treaty norms is argued not to be compatible with the general international legal order and moreover with the system of the Vienna Convention, … according to which the interpretation of any treaty must be literal and objective.'[44] The Italian court categorically rejected this argument:

> Compared to other international law treaties, the ECHR has the particular characteristic of having provided for the jurisdiction of a court, the European Court of Human Rights, which is charged with the role of interpreting the provisions of the Convention. … Since legal norms live through the interpretation which is give [sic] to them by legal practitioners, and in the first place the courts, the national consequence … is that the international law obligations undertaken by Italy in signing and ratifying the ECHR include the duty to bring its own legislation into line with the Convention, in line with the meaning attributed by the court specifically charged with its interpretation and application. It is therefore not possible to speak of the jurisdiction of a court overlapping with that of the Italian courts, but of a pre-eminent interpretive role which the signatory states have recognised in the European Court, thereby contributing to clarifying their international law obligations in that particular area.[45]

[40] Judgment no. 264, *supra* note 37, para. 5.2 (noting that the European Court of Human Rights' (ECtHR) position in the *Maggio* case 'coincides essentially with the principles asserted by this Court with regard to the prohibition on the retroactivity of the law').

[41] Italian Constitutional Court, Judgment no. 238, 22 October 2014. Germany sued Italy in the International Court of Justice (ICJ). Asserting state immunity, Germany opposed civil actions in Italian courts seeking damages from Germany for crimes committed in Italy against Italian citizens during World War II. After the ICJ ruled against Italy, the Italian Constitutional Court struck down Italian statutes requiring Italian courts to respect the ICJ judgment.

[42] See *ibid.*, para. 3.1.

[43] These are Italian Constitutional Court, Judgment no. 348, 22 October 2007; Italian Constitutional Court, Judgment no. 349, 22 October 2007, concerning compensation for state seizures of property.

[44] Judgment no. 348, *supra* note 43, at 13, para. 2.1.

[45] *Ibid.*, at 37–38, para. 4.6.

The second case similarly concerned compensation for expropriated property. It gave robust support for the harmony of domestic and ECHR law, which was a sharp contrast to the Russian refrain of 'subordination'.[46] It also characterized the ECtHR as having 'the last word' on the interpretation of the ECHR: 'The interpretation of the Rome Convention and of the Protocols is a matter for the Strasbourg Court, which only guarantees the application of a uniform level of protection throughout the member states.'[47]

(iii) Austria

The RCC made a single-sentence reference to a 1987 judgment of the Austrian Constitutional Court, Case no. B267/86 of 14 October 1987, asserting that the Austrian Court had reached a conclusion on the 'impossibility of conventional provisions in the interpretation of the European Court of Human Rights, contradicting the norms of the national constitutional law'. The case concerned whether Article 6 of the ECHR applied to an administrative proceeding (namely, issuing a construction permit) that the Austrian Court had not considered to require oversight by an independent tribunal. One commentator's summary suggests why it so appealed to the RCC:

> The Court noted, however, that this would compel Austria to restructure radically its legal structure and took the view that Austria could neither have intended to accept such consequences when it acceded to the ECHR nor have foreseen that the European Court of Human Rights would develop such a broad interpretation of civil rights. In the view of the VfGH [Austrian Constitutional Court], the European Court of Human Rights' extensive interpretation of the civil rights concept in the Convention is a case of manifest judicial extension of law for which there may be sound reasons, but which imposes obligations on states which they neither intended nor agreed to accept.[48]

The Austrian Court concluded (in the words of another commentator) that, '[a]lthough it would generally try to harmonize both legal orders, if there was no margin for harmonization it considered itself bound by the basic principles of national constitutional law'.[49]

If the story ended there, this case might have aligned the RCC with a famous constitutional court and an early member of the Council of Europe. But the RCC omits mention that, after the Austrian Court's judgment, the 'legislator reacted by making the most profound changes' to the Austrian Constitutional Statute to conform administrative practices to the requirements of the ECHR.[50] This was in keeping with an

[46] Judgment no. 349, *supra* note 43, para. 6.1.2: 'It is therefore possible to infer from the case law of this court a recognition of the principle of the special relevance of the Convention provisions in the light of their content, which translates into an intention to guarantee, above all through interpretation, the tendency to harmonise the Constitution with the ECHR and incorporate the guarantees contained in the latter, which Parliament is found to respect and to further in ordinary legislation.'

[47] *Ibid.*, para. 6.2.

[48] Öhlinger, 'Austria and Article 6 of the European Convention on Human Rights', 1 *European Journal of International Law* (1990) 286, at 290.

[49] Thurnherr, 'The Reception Process in Austria and Switzerland', in H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 311, at 362.

[50] *Ibid.*, at 347.

evolution in Austrian thinking about the ECHR, which 'has the rank of *directly applicable federal constitutional law* in Austria and is therefore formally fully equivalent to the original catalogue of fundamental rights in the Austrian Federal Constitution'.[51] Now, in the event the Austrian Constitutional Court has perceived conflicts with obligations under the ECHR, 'the legislator has to give effect to the rights and freedoms of the Convention and all courts and administrative authorities have to interpret the law in a manner that does not infringe the rights of the Convention'.[52] Referencing only the holding, but not its aftermath, the RCC gave the misleading impression that Austria shared its view of *a la carte* enforcement of ECtHR judgments. Viewed in context, however, the Austrian case stands for the opposite conclusion: the result was not defiance of ECtHR interpretations but, rather, reform of national law.

(iv) The United Kingdom

Finally, the RCC stated that the UK Supreme Court 'noted inadmissibility for the British legal system of the conclusions and interpretation' of the ECHR in *Hirst (No. 2)*, concerning prisoner voting rights.[53] According to the RCC, the UK Supreme Court's 'legal position' was that ECtHR judgments are 'not perceived as subject to unconditional application; as a general rule, they are only "taken into consideration"; it is deemed possible to follow these decisions only in the event if they do not contradict fundamental material and procedural norms of the national law'.

The RCC's summary is partial and, consequently, inaccurate. True, the UK government's foot dragging in *Hirst (No. 2)* caused considerable concern. As the RCC notes, Lord Mance, writing for the UK Supreme Court, acknowledged the limited authority that Parliament gave to the Court in the Human Rights Act to 'take into account' ECtHR case law.[54] But this RCC summary is out of context. The UK Attorney General had 'made a fresh challenge to the principles endorsed' by the ECtHR's prisoner voting rights cases and invited the Court to 'take into account' this case law by rejecting it.[55] Importantly, Lord Mance and his colleagues refused to do so, twice.[56]

Lord Mance explored the issue under a subheading in the UK Supreme Court's judgment: 'Should the Supreme Court follow the Strasbourg case-law?' This question was answered affirmatively, which point the RCC also omits to mention. The RCC's opinion overlooks a critical difference between its approach and that of the UK Supreme Court. Lord Mance explored in theoretical terms the exceptional circumstances that would be necessary to refuse to follow ECtHR precedents. Such a refusal, he suggested, was as much about 'meaningful dialogue between United Kingdom Courts and Strasbourg'

[51] Öhlinger, *supra* note 48, at 286 (emphasis in the original).

[52] Thurnherr, *supra* note 49, at 326.

[53] ECtHR, *Hirst v. United Kingdom (No. 2)*, Appl. no. 74025/01, Judgment of 6 October 2005.

[54] See *R v. Secretary of State for Justice*, [2013] UKSC 63, para. 28. Lord Mance also noted the requirement that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Human Rights Act 1998, 1998, c. 42, Section 3(1).

[55] *Secretary of State for Justice*, *supra* note 54, para. 28.

[56] *Ibid.*, paras 34, 35.

as it would be about judicial deference to 'Parliament as the democratically elected legislature to complete its consideration', at which point '[t]here is no further current role for this Court'.[57] The new law that emerged from the RCC's judgment, however, neither promoted inter-court dialogue nor legislative deference. Indeed, it was premised on a need not to engage in dialogue with Strasbourg but, rather, to reverse a relationship of subordination with it. The result of the RCC finding a conflict was draconian action, as will be seen below.

3 The New Law

On 14 December 2015, Federal Constitutional Law no. 7-FKZ on the Constitutional Court of the Russian Federation amended an already much-amended 1994 statute that established the mechanics for the Court's jurisdiction and authority.

A *The Text*

The law authorizes the RCC to hear a new category of civil action. According to Article 3.2, the RCC:

> [s]hall upon requests ['по запросам'] by federal executive body competent to operate in the field of protecting Russia's sovereign interests within the procedure of considering complaints filed against the Russian Federation, which is carried out by the interstate human rights protection institution according to an international covenant to which Russia is a party, resolve the issue of feasibility ['разрешает вопрос о возможности'] of the enforcement of the interstate human rights protection institution's decision.[58]

The RCC's translation of 'разрешает вопрос о возможности' as 'resolve the issue of feasibility' is somewhat misleading. Feasibility in the sense of ease or convenience is not really the question. Clarification is found in the new Article 104.4. Here, the statute provides the only two conclusions that the RCC may reach to resolve such a case: conformity (the Court's translation of 'о возможности') or non-conformity ('о невозможности') in whole or part with the Russian Constitution. Taken together, these provisions suggest that 'feasibility' might better be understood to mean 'possibility' (or 'impossibility').

This understanding is supported by the result that the law prescribes should a finding of non-conformity be made. Articles 104.4 and 106 are unequivocal: '[A]ny measures (acts) aimed at enforcement of respective interstate institution's decision shall not be taken (adopted) within the territory of the Russian Federation.'[59] Thus, a finding of non-conformity is an end to all discussion of the matter, not an invitation to dialogue about

[57] *Ibid.*, paras 34, 42.

[58] Translation provided by the RCC. See Venice Commission, Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation of 14 December 2015, Doc. CDL-REF(2016)006, 20 January 2016.

[59] In Russian, Art. 106 omits the adjectival phrase 'for the protection of human rights and freedoms' that appears in the otherwise identical Art. 104.4(2).

how to find conformity with existing law or even the feasibility of amending the law to achieve conformity.

Procedural rules give priority to official government positions. Article 47.1, as amended, permits decision without conducting a public hearing. Article 105 is amended to provide that only the president and the government may petition the Court to interpret constitutional provisions with the aim of 'resolving the uncertainty in their reading' in the face of 'discovered contradictions' ('выявившегося противоречия') between the Constitution and the interpretation given to the international treaty by the interstate body. Thus, the 'discovered contradictions' that are the starting point for this discussion are provided by government officials outside of an adversarial, public process.

B *The Venice Commission's Analysis: Yukos Foreseen*

Drafts of this legislation attracted the attention of the Parliamentary Assembly of the Council of Europe. Four days before President Vladimir Putin signed the draft into law, the Parliamentary Assembly's Legal Affairs Committee agreed to seek an opinion from the Venice Commission.[60] The commission severely criticized the law, primarily on international law grounds. The commission found that the provisions of Articles 104.4 and 106 (prohibiting the execution of ECtHR judgments that the RCC finds do not conform to the Constitution) 'are in direct conflict with the obligations stemming from the Vienna Convention on the Law on Treaties and from Article 46 ECHR'.[61]

The Venice Commission found these provisions too absolute. Its more forcefully worded interim report described these amendments as presenting an 'all or nothing' approach with the 'black or white alternative' of either 'refusing the implementation of ECtHR judgments – which is inadmissible – or through declaring that there is no conflict between these judgments and the Russian Constitution'.[62] No state action could remedy an RCC finding against an ECtHR judgment; the text prohibits 'any measures (acts) aimed at enforcement' of such a judgment within Russian territory.[63] Presumably, this included both specific measures (for example, just satisfaction) and legal reforms, including constitutional amendment.

Such an absolute position was untenable under international law. The VCLT prohibited it: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[64] According to the Venice Commission, '[n]o legal argument at national law, including constitutional law, can justify an act or omission which turns out to be in breach of international law'.[65] The relevant international law in this case was the set of treaty obligations in the ECHR. The Venice Commission

[60] Committee on Legal Affairs and Human Rights, Synopsis of the Meeting Held in Paris on 8 December 2015, Doc. AS/Jur (2015) CB 08, 10 December 2015.

[61] Venice Commission, *supra* note 22, para. 31.

[62] *Ibid.*, para. 32.

[63] *Ibid.*, para. 129.

[64] VCLT, *supra* note 28, Art. 27, which continues: 'This rule is without prejudice to article 46.' Art. 46 provides only a limited exception by which a state may declaim consent to be bound to a treaty on grounds of a violation of its internal law concerning competence to conclude treaties. This provision applies only if 'that violation was manifest [meaning "objectively evident"] and concerned a rule of its internal law of fundamental importance'.

[65] Venice Commission, *supra* note 22, para. 84.

noted three intersecting provisions of relevance. Article 1 provides that member states undertook to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention', to wit, Articles 2–18. Article 32 provides that an integral role of the ECtHR extends 'to all matters concerning the interpretation and application of the Convention and the Protocols thereto', including, necessarily, the interpretation of those rights. Finally, Article 46(1) states that '[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

Summing up the meaning of this obligation, the Venice Commission concluded:

> The judgements of the Court therefore enjoy the authority of res judicata, both formally (they could not be modified or contested beyond the ways permitted by the ECHR – through referral before the Grand Chamber – or by the Rules of the Court – through requests for interpretation or revision) and substantively (their content and conclusions are final and obligatory for the parties concerned).[66]

Lest there be any doubt about this conclusion, the commission set forth its conclusion with rare emphasis: '*In other words, upon becoming a party to the Convention, the state parties expressly accept the competence of the ECtHR to interpret, and not only apply, the Convention.*'[67] This competence was to be applied 'to the factual and legal circumstances of each specific case *at the time of decision of the case*'.[68] This latter emphasis was to rebut the Russian argument that the ECtHR deserved no respect for interpretations that expanded ECHR obligations beyond what Russia could reasonably have been understood to have accepted. The Venice Commission was unsympathetic to that view:

> [B]y ratifying the ECHR in 1998, the Russian Federation accepted the supervisory mechanism at a time when the extent of the interpretative activity of the European Court of Human Rights already appeared rather clearly. … Therefore, even assuming that in a given judgment the ECtHR had engaged in an evolutive interpretation, the respondent State would nevertheless be bound to execute it in full.[69]

If the RCC thought executing a particular Strasbourg judgment could not be done without violating the Russian Constitution, then 'there remains only one possibility' for Russia to remain in compliance with its international obligations: 'amending the Constitution'.[70]

The Venice Commission also criticized the law for other reasons. Its procedural aspects, according a right of appeal exclusively to the president and government without requiring a public hearing, privileged the side most likely to be antagonistic to ECtHR judgments. Such a role 'means that the Russian President and Government can frame their case to the Constitutional Court on the basis that there is a discovered

66 *Ibid.*, para. 98.
67 *Ibid.*, para. 91.
68 *Ibid.* (emphasis in original).
69 *Ibid.*, para. 120.
70 *Ibid.*, para. 23.

contradiction' between Russia's constitutional law and its international obligations. But this might be a 'discovered contradiction' only 'in the sense that it is the result of a view taken of the Russian Constitution by the President or Government, in circumstances where it is not self-evident or obvious from the face of the relevant constitutional provision'. Special access for only the government's views 'could exert an important "weight" when the Constitutional Court reaches its conclusion'.[71]

Finally, the Venice Commission criticized the RCC's invocation of the *Görgülü* case. In its opinion for the Duma deputies, the RCC noted with favour the BVerfG's 2004 judgment. The RCC thought it was 'the most emblematic' of the practices of those European states that the RCC perceived to have deviated from ECtHR judgments, just as the RCC proposed to do.[72] The RCC read the German high court's judgment as having 'formulated the principle of priority' of a national constitution over ECtHR judgments. By extension, ECtHR judgments 'are not always obligatory for execution by the [German] courts, but they must not remain fully without attention; national justice must take these decisions into account in a proper way and carefully adapt them to the internal legislation'.[73] The RCC's reading aligned nicely with its proffered position as final adjudicator of compliance with an ECtHR judgment.

The Venice Commission found 'evident differences' between the Russian and German approaches. First and foremost, only the Russian approach allowed for a 'direct review of the constitutionality of an ECtHR-decision and leads to a decision about the feasibility' of its enforcement in Russia.[74] The German approach focused on individuals claiming a right under the German Basic Law, whereas only the state could petition the RCC regarding a 'discovered contradiction' between the ECtHR decision and the Russian Constitution.

The biggest difference, however, was a philosophical one. The Russian approach was binary and absolute; the RCC's only choice was whether an ECtHR judgment conflicted with the Russian Constitution, and, if it did, the only option was forbidding its enforcement. The Venice Commission concluded that this approach 'prevents dialogue and does not allow to find solutions in the future'.[75] 'In contrast', the German approach 'is based on the idea of cooperation and harmonization between the two legal regimes'.[76]

Indeed, dialogue and harmonization were the twin themes of the *Görgülü* case. The BVerfG actually rejected the interpretation of a regional court that was much closer to the RCC's view. The Naumburg Higher Regional Court concluded that 'neither in interpreting the European Convention on Human Rights nor in interpreting national fundamental rights could domestic courts be bound by the decisions' of the Strasbourg Court.[77] To the contrary, the BVerfG held that the ECtHR's judgments 'are binding on

[71] *Ibid.*, para. 79.

[72] Judgment no. 21-P/2015, *supra* note 21, para. 4.

[73] *Ibid.*

[74] Venice Commission, *supra* note 22, para. 135.

[75] *Ibid.*, para. 136.

[76] *Ibid.*, para. 138.

[77] *Görgülü*, *supra* note 16, para. 18.

the parties to the proceedings and thus have limited substantive res judicata'.[78] More generally, '[t]he decisions of the [ECtHR] in proceedings against other States parties merely give the states that are not involved an occasion to examine their domestic legal systems and, if it appears that an amendment may be necessary, to orient themselves to the relevant case-law of the [ECtHR]'.[79]

The BVerfG did allow for a very narrow circumstance when such priority might not be accorded an ECtHR judgment. Crafting this exception, the BVerfG used similar language to its famous *Solange* judgments:

> As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECHR, for example because the facts on which it is based have changed, clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties.[80]

The application of this exception was easy to see in the facts of the *Görgülü* case, which concerned a custody dispute. The length of time that the case took to travel up and down the German judiciary, and across the ECHR system, naturally could have affected a new determination of 'the best interests of the child' under German law.[81] It was therefore conceivable (although not applicable here) that a German court might reach a different result than the ECtHR because of factual differences that incidentally might have affected the ultimate goal of harmonization, not a battle of sovereignties.[82]

This context is omitted from the RCC's judgment in the Duma deputies' case. Without it, the German approach sounds much more independent, reducing the role of the ECHR and the ECtHR's case law to 'a guiding line for interpretation' of rights under the German Basic Law so long as this line 'does not lead to restriction or derogation of basic rights of citizens'.[83] In fact, the German approach seems to be based on an entirely different philosophical foundation. In Germany, it is 'the task of the domestic courts to integrate a decision of the [ECtHR] into the relevant partial legal area of the national legal system',[84] not to defend state sovereignty from the interference of a foreign international court.

Furthermore, the RCC also does not mention an important follow-up to the *Görgülü* case. In the 2011 *Preventive Detention* case, the German Constitutional Court departed

[78] *Ibid.*, para. 38.

[79] *Ibid.*, para. 39 (citation omitted).

[80] *Ibid.*, para. 62; see also Frowein, 'The Binding Force of ECHR Judgments and Its Limits', in S. Breitenmoser *et al*. (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007) 261, at 263: 'The Federal Constitutional Court took that problem into account and made clear that the binding force of the judgment is limited by the *res judicata* and would not be valid after the facts would have changed.'

[81] *Görgülü*, *supra* note 16, para. 55.

[82] *Ibid.*, para. 69.

[83] Judgment no. 21-P/2015, *supra* note 21, para. 4.

[84] *Görgülü*, *supra* note 16, para. 58.

from an earlier view upholding a German law on the subject, in the process augmenting its *Görgülü* position on inter-court dialogue and sovereignty:

> The openness to international law of the Basic Law is thus the expression of an understanding of sovereignty which is not only not in conflict with an integration into international and supranational contexts and their further development, but actively presumes and expects them. Against this background, even the 'last word' of the German constitution is not opposed to an international and European dialogue of courts, but is the normative basis for this.[85]

The Court also noted that its case law established the 'constitutional significance' of the ECHR and the ECtHR judgments to the 'interpretation of the fundamental rights and rule-of-law principles of the Basic Law'.[86] This 'effectively raised the ECHR and the Strasbourg jurisprudence to the level of constitutional law as aids to interpretation for determining the content and scope of the fundamental rights and rule-of-law guarantees of the Basic Law'.[87]

4 Implementation: Exercising the 'Right to Object'

A *The First Case: Anchugov & Gladkov*

On 2 February 2016, before the Venice Commission had completed its interim opinion, the Russian Ministry of Justice appealed the ECtHR judgment in *Anchugov & Gladkov*. As noted above, this case had already been chosen six months before the law authorizing its review was drafted.

It was an interesting choice. First, the case presented an issue about which another member state (the UK) also resisted the ECtHR's judgments.[88] Thus, Russia could claim company resisting a controversial judgment. Second, the ECtHR's judgment was unanimous; the Russian judge on the Court agreed that Russia had violated the ECHR. By disagreeing with its 'own' judge, Russia could claim a principled motivation, not one of self-interest. Third, this case concerned a provision of the Russian Constitution. Like *Markin*, it more directly challenged the RCC's authority.

1 The Strasbourg Court's Judgment

Anchugov & Gladkov concerned Article 32(3) of the Russian Constitution, which denies the franchise to 'citizens kept in places of confinement by a court sentence'. The petitioners – incarcerated convicts – alleged this prohibition violated their freedom of expression (Article 10), freedom from discrimination (Article 14) and right to free elections (Article 3, Protocol 1). The ECtHR held only that the elections provision was

85 BVerfG, *Preventive Detention*, Judgment of the Second Senate, 2 BvR 2365/09, 4 May 2011, para. 89.

86 *Ibid.*, para. 88.

87 Andenas and Bjorge, '*Preventive Detention*. No. 2 BvR 2365/09', 100 *American Journal of International Law* (2011) 768, at 771 (internal quotation marks and citation omitted).

88 *See Hirst (No. 2)*, *supra* note 53; ECtHR, *Greens & M.T. v. United Kingdom*, Appl. nos 60041/08 and 60054/08, Judgment of 11 April 2011.

violated; the other complaints were held as being either inadmissible or presenting no separate issues worth further consideration.

This case was relatively easy for the ECtHR; its Grand Chamber had already ruled that prisoners have voting rights in *Hirst v. UK (no. 2)*.[89] A lower-level Russian court argued that the Russian disenfranchisement law satisfied that precedent by 'attach[ing] decisive weight to the proportionality and reasonableness of establishing this measure in law'.[90] The ECtHR disagreed, noting the similarities to *Hirst* and finding no support for the lower-level court's interpretation of the constitutional provision in any Russian case law or judicial practices.[91]

In its arguments, Russia returned to the theme of subordination, foreshadowing the December 2015 law that would be used to reconsider the ECtHR's judgment. First, Russia argued that the case was inadmissible because of its subject matter: '[T]he Constitution was the highest-ranking legal instrument within the territory of Russia and took precedence over all other legal instruments and provisions of international law,' including the ECHR.[92] The ECtHR rejected this argument, citing Article 1, by which Russia agreed to 'secure to everyone within their jurisdiction the rights and freedoms' in the ECHR:

> That provision makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' 'jurisdiction' from scrutiny under the Convention. It is, therefore, with respect to their 'jurisdiction' as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called upon to show compliance with the Convention.[93]

Russia viewed the constitutional origin of its disenfranchisement provision (as opposed to the UK's statutory basis to disenfranchise convicts) as the distinguishing feature. Pursuant to Article 135 of the Russian Constitution, its alteration 'would necessitate adoption of a new Constitution'. This 'democratic vision of Russia' must be accorded a wide margin of appreciation.

The ECtHR acknowledged a margin of appreciation for election rights, but it reserved for itself 'to determine in the last resort' whether ECHR requirements were satisfied.[94] Citing Article 27 of the VCLT, the ECtHR found the constitutional source for the disenfranchisement provision insufficient to distinguish *Hirst (No. 2)*.[95] The ECtHR advised that Russia could meet its international legal obligations 'through some form of political process or by interpreting the Russian Constitution by the competent authorities – the Russian Constitutional Court in the first place – in harmony with the ECHR in such a way as to coordinate their effects and avoid any conflict between them'.[96]

89 *Hirst (No. 2)*, *supra* note 53.
90 *Anchugov & Gladkov*, *supra* note 6, para. 23.
91 *Ibid.*, paras 101, 105–106.
92 *Ibid.*, para. 48.
93 *Ibid.*, para. 50 (internal citations omitted).
94 *Anchugov & Gladkov*, *supra* note 6, paras 95–96.
95 *Ibid.*, para. 108.
96 *Ibid.*, para. 111.

2 *The RCC's Response*

These very same arguments were reheard in the much more sympathetic forum of the RCC nearly three years later.[97] The RCC's judgment begins by noting that 'the interaction of the European conventional and the Russian constitutional legal orders is impossible in the conditions of subordination'.[98] The RCC offered that it 'is ready to look for a lawful compromise for the sake of maintaining this system', so long as that could be done within the bounds of conformity to the Russian Constitution.[99] (This phrase appears almost verbatim in the RCC's earlier judgment of 14 July 2015.) Thus, the real issue for the RCC was whether the ECtHR's judgment in *Anchugov & Gladkov* could be executed within the confines established by the Russian Constitution, which confines were not to be changed in order to comply with any judgment of the ECtHR. To do so would be 'subordination' of the Russian system to the European one.

But had not the Russian Federation acceded to the interpretive authority of the ECtHR when it joined the Council of Europe and ratified the ECHR? Yes, the RCC acknowledged, but only 'in the context of the circumstances and conditions, on which Russia has signed and ratified it'.[100] In 1998 (when Russia ratified it), the RCC asserted that this could only have been done:

> proceeding from the understanding that Article 32 (Section 3) of the Constitution of the Russian Federation was fully in accord with the prescriptions of Article 3 of Protocol No. 1 to the Convention and therefore needed no alteration. The Council of Europe had no questions connected with possible contradictions between them either. In other words, both Russia and the Council of Europe recognized that [these provisions of the Russian Constitution and the Convention] were in full accord with each other. From that moment and until now these norms (rules) corresponding to each other underwent no textual changes.[101]

No textual changes, but, by implication, the ECtHR had made an interpretive change. Although Russia had granted that Court authority to find that Russia had violated the ECHR, this was a limited grant because 'Russia is not entitled to conclude international treaties not conforming to the Constitution of the Russian Federation'.[102] Russia 'gave no consent during its ratification' – indeed, it could not give such consent – to an interpretation of the Convention that violated its own Constitution. In other words, 'judgments of the European Court ... are subject to realization on the basis of the principle of supremacy and supreme legal force of exactly the Constitution of the Russian Federation in the legal system of Russia, international-law acts being an integral part of it'.[103]

97 Perhaps strategically, the RCC chose not to make use of the full panoply of its power in this first case. It could have decided the case without holding a hearing (under revised Art. 47(1)); it not only chose to hold one but also agreed to hear from numerous presenters, including Anchugov himself and representatives of Gladkov.

98 Constitutional Court of the Russian Federation, Judgment no. 12-П/2016, 19 April 2016, at 7, s. 1.2 (translation by the RCC).

99 *Ibid.*

100 *Ibid.*, at 8, s. 4.2.

101 *Ibid.*, at 19, s. 4.2.

102 *Ibid.*, at 17, s. 4.2.

103 *Ibid.*, at 18, s. 4.2.

Or, to be more precise, 'exactly the Constitution' as interpreted by the RCC. The ECtHR could give evolutive judgments to the ECHR as a living document, but the RCC warned that it did so at its own risk. The RCC thus justified its approach as a help, not a hindrance, to the ECtHR:

> [T]he Constitutional Court of the Russian Federation notes that if as an exception it deems it necessary to enjoy the right to objection, it is only in order to make contribution to the crystallization of the developing practice of the European Court of Human Rights in the field of suffrage protection, whose decisions are called upon to reflect the consensus having formed among states parties to the Convention.[104]

Disenfranchisement of Anchugov and Gladkov was Russia's 'contribution to … the field of suffrage protection'! Russia's approach to disenfranchising convicts did comply with ECtHR precedents, just as the lower-level court had first explained. Russian law required judges, when imposing a sentence for certain crimes, to 'take into consideration the fact that such sentence will mean for the convicted person also the restriction of his electoral rights', which is precisely the individual consideration that the ECtHR criteria demanded. The fact that the ECtHR had been unpersuaded by these arguments in 2013 was countered by providing official statistics in this 2016 judgment.[105] Likewise, Anchugov's and Gladkov's disenfranchisement 'does not violate the principle of proportionality', and, in any event, 'reconsideration of judicial decisions in their cases and compensation of any damage is impossible'.[106] Therefore, the RCC held that it was impossible to execute the ECtHR's *Anchugov & Gladkov* judgment in the manner that the ECtHR had suggested. On the other hand, its execution as outlined by the RCC was 'possible and realizable in Russia's legislation and judicial practice', either with additional legislative reforms or according to the interpretation of existing legislation found in the RCC's judgment.

Perhaps signalling its disagreement little over a year later, the Strasbourg Court joined 24 separate applications raised by prisoners complaining about their disenfranchisement for examination in a single judgment.[107] Citing *Anchugov & Gladkov*, the ECtHR found the same violation and ordered the payment of modest amounts (none exceeding €30) to each applicant. It is hard to say for whom this was a victory.

B *The Second Case: Yukos v. Russia*

The second case decided under the new law (like the first, selected in June 2015) presented a greater challenge to the ECtHR's authority. The Ministry of Justice petitioned the RCC to review the ECtHR's just satisfaction judgment in *Yukos v. Russia*, asserting to have 'discovered uncertainty in the question of the possibility to execute' the

[104] *Ibid.*, at 24, s. 4.4.
[105] *Ibid.*, at 32, s. 5.3.
[106] *Ibid.*, ss 6, 7.
[107] ECtHR, *Isakov & Others v. Russia*, Appl. no. 54446/07 and 23 others, Judgment of 4 July 2017.

ECtHR's judgment without violating the Russian Constitution.[108] As with its review of *Anchugov & Gladkov*, the RCC again opted to hold a hearing (notwithstanding its new authority not to do so) and filled its chamber with lawyers offering additional interventions. Most were from official institutions (for example, representatives from the president, Council of the Federation, government and the procurator general). In addition, J.P. Gardner, the lawyer who represented Yukos before the Strasbourg Court was invited; for unexplained reasons, his written submissions were merely 'announced in the hearing'. Other 'interventions' were allowed from the Presidential Council for the Development of Civil Society and Human Rights and the Institute of Law and Public Policy, a non-profit organization, and from a professor of law from Saint-Petersburg State University, N.A. Sheveleva, who 'prepared an opinion in the case, having examined the submitted documents and other materials, including written observations of former shareholders of OAO Neftyanaya Kompaniya Yukos – companies "Hulley Enerprises [sic] Limited" and "Yukos Universal Limited" signed by the Director of these companies T. Osborne'.[109] (No arguments from any of these sources is referenced as such in the opinion.)

In 2011, the ECtHR held that tax prosecutions that led to the bankruptcy of Yukos, Russia's largest private oil company (and, ultimately, the arrest of its leadership), violated Article 6 and Article 1 of Protocol 1 of the ECHR.[110] In 2014, the ECtHR assessed €1.8 billion in damages to be paid.[111] On 19 January 2017, the RCC issued its own judgment on the question 'of the possibility to execute in accordance with the Constitution of the Russian Federation the judgment of the European Court of Human Rights'.[112] The RCC held that Russia could not use the state budget to pay the 2014 just satisfaction award.

The RCC began by flatly challenging the ECtHR's interpretive role. Describing provisions of the ECHR as 'highly abstract', the RCC asserted that when the ECtHR 'attributes to a term used in it other meaning than its usual one or carries out interpretation contrary to the object and purpose' of the ECHR, 'a state in whose respect the judgment in this case has been delivered is entitled to refuse to execute it as going beyond the obligations, voluntarily taken upon itself when ratifying the Convention'.[113]

This language was drawn from Article 31 of the VCLT. The RCC's logic was the same as in its 2015 advisory opinion and in its 2016 judgment on *Anchugov &*

[108] Постановление no. 1-П/2017 (19 January 2017) по делу о разрешении вопроса о возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по правам человека от 31 июля 2014 года по делу 'ОАО 'Нефтяная компания 'ЮКОС' против России' в связи с запросом Министерства юстиции Российской Федерации (an English translation was provided by the Russian Federation Ministry of Justice; see Secretariat of the Committee of Ministers, Doc. DH-DD(2017)207, 22 February 2017).

[109] Постановление no. 1-П/2017, *supra* note 108, at 2.

[110] *OAO Neftyanaya Kompaniya Yukos v. Russia*, Appl. no. 14902/04, Judgment of 20 September 2011, para. 2.

[111] *OAO Neftyanaya Kompaniya Yukos v. Russia*, Appl. no. 14902/04, Judgment (Just Satisfaction) of 31 July 2014.

[112] Постановление no. 1-П/2017, *supra* note 108, at 1.

[113] *Ibid.*, at 5.

Gladkov. Russia had ratified the ECHR in 1998 based on an understanding that its terms were consistent with its constitutional order. If the ECtHR subsequently interpreted the ECHR in a different way, than this interpretation was beyond the obligations that Russia had accepted.

The Russian Court acknowledged that the ECHR was a 'living instrument' that could 'take into account objective changes in the field of human rights protection'. What these 'objective changes' were, or how they were to be discovered, the RCC left unsaid. The RCC immediately asserted, however, that interaction with the 'European conventional … legal order[] is impossible in the conditions of subordination'.[114] The RCC thus seemed to concede that its international legal obligations were not fixed according to the meaning of the ECHR in 1998 but were nevertheless governed by an undefined idea of 'national constitutional identity'.

This might be contrasted with the approach of the Supreme Court of the Russian Federation, whose analysis ran in the opposite direction. In 2003, the Russian Supreme Court examined section 3(b) of Article 31 of the VCLT.[115] Section 3(b) provides the general rule that, together with the text and the context of a treaty, interpretation shall take into account '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Specifically referencing the ECHR and the ECtHR, the Supreme Court instructed that 'the application of the above-mentioned Convention by the courts must be carried out taking into account the practice of the European Court of Human Rights in order to avoid any violation of the Convention'.[116] The Supreme Court emphasized that decisions with respect to the Russian Federation by the ECtHR and the Council of Ministers (enforcing its judgments) 'are binding for all organs of state power of the Russian Federation, including in that number the courts'.[117]

This is the opposite conclusion that the RCC reached in 2017, drawing on a different part of Article 31. How does the RCC square 'objective changes' that are acceptable to it with violations of Article 31, which are not? The RCC positioned itself to make the final determination of the permissible extent of the ECtHR's 'evolutive' judgments when these raised interpretive issues regarding the Russian Constitution. Of course, the RCC also reserved for itself the exclusive authority to identify those instances as well.

The RCC cautioned that this entitlement 'to deviate from fulfilment of the obligations' of the ECHR was limited to 'exceptional cases and in the presence of sufficiently weighty reasons'. These 'exceptional cases' not only involve collision between the ECHR and the Russian Constitution but also:

[114] *Ibid.*, at 4.

[115] Пункт 10, Постановление Пленума Верховного Суда Российской Федерации, No. 5 (10 октября 2003 г.) (с изменениями, внесенными постановлением Пленума от 5 марта 2013 г. No. 4).

[116] *Ibid.*

[117] *Ibid.*, at пункт 11; see also Пункт 2, Постановление Пленума Верховного Суда Российской Федерации, no. 21 (27 июня 2013 г.), broadening this instruction to include ECtHR judgments concerning other member states in sufficiently analogous circumstances.

as a rule, concern not so much the main content (essence) of some or other rights and freedoms as such, as their concretization by way of interpretation in judgments of the European Court of Human Rights, including if the result of such interpretation is the denial of legal constructions, *which have formed in the Russian legal system as a result of exercise by the federal legislator* of his prerogatives....[118]

Thus, ECHR law is not the only moving target. Russian constitutional law can change as well 'as a result of exercise by the federal legislator of his prerogatives'. Of course, the range of legislative action is controlled by the RCC, which polices the boundaries of acceptable (that is, constitutional) legislation. If the RCC deems the legislator's changes to be constitutional, but these same legislative actions seem to be inconsistent with the ECHR, then the real subordination is the ECtHR under the RCC, which controls both the meaning of the Constitution and also (by extension) the range of Russia's international obligations under the ECHR.

What put the *Yukos* case into the category of 'exceptional cases' and 'sufficiently weighty reasons' that rendered the Strasbourg Court's judgment unworthy of execution? Or, more bluntly, why should Russia not pay Yukos shareholders the just satisfaction awarded by the ECtHR? The RCC gave two reasons.

First, 'principles of equality and fairness, commensurability (proportionality) and inevitability of liability would have been breached'.[119] The Court cited six applicable constitutional provisions.[120] More specifically, the Court referenced 'the conditions of political and economic instability' of the 1990s before observing that 'the court may excuse the tax authorities' missing of the time-limit' set by a statute of limitations.[121] This was an odd excuse, seeing as the tax authorities were rather strictly enforcing tax rules from the same period when these worked against the interests of Yukos.

Second, the RCC seemed to conclude (in passages worth quoting at length) that Yukos was too big and too bad a company for the law to be strictly applied to its benefit: '[T]he company, using refined illegal schemes, showed itself as a malicious non-payer of taxes.'[122] The RCC concluded:

[Yukos's] activity, bearing in mind its place in [the] country's economy, even if we leave without legal analysis the question of fairness of methods of company's assets formation in a strategically important and one of [the] most profitable branches of [the] Russian economy, thanks to which it became one of the biggest economical subjects (and, accordingly, the largest potential taxpayers) in Russia, had a law-ruining effect, hindering stabilization of constitutional law regime and public legal order. Nor did the European Court of Human Rights, delivering the

[118] *Ibid.*, at 6–7 (emphasis added).

[119] *Ibid.*, at 9.

[120] Russian Constitution, Art. 15, paras 1, 2 (supreme juridical force of the Constitution and obligation to observe it and Russian laws); Art. 17, para. 3 (the exercise of rights shall not violate the rights of others); Art. 19, paras 1, 2 (equal protection of the law); Art. 55, paras 2, 3 (limitation of rights only by law to the extent necessary to achieve essential purposes); Art. 57 (everyone must pay lawfully established taxes but tax law may not have retroactive effect); and Art. 79 (participation in international associations only in conformity with constitutional law).

[121] Постановление no. 1-П/2017, *supra* note 108.

[122] *Ibid.*, at 14.

> Judgment of 20 September 2011, deny the presence of a large-scale schemes [sic] of evasion of taxpaying in the company's activity.
> In this context, payment of such a huge monetary sum, awarded by the European Court of Human Rights to former shareholders of a company having built illegal schemes of evasion of taxation, their heirs and legal successors from the budget system, which was regularly not receiving from it in due amount enormous tax payments, necessary, *inter alia*, for the fulfilment of public obligations before all citizens, getting over financial and economic crisis, in itself contradicts constitutional principles of equality and justice in tax relations....[123]

'In the concrete historical circumstances', the Court concluded, Yukos '(having highly professional lawyers at its disposal) should not have expected an application of the branch norm on the time-limit for holding a taxpayer liable for tax offences in the understanding, comfortable for realization of unlawful goals, but diverging from its constitutional law meaning'.[124]

In short, Yukos was too bad, and the country too needy, for anyone to expect something as formalistic as a statute of limitations to be rigorously applied. Compensating Yukos (in effect, undoing the tax assessment) in such a circumstance violated Russia's constitutional principles ranging from its equal protection provisions, to its requirement that the law be strictly enforced, to its felt need for justice.

The RCC's solution to this impasse sounded in diplomacy more than law, since the RCC deemed it necessary 'to look for a lawful compromise for the sake of maintenance of this [European human rights] system'.[125] At a regularly scheduled deputies' meeting of the Committee of Ministers of the Council of Europe, the Russian delegation informed the assembled deputies that the RCC 'in particular ... deemed it possible for the government to initiate the consideration of the question of payment to Yukos shareholders' under certain conditions.[126]

Those 'certain conditions' were to be found in paragraph 7 of the RCC's judgment, the final paragraph before the summation of the Court's holding.[127] This paragraph states the RCC's view that, although the Court did not recognize 'the imperative obligation to execute' the ECtHR's judgment in the case because of its failure to conform to the Russian Constitution, the Court 'nevertheless does not exclude the possibility to manifest good will of the Russian Federation in determining the bounds of such compromise and mechanisms of its attainment in respect of shareholders of OAO Neftyanaya Kompaniya Yukos, who suffered from the unlawful actions of the company and its management'.[128] Having thus put the onus for any rights violations squarely on the shoulders of the party determined by the ECtHR to have been the victim, the Court continued:

[123] *Ibid.*, at 14.

[124] *Ibid.*, at 15.

[125] *Ibid.*, at 21, para. 7.

[126] Decisions, Ministers' Deputies, *OAO Neftyanaya Kompaniya Yukos v. Russian Federation* (Application no. 14902/04), Doc. CM/Notes/1280/H46-26, 1280th Meeting, 10 March 2017, para. 2, n.1. Eight months later, Russia informed the committee that it had 'organized the payment of compensation of costs and expenses' associated with the case. Secretariat of the Committee of Ministers, Communication from the authorities concerning the case of *OAO Neftyanaya Kompaniya Yukos v. Russian Federation* (Application no. 14902/04), Doc. DH- DD(2017)1342, 27 November 2017.

[127] Постановление no. 1-П/2017, *supra* note 108, at 21, para. 7.

[128] *Ibid*.

> In this connection, the Government of the Russian Federation is competent to initiate the consideration of the question of payment of respective sums in the procedure of distribution of newly revealed property of a liquidated legal person provided for by the Russian and foreign legislation which may be carried out only after settlements with creditors and taking of measures to reveal other property (for example, concealed on foreign accounts). However, such payment, proceeding from the legal positions expressed in the present Judgment, in any event must not affect budget receipts and expenditures, as well as the property of the Russian Federation.[129]

It would seem that the compromise suggested by a payment that would 'not affect budget receipts' had to do with the imposition of civil liability on Mikhail Khodorkovsky as the chief executive of Yukos.[130] Perhaps it is imagined that a partial payment of one Strasbourg judgment with the sequestered funds owed in another Strasbourg judgment could somehow be deemed just satisfaction. *Yukos v. Russia* is now an ECtHR judgment not just ignored or left unexecuted, which has happened before and not just with Russia. This time, an ECtHR judgment has been openly and directly rejected by order of a member state's highest court. That is a first for the Council of Europe.

5 Conclusions

For those who see virtue in the European human rights system, there is much to dislike in Russia's new law and its first applications by the RCC. What the RCC gives with one hand, such as acknowledging the ECHR as a 'living instrument' and recognizing the legitimacy of the 'evolutive' nature of the ECtHR's judgments, it takes away with the other, along with a bit more. Whenever it suspects an ECtHR judgment may conflict with the Russian Constitution, the RCC is now empowered to decide whether to allow its enforcement, removing the ECtHR's *res judicata* authority. What is more, the rationale behind this power casts aspersions on the ECtHR's good faith in interpreting the ECHR.

The implications for the European human rights system are grim if this approach proliferates among other member states. The former ECtHR president, Guido Raimondi, has emphasized the value of interpreting the ECHR as a living instrument to ensure 'the strong impact and the remarkable dynamism of European human rights law'.[131] This interpretive power keeping the convention current can also threaten the ECtHR's legitimacy; detractors complain that this judicial power will replace democratic governance by popular majorities in sovereign states.[132] So far, other states have largely perceived harmonization of their national and international legal obligations as both

[129] *Ibid.*, at 21, para. 7.

[130] See Notes on the Agenda, Doc. CM/Notes/1294/H46-23, 22 September 2017 (noting that compensation transferred to Khodorkovsky's account in just satisfaction of a judgment of violation by the ECtHR in a related case 'had been seized by the Federal Bailiff Service in the enforcement proceedings to recover partially the damages awarded against him', totalling roughly 17.4 billion rubles).

[131] Speech of Guido Raimondi, Conferral of the Treaties of Nijmegen Medal, Nijmegen, 18 November 2016.

[132] 'The challenge is to the very idea of the Convention system. It questions the authority, and even the legitimacy of the European Court of Human Rights. … It takes aim at what is said to be a judicial activism at the European level, over-reaching by a judicial European institution, over-riding national democracy and over-turning national decisions.' *Ibid.*

possible and desirable. Russia's approach challenges both assumptions, primarily by starting from the more antagonistic assumption that its courts are at risk of 'subordination' to Strasbourg.

There is some hope in the continued interaction that Russia has maintained with Strasbourg that a solution may be achieved.[133] But, if Russia's new law remains in place, then, like Chekhov's gun, it is likely that the RCC will use it again. This is a play that is dangerous for other member states to watch.

[133] On 25 September 2017, Russia ratified Protocol no. 15, which amends some of the admissibility criteria in the ECHR and adds references to the principles of subsidiarity and the margin of appreciation to the convention's preamble.