

# Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania

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## Abstract

In today's Europe the protection of human rights is ensured by different legal instruments on the national, regional and international levels. Sometimes these human rights regimes clash with each other, not infrequently because of diverging understandings of rights by the judicial bodies responsible for their interpretation. On the one hand, states have a legal obligation to comply with their international commitments and, pursuant to Art. 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention), also with judgments of the European Court of Human Rights (ECtHR or the Court) delivered against them. On the other hand, in the majority of countries international treaties (including international courts' judgments) have a lower formal rank than national law and in particular the Constitution, which is regarded as the su-

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preme source of law. This paper compares the case-law and approaches of the Constitutional Courts of Russia and Lithuania towards judgments of the Strasbourg Court, which potentially challenge national constitutional provisions. Neither the Constitutional Court of Russia nor the Constitutional Court of Lithuania was willing/able to reconcile the Convention and the Constitution, but whereas the former encouraged the State to respect its international obligations, the latter used its authority to justify non-compliance.

## I. Introduction

The European human rights protection system consisting of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protector – the European Court of Human Rights – is often described as one of the most effective and successful human rights regimes in the world.<sup>1</sup> The jurisdiction of the ECtHR is compulsory and covers the territories of the 47 member states of the Council of Europe (CoE). Since the Court's inception in 1959 it has delivered more than 16,000 judgments finding at least one violation of the Convention, which have resulted in important changes within the states' domestic legal and political systems.

Today, the Strasbourg system faces a number of challenges, one of which is related to domestic enforcement of judgments of the ECtHR described by some as “the Achilles heel” of the system.<sup>2</sup> For a long time the ECtHR was perceived as an example of an international court with extremely high judgment compliance; however, according to the 2016 annual report of the Committee of Ministers (CM) at the end of 2016 there were 9,941 non-executed judgments.<sup>3</sup> As revealed by the data, the willingness and the ability of the states to redress specific violations and comply with ECtHR's judg-

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<sup>1</sup> For example, A. Føllesdal/B. Peters/G. Ulfstein, Introduction, in: A. Føllesdal/B. Peters/G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, 2013, 1. *L. R. Helfer* and *A.-M. Slaughter* use the ECtHR as one of the examples of effective supranational adjudication: *L. R. Helfer/A.-M. Slaughter*, *Toward a Theory of Effective Supranational Adjudication*, in: *Yale L.J.* 107 (1997), 273 et seq.

<sup>2</sup> For example, A. Donald, *Tackling Non-Implementation in the Strasbourg System: The Art of the Possible*, in: *EJIL: Talk!*, 28.4.2017, <[www.ejiltalk.org/](http://www.ejiltalk.org/)>.

<sup>3</sup> This number had decreased from 10,652 in 2015: see Committee of Ministers, *10<sup>th</sup> Annual Report: Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 2016, <<http://www.coe.int>>.

ments should not be taken for granted as very few countries can boast perfect compliance.

Art. 46(1) of the ECHR establishes a legal obligation of the states to abide by the final judgments of the ECtHR in cases to which they are parties. The European Commission for Democracy through Law (the Venice Commission) has described the execution of judgments as

“an unequivocal, imperative legal obligation, whose respect is vital for preserving and fostering the community of principles and values of the European continent”.<sup>4</sup>

The ECtHR has established, through its case-law, that this obligation entails the duty of the state to end the violation, to provide redress to the victim and to prevent similar violations from occurring in the future.<sup>5</sup> The main responsibility in executing the ECtHR’s judgments belongs to the states, which means the state as a whole, covering all state institutions.<sup>6</sup>

Member states differ in how their national legal systems protect human rights and how these systems relate to international law. National courts play an important role before the case reaches Strasbourg by applying the standards of the ECHR when adjudicating cases domestically. *Julia Laffranque*, a judge in Strasbourg, has described national courts as “ambassadors” for the case-law of the ECtHR.<sup>7</sup> Thus, in cases where the violation of the Convention is related to the application of law rather than its quality, national courts are key actors in preventing violations of the ECHR in future cases. As was pointed out by *Mark Villiger*, a former judge of the ECtHR, domestic courts contribute to the enforcement of judgments *indirectly* by assuring that “in subsequent domestic cases their decisions comply with the Strasbourg case-law”.<sup>8</sup> The direct role of domestic courts in redressing a specific violation is rather minimal since the majority of cases do

<sup>4</sup> Venice Commission, Russian Federation: Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, No. 832/2015, 13.6.2016, 11, <<http://www.venice.coe.int>>.

<sup>5</sup> In *Scozzari and Giunta v. Italy* the ECtHR established: “It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also 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 so far as possible the effects.” ECtHR, *Scozzari and Giunta v. Italy*, 13.7.2000, Application Nos. 39221/98 and 41963/98, Para. 249.

<sup>6</sup> Venice Commission (note 4), 10.

<sup>7</sup> *J. Laffranque*, in: Council of Europe, Dialogue between Judges: Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility, 2014, 9.

<sup>8</sup> *M. Villiger*, in: Council of Europe (note 7), 27.

not require more than the payment of monetary compensation to the applicant whose rights were violated and the implementation of general measures such as legislative amendments falls within the competence of other state authorities. One area where domestic courts can contribute directly to the implementation of individual measures is through the reopening of domestic proceedings following a judgment of the ECtHR.<sup>9</sup> However, the basis for such a procedure often requires special legislation and the courts will not be able to act until the legislator adopts the necessary legislative provisions.<sup>10</sup>

National constitutional courts have a special relationship with the ECtHR: being the guardians of national constitutions they are able to interpret national constitutions in a Convention-friendly manner and in this way domestically implement the standards of the ECHR. The ability on the part of constitutional courts to take into consideration the Convention (as interpreted by the ECtHR) also helps to minimize the risk of direct constitutional-conventional conflict. This exceptional role for constitutional courts has been acknowledged by the CM in its 2015 annual report:

“Experience has shown how, through interpretation and dialogue, constitutional courts have successfully overcome conflicts and eventually found solutions, reconciling national interests and the Convention requirements.”<sup>11</sup>

However, sometimes such solutions cannot be easily found and national constitutional courts “rebel” against Strasbourg. Yet, as suggested by *Da-vide Paris*, disagreements in exceptional situations – provided that they do not become the rule – do not necessarily pose a threat to the entire system.<sup>12</sup>

The main aim of this paper is to shed light on the role that national constitutional courts can play *after* the ECtHR rules against a country, i.e., during the judgment execution stage. The selected cases also deal with the issue of constitutional-conventional collision and the solutions proposed by different constitutional courts in two post-Soviet states. In Lithuania, a conflict arose between the *interpretations* given by the Constitutional Court of

<sup>9</sup> Committee of Ministers, Recommendation No. R (2002) 2 “On the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights”, 19.1.2000, <<http://www.coe.int>>.

<sup>10</sup> For example, Art. 366(1) of the Lithuanian Code of Civil Procedure provides for a possibility to reopen legal proceedings following a judgment of the ECtHR finding that a decision of a Lithuanian court was contrary to the ECHR.

<sup>11</sup> Committee of Ministers, 9<sup>th</sup> Annual Report, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 2015, 11, <<http://www.coe.int>>.

<sup>12</sup> *D. Paris*, Allies and Counterbalances: Constitutional Courts and the European Court of Human Rights: A Comparative Perspective, in this Issue, 645.

the Republic of Lithuania (LCC) and the ECtHR of the passive voting right of former President *Rolandas Paksas*, who was dismissed from office through impeachment procedure.<sup>13</sup> While the LCC did not accept the guidance from Strasbourg and in 2012 confirmed its original interpretation of the constitutional provisions, it explicitly directed the Parliament to amend the Constitution so that the incompatibility would be removed and the judgment of the ECtHR, finding Lithuania in violation of the ECHR, would be enforced domestically.

In 2015, the Constitutional Court of the Russian Federation (RCC) pronounced that in cases of conflict between an interpretation of the ECtHR and the Russian Constitution, Russia could refuse execution of the ECtHR's ruling in order to avoid violating the principles and norms of its Constitution.<sup>14</sup> The position that final and binding judgments of the ECtHR might be declared non-executable is extremely problematic from the point of view of public international law, as discussed in the opinions of the Venice Commission.<sup>15</sup> Despite its assurances that non-compliance would be exceptional, in less than two years the RCC has already found two judgments of the ECtHR to be in conflict with the Constitution and impossible to execute.<sup>16</sup>

Although both courts did not reconcile national constitutional law provisions with those of the ECHR, I would argue that the case of *Paksas* should be seen as a deviation from the LCC's approach towards the ECHR, which challenges but does not threaten the European human rights system. On the contrary, in light of the RCC's rulings authorizing non-execution of legally binding judgments of the ECtHR, one can question its commitment to the Convention and its values. In order to compare the two cases, I will first briefly describe the position of international law in general and the ECHR in particular in the domestic legal systems of Lithuania and Russia. I will also discuss how these constitutional courts approach the ECHR and the case-law of the Strasbourg Court. Then, I will analyze the selected rulings of the Lithuanian and Russian Constitutional Courts and draw conclusions.

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<sup>13</sup> LCC, 25.5.2004, Case No. 24/04; ECtHR, *Paksas v. Lithuania* [GC], 6.1.2011, Application No. 34932/04.

<sup>14</sup> RCC, 14.7.2015, No. 21-P. For analysis of the judgment see *L. Mälksoo*, Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No. 21-P/2015, *Eu Const. L. Rev.* 12 (2016), 377 et seq.

<sup>15</sup> Venice Commission (note 4).

<sup>16</sup> ECtHR, *Anchugov and Gladkov v. Russia*, 4.7.2013, Applications Nos. 11157/04 and 15162/05 and ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia* (just satisfaction), 31.7.2014, Application No. 14902/04.

## II. The Case of Lithuania

### 1. The ECHR and Judgments of the ECtHR in the Lithuanian Legal System

After restoring its independence in 1990, Lithuania quickly became a party to several international human rights treaties, demonstrating “an intention of the young Lithuanian democracy to respect and promote fundamental rights”.<sup>17</sup> A broad catalogue of human rights was included in its 1992 Constitution adopted by national referendum on October 25<sup>th</sup> and placed at the top of the hierarchy of legal norms.<sup>18</sup>

Like the rest of the post-communist states of Central and Eastern Europe, Lithuania established a constitutional court, the powers of which were outlined in Chap. 8 of the Constitution as well as in the 1993 Law “On the Constitutional Court of the Republic of Lithuania”. Pursuant to Art. 102 of the Constitution, the Constitutional Court was empowered to decide on the constitutionality of laws and other acts of the Parliament (the *Seimas*) and whether the acts of the President and the Government were in conflict with the Constitution or other laws. In addition, it could provide conclusions regarding the compatibility of international treaties with the provisions of the Constitution, which included both ex-ante and ex-post control.<sup>19</sup> There is no right of individual constitutional petition in Lithuania, and the only subjects that can petition the LCC are the Government, members of the *Seimas*, the courts and the President.

From a constitutional law perspective, international treaties ratified by the Parliament form a constituent part of the Lithuanian legal system.<sup>20</sup> In case of a collision between a ratified international treaty and a national legal

<sup>17</sup> D. Jociene, Lithuania: The European Convention on Human Rights in the Lithuanian Legal System: The Lessons Learned and Perspectives for the Future, in: I. Motoc/I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, 2016, 235.

<sup>18</sup> Art. 7(1) of the Constitution of the Republic of Lithuania stipulates that: “Any law or other act that contradicts the Constitution shall be invalid.” As explained by the LCC, the provision as such does not make an international treaty ineffective, but requires that treaty and constitutional provisions are not in conflict. LCC, National Report, XVI<sup>th</sup> Congress of the Conference of European Constitutional Courts, 2013, 4.

<sup>19</sup> Art. 105 Para. 3 Constitution of the Republic of Lithuania. Art. 73(3) of the Law “On the Constitutional Court of the Republic of Lithuania” provides that the LCC gives conclusions on whether international treaties of Lithuania are not in conflict with the Constitution. The conclusion concerning an international treaty may be requested prior to the ratification thereof in the *Seimas*.

<sup>20</sup> Art. 138 Para. 3 Constitution of the Republic of Lithuania.

act the provisions of the international treaty must be applied.<sup>21</sup> No such priority is given to an international treaty that contradicts the Constitution. In 1995, when assessing whether certain provisions of the ECHR were compatible with the Constitution of Lithuania prior to its ratification, the LCC emphasized the superiority of the latter:

“The legal system of the Republic of Lithuania is based on the fact that no law or other legal act as well as international treaties (in this case the Convention) may contradict the Constitution”.<sup>22</sup>

In the same conclusion the LCC acknowledged the special character of the ECHR due to its purpose of recognizing and protecting universal human rights. The LCC noted that the function of the Convention was the same as that of the Constitution – namely, to protect human rights – but the former did so on the international level and the latter within the state.<sup>23</sup> The *Seimas* ratified the ECHR on 27.4.1995 and it came into force on 20.6.1995.<sup>24</sup>

Pursuant to Art. 104(1) of the Constitution, judges of the Constitutional Court must follow only the Constitution. The Constitution of Lithuania, unlike the constitutions of some countries, is not specific about how its provisions should be interpreted.<sup>25</sup> However, on the basis of Art. 135(1) of the Constitution, which provides that in its foreign policy Lithuania should follow universally recognized principles and norms of international law and ensure people’s rights and freedoms, the LCC has interpreted the Constitution in a manner open and friendly to international and human rights law. According to the interpretation of the LCC, Art. 135(1) consolidates the principle of respect for international law.<sup>26</sup> Moreover, the LCC also established that the observance of international obligations undertaken by Lithuania and the respect for universally recognized principles of international law (including *pacta sunt servanda*) are “a legal tradition” and “a constitu-

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<sup>21</sup> Art. 11(2) of the 1999 Law “On International Treaties of the Republic of Lithuania”.

<sup>22</sup> LCC, 24.1.1995, Case No. 22/94.

<sup>23</sup> LCC (note 22).

<sup>24</sup> By 2016, the ECtHR had delivered 140 judgments against Lithuania, finding violations of the Convention in the majority of cases (mostly concerning Arts. 5, 6 and 8, as well as Art. 1 of Protocol 1). According to the CM’s database, Lithuania has complied with the majority of judgments (77) and as of April 2017 there were 31 judgments pending before the CM.

<sup>25</sup> See, for example, Art. 10(2) of the 1978 Spanish Constitution: “Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.”

<sup>26</sup> National Report (note 18).

tional principle” of Lithuania.<sup>27</sup> In the national report submitted to the XVI<sup>th</sup> Congress of the Conference of European Constitutional Courts the LCC acknowledged that it had an obligation to apply and refer to international and EU law and that such duty arose from the principles mentioned above,<sup>28</sup> as well as an obligation to take into account and invoke the interpretations of international norms and principles as provided by competent international institutions.<sup>29</sup>

In its constitutional jurisprudence the LCC regularly refers to different provisions of the ECHR as well as the case-law of the Strasbourg Court.<sup>30</sup> According to the LCC itself, the jurisprudence of international courts can play different roles, such as, orientating, strengthening and harmonizing functions.<sup>31</sup> *Karolina Bubnyte* argued that the harmonizing role, when constitutional provisions are given the same meaning as the one existing in the ECHR, is dominant in the case-law of the LCC.<sup>32</sup> For example, in 2011, in a politically sensitive case regarding the definition of “family”, the LCC found that the “State Family Policy Concept”, which defined family as exclusively based on marriage, was contrary to the Lithuanian Constitution.<sup>33</sup> While this conclusion arguably was reached on the basis of provisions of the Constitution, the LCC also considered the position of the ECtHR. According to the Constitutional Court, the constitutional concept of “family” must be construed “by taking account of the international commitments of the State of Lithuania that were undertaken after it had ratified the Convention for the Protection of Human Rights and Fundamental Freedoms”.<sup>34</sup> To achieve this, the LCC analyzed the case-law of the ECtHR and concluded that the understanding of “family” in Art. 8 of the ECHR was not limited

<sup>27</sup> LCC, 14.3.2006, Case No. 17/02-24/02-06/03-22/04.

<sup>28</sup> National Report (note 18).

<sup>29</sup> National Report (note 18).

<sup>30</sup> A simple search on the LCC’s website finds 74 rulings with a reference to the ECHR and 65 – to cases of the ECtHR. First references were made even before Lithuania’s ratification of the ECHR.

<sup>31</sup> National Report (note 18), 14 et seq.

<sup>32</sup> *K. Bubnyte*, *Zmogaus Teisiu ir Pagrindiniu Laisviu Apsaugos Konvencijos Poveikis Lietuvos Konstitucinei Jurisprudencijai – Jo Budai ir Leistinos Ribos* [The Influence of the Convention on Human Rights and Fundamental Freedoms on Lithuanian Constitutional Jurisprudence – Methods and Permissible Limits], *Teise* 89 (2013), 136 et seq. The exact contours of these influences are not always clear. For example, *Bubnyte* regards the 2011 ruling on the “State Family Concept” as an example of the harmonizing method, but according to the LCC, the jurisprudence of the ECtHR had a “strengthening” role: see National Report (note 18), 15.

<sup>33</sup> LCC, 28.9.2011, Case No. 21/2008.

<sup>34</sup> LCC (note 33).



to the notion of traditional family based on marriage. Consequently, in its ruling the LCC established that under the Constitution

“marriage is one of the bases of the constitutional institute of family for creating family relations, however, it does not mean that the Constitution [...] does not protect or defend families other than those founded on basis of marriage [...]”<sup>35</sup>

The LCC has established that case-law of the ECtHR is important for construction and application of Lithuanian law.<sup>36</sup> Moreover, the LCC has acknowledged the status of the ECHR as the international document with “the largest authority” and “the biggest respect and recognition”, used “in the assessment of the compliance of national acts with the provisions of the Constitution”.<sup>37</sup> As noted by *Egidijus Kuris*, the former President of the LCC and currently a judge at the ECtHR, the Lithuanian Constitution was inspired by international human rights documents, including the ECHR. Although this *per se* does not make international treaties a source of constitutional law in Lithuania, in the (special) case of the ECHR, the LCC has created a doctrine where the jurisprudence of the ECtHR and the Convention are treated as *sources of interpretation* for the constitutional law of Lithuania.<sup>38</sup> According to *Egidijus Jarasiunas*, a former justice of the LCC, the jurisprudence and legal doctrine of the international community are important “guiding sources” for the interpretation of constitutional norms in Lithuania. For example, in a landmark decision of 9.12.1998, in which the LCC found that the death penalty was unconstitutional, the LCC reviewed the regulation of the death penalty in different international human rights instruments, including the ECHR.<sup>39</sup> The LCC noted:

“Holding that it is a member of the international community possessing equal rights, the State of Lithuania, of its own free will, adopts and recognizes these

<sup>35</sup> LCC (note 33). While the ruling was welcomed by the human rights community, it caused a backlash from the Parliament, where a group of MPs initiated the process of a constitutional amendment in order to establish the narrow definition of “family” in the text of the Constitution.

<sup>36</sup> For example, LCC, 8.5.2000, Case No. 12/99-27/99-29/99-1/2000-2/2000; LCC, 9.6.2011, Case No. 12/2008-45/2009; LCC (note 33).

<sup>37</sup> National Report (note 18).

<sup>38</sup> *E. Kuris*, *Ekstranacionaliniai veiksniai Lietuvos Respublikos Konstituciniam Teismui Aiskinant Konstitucija* [Extranational factors for the LCCs Interpretation of the Constitution], *Teise* 50 (2004), 85 et seq. The author’s translation.

<sup>39</sup> At the time Lithuania had not signed Protocol No. 6, abolishing the death penalty in all circumstances.

principles and norms, the customs of the international community, and naturally integrates itself into the world culture and becomes its natural part.”<sup>40</sup>

When discussing the compatibility of the death penalty with constitutional provisions, the LCC referred to the definitions of torture and degrading punishment in the ECtHR’s ruling in *Ireland v. the United Kingdom*.<sup>41</sup> Although one could argue that the decision of the LCC was grounded in the systemic interpretation of the Constitution, extra-national factors were also important. In the view of *Jarasiunas*, the use of international sources is “a reflection of the modern continental trend in the development of law, which is characterized as internationalization of law”.<sup>42</sup> The LCC’s attitude towards the ECHR is not unique in the Lithuanian judicial system, as other courts (including the lower ones) also apply the Convention and take into account the ECtHR’s case-law.<sup>43</sup>

To sum up, the importance of international human rights law in general and the ECHR in particular for the interpretation of constitutional rights in Lithuania should not be underestimated. Whereas the status of the ECHR is formally below the Constitution, it is nevertheless used as an interpretative aid (“a source of inspiration”) for constitutional provisions similarly to the constitutional courts of other Western European countries.<sup>44</sup> The flexible approach allows the LCC to balance between the constitutional requirement to respect international law and the supremacy of the Constitution. The LCC’s attitude is not unique among Central and Eastern European states, which have good reasons to become allies of the Strasbourg Court.<sup>45</sup>

<sup>40</sup> LCC, 9.12.1998, Case No. 2/98.

<sup>41</sup> ECtHR, *Ireland v. United Kingdom*, 18.1.1978, Application No. 5310/71.

<sup>42</sup> E. *Jarasiunas*, The Influence of the Jurisprudence of the Constitutional Court on the Development of Legal Thought in Lithuania, in: E. *Jarasiunas*/E. *Kuris*/K. *Lapinskas*/A. *Normantas*/V. *Sinkevicius*/S. *Staciokas*, Constitutional Justice in Lithuania, 2003, 590.

<sup>43</sup> D. *Jociene*, Europos Zmogaus Teisiu Teismo Jurisprudencijos Itaka Nacionalinei Teisei bei Jurisprudencijai, Tobulinant Zmogaus Teisiu Apsauga. Konvencijos ir Europos Sajungos Teises Santykis [The Influence of the Jurisprudence of the European Court of Human Rights on National Law and Jurisprudence, while Improving the Protection of Human Rights. The Relationship between the Convention and EU Law], *Jurisprudencija* 7:97 (2007), 17 et seq.

<sup>44</sup> See D. *Paris* (note 12).

<sup>45</sup> W. *Sadurski*, Partnering with Strasbourg: Constitutionalism of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments, *HRLR* 9 (2009), 397 et seq.

## 2. The ECtHR's Ruling in *Paksas v. Lithuania*

In April 2004 the Lithuanian Parliament impeached *Rolandas Paksas*, who had been President of Lithuania since the beginning of 2003. *Paksas* was accused, among other things, of having ties to a Russian businessman who funded *Paksas*' presidential campaign and in return was granted Lithuanian citizenship.<sup>46</sup>

After his dismissal from office, *Rolandas Paksas* immediately wanted to stand as a candidate in the upcoming presidential election. On 4.5.2004, the *Seimas* amended the Law on Presidential Elections in order to disqualify persons who were removed from office through impeachment procedure from running for the position of the President if less than five years had passed since their removal. As a result, *Rolandas Paksas* was barred from taking part in the election. Members of the *Seimas* petitioned the LCC, asking whether such a provision was compatible with the Constitution of Lithuania given that the restriction on the passive voting right did not exist in the constitutional text. Moreover, in the view of the petitioners, the constitutional doctrine of impeachment did not foresee additional sanctions to removal from office and the limitation created by the amendment was contrary to the constitutional principles of a state under a rule of law, justice and proportionality.<sup>47</sup>

On 25.5.2004, the LCC not only rejected the arguments of the petitioners holding that a restriction *per se* for a person who was removed from office of the President through impeachment proceedings for a gross violation of the Constitution and a breach of the oath was not contrary to the Constitution, but also established that the time limit set in the law was unconstitutional. In the view of the LCC, such persons may *never* hold the office established in the Constitution, the beginning of the holding of which, according to the Constitution, is linked with taking the oath.<sup>48</sup> This effectively meant that he or she could also never be elected to a number of other positions, such as, to become a member of the *Seimas* or a judge of the Constitutional Court. As the LCC explained, with respect to this person "there would always exist a reasonable doubt, which would never disappear [...] whether this person will not breach the oath to the Nation again [...]"<sup>49</sup> Although the prohibition was not in the text of the Constitution, in the

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<sup>46</sup> On 31.3.2004 the LCC found that, through his actions, the President breached his oath and grossly violated the Constitution. LCC, 31.3.2004 (Conclusion), Case No. 14/04.

<sup>47</sup> LCC (note 13).

<sup>48</sup> LCC (note 13).

<sup>49</sup> LCC (note 13).

view of the LCC, a perpetual ban on standing for offices requiring an oath existed in the Constitution.<sup>50</sup>

The LCC argued that a different interpretation of the provisions of the Constitution would make impeachment for a gross violation of the Constitution meaningless and “would be inconsistent with both the constitutional principle of a state under the rule of law and the constitutional imperative of an open, just, and harmonious civil society”.<sup>51</sup> As explained by the Constitutional Court, the Constitution needs to be interpreted in a manner that respects its spirit, which can only be achieved through a “comprehensive interpretation”. In the court’s view, values of loyalty to the state and state security were decisive. As the LCC put it:

“A gross violation of the Constitution or a breach of the oath undermines the trust in the institution of the President of the Republic and alongside, it weakens the trust in the state power as a whole and in the State of Lithuania.”<sup>52</sup>

Moreover, impeachment helps to protect the state “as the common good of the society which is provided for in the Constitution”.<sup>53</sup> In this ruling the LCC did not make any references to international practice or the jurisprudence of the ECtHR, which may simply have been due to the fact that there were not any relevant cases.

As a result of the ruling, on 15.7.2004 the Lithuanian Parliament amended the Law on Elections to the *Seimas* barring a person who was removed from office according to impeachment proceedings from being elected as a member of the *Seimas*.<sup>54</sup>

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<sup>50</sup> Art. 56 Constitution of the Republic of Lithuania: “Any citizen of the Republic of Lithuania who is not bound by an oath or a pledge to a foreign state, and who, on the election day, is not younger than 25 years of age and permanently resides in Lithuania, may stand for election as a Member of the Seimas. Persons who have not served punishment imposed by a court judgment, as well as persons declared by a court to be legally incapacitated, may not stand for election as a Member of the Seimas.” Art. 59(2): “An elected Member of the Seimas shall acquire all the rights of a representative of the Nation only after taking an oath at the Seimas to be faithful to the Republic of Lithuania.” Art. 74, The Constitution of the Republic of Lithuania: “The President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal, as well as any Members of the Seimas, who grossly violate the Constitution or breach their oath, or are found to have committed a crime, may be removed from office or have the mandate of a Member of the Seimas revoked by a 3/5 majority vote of all the Members of the Seimas. This shall be performed according to the procedure for impeachment proceedings, which shall be established by the Statute of the Seimas.”

<sup>51</sup> LCC (note 13).

<sup>52</sup> LCC (note 13).

<sup>53</sup> LCC (note 13).

<sup>54</sup> Amendment of 15.7.2004, No. IX-2374.

Following these developments, *Rolandas Paksas* complained to the ECtHR that the restrictions on his right to stand for election violated, *inter alia*, Art. 3 of Protocol No. 1 (right to free elections). The Chamber relinquished its jurisdiction to the Grand Chamber, which found that a permanent and irreversible prohibition for the applicant to be elected to the Parliament pursued a legitimate aim of preserving the democratic order, but was a disproportionate measure for the aim pursued.<sup>55</sup>

The judges noted that while in the majority of the CoE states impeachment proceedings for the heads of State existed, only in a few countries were they directly related to restrictions of the electoral and other political rights of the impeached person. Moreover, the argument of the Lithuanian Government that the prohibition was (implicitly) established in the Constitution was not accepted by the ECtHR. The fact that the ban was “set in constitutional stone” was actually seen as being more difficult to reconcile with the proportionality requirement. In addition, the Government of Lithuania argued that the measure in question was not disproportionate in the specific historical and political context of Lithuania – a country with a relatively short democratic experience and many examples of unethical behavior by politicians. The Government referred to the ECtHR’s ruling in *Zdanoka v. Latvia*, where the ECtHR had found that disqualification of a former member of the Communist Party from standing for election to the Latvian Parliament was compatible with the Convention.<sup>56</sup> In assessing the proportionality of the measure the ECtHR relied on historical factors, such as the role of the Communist Party in attempted coups in the Baltic States in 1991, and concluded that in such situations the margin of appreciation was wide. The ECtHR did not dismiss the importance of the “local political context” in the *Paksas* case. Nonetheless, it placed greater emphasis on the severe nature of the measure in question: due to its constitutional nature, the disqualification was permanent and irreversible, and extended to several other positions requiring the taking of an oath.

When addressing the question of just satisfaction the ECtHR reminded Lithuania about its obligation to comply with the judgment, arising from Art. 46 of the ECHR. In addition, the ECtHR reiterated what it had established in its earlier case-law that finding of a violation meant a duty on the state to adopt general and/or individual measures in order to end the violation and to make reparations for its consequences in such a way as to re-

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<sup>55</sup> ECtHR, *Paksas v. Lithuania* (note 13). The ECtHR only addressed the question of the right to be elected to the Parliament as part of Art. 3 of Protocol No. 1.

<sup>56</sup> ECtHR, *Zdanoka v. Latvia* [GC], 16.3.2006, Application No. 58278/00.

store as far as possible the situation existing before the breach.<sup>57</sup> In order to comply with the judgment the Lithuanian Parliament on 22.3.2012 adopted a new amendment to the law on parliamentary election limiting the period of disqualification to four years.<sup>58</sup>

### 3. The LCC Rules Once Again – Reinterpretation Is Not Possible

Following the amendment, a group of MPs turned to the LCC arguing that given its earlier interpretation of the constitutional doctrine of impeachment the new time-limit of four years was unconstitutional. On 5.9.2012 the LCC confirmed that its 2004 interpretation had not changed and that the term established in the law was in conflict with various constitutional provisions.<sup>59</sup> In addition, the LCC held that by attempting to overrule its earlier decision the *Seimas* had overstepped its powers and violated the constitutional principles of the separation of powers and the state under the rule of law.<sup>60</sup>

Given that in 2004 the LCC had developed a firm constitutional doctrine, the question was whether such a doctrine could be changed and to what extent this change may be influenced by the ECtHR's ruling. According to some constitutional law scholars, while in theory this should not happen, in practice the LCC has occasionally amended its earlier doctrines.<sup>61</sup> This view was not dismissed by the LCC, which noted that in general it was bound by its precedents, but that in certain situations when it was "unavoidably and objectively necessary, constitutionally grounded and reasoned" exceptions could be made. Such need for reinterpretation could arise because of, *inter alia*:

<sup>57</sup> ECtHR, *Paksas v. Lithuania* (note 13), Para. 119.

<sup>58</sup> Amendment of 22.3.2012, No. XI-1939.

<sup>59</sup> LCC, 5.9.2012, Case No. 8/2012.

<sup>60</sup> LCC (note 59).

<sup>61</sup> In the view of *Egidijus Kuris*, "[t]his is acceptable and even encouraged by the idea of *living Constitution*": *E. Kuris*, *The Constitutional Court and Interpretation of the Constitution*, in: E. Jarasiunas/E. Kuris/K. Lapinskas/A. Normantas/V. Sinkevicius/S. Staciokas (note 42), 224. According to *Vytautas Sinkevicius*, even though the LCC "takes into account" the ECtHR's interpretations, the supremacy of the Constitution requires that it is interpreted on the basis of itself, its logic and the overall constitutional regulation: *V. Sinkevicius*, *Byla Paksas pries Lietuvai arba Meginimas Iveikti Konstitucinio Teismo Nutarima [Case Paksas v. Lithuania or the Attempt to Overcome the Ruling of the Constitutional Court]*, *Socialiniu Mokslu Studijos* 4:1 (2012), 205 et seq.

“the necessity to increase the possibilities for implementing innate and acquired rights of persons and their legitimate interests, the necessity to better defend and protect the values enshrined in the Constitution, the need to create better conditions in order to reach the aims of the Lithuanian Nation declared in the Constitution”.<sup>62</sup>

However, reinterpretation of an official constitutional doctrine was “constitutionally impermissible” when it would result, *inter alia*, in changes to the constitutional value system, a reduction in the protection of the supremacy of the Constitution or denial of the understanding of the Constitution as “a single act and harmonious system”.<sup>63</sup> In its jurisprudence the LCC had also established that reinterpretation was possible only when the necessity to change the existing precedent was based in the Constitution itself.<sup>64</sup>

In the ruling the LCC acknowledged that an incompatibility existed between the provisions of the Lithuanian Constitution and the obligations arising from the judgment of the ECtHR. However, given that the conditions for reinterpretation of the LCC’s earlier constitutional doctrine were not fulfilled, the only way to remove the incompatibility was by amending the Constitution. Besides reiterating the general principles applicable to the reinterpretation of constitutional doctrine, the LCC did not elaborate on the application of these principles in this specific case. The main argument of the LCC seemed to be that since the constitutional institution of impeachment, the oath and electoral rights were “interrelated and integrated”, a change in one of them would change the value system entrenched in all of them. Having established that the judgment of the ECtHR in itself “may not serve as the constitutional basis for reinterpretation (correction) of the official constitutional doctrine”, the LCC did not address the question of whether the interpretation of constitutional provisions in line with the ruling of the ECtHR would in fact enhance constitutional values such as respect for human rights and international law. One could question why the case-law of the ECtHR against other countries is taken into consideration when construing the constitutional understanding of “family”, but is not important for the interpretation of the electoral rights based on a concrete case against Lithuania. Moreover, in the ruling the LCC stressed the subsidiary role of the Convention system and that its court “[did] not replace the powers of the Constitutional Court to officially construe the Constitution”.<sup>65</sup>

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<sup>62</sup> LCC (note 59).

<sup>63</sup> LCC (note 59).

<sup>64</sup> LCC, 28.3.2006, Case No. 33/03.

<sup>65</sup> LCC (note 59).

The LCC noted that the Lithuanian legal system was based on the principle of superiority of the Constitution, which required that the provisions of other legal acts (including international treaties) were not in contradiction with constitutional norms. Moreover, respect for Lithuania's international obligations and universally recognized principles of international law (including *pacta sunt servanda* principle) were "a legal tradition" and "a constitutional principle" of independent Lithuania. Since the Constitution created a duty to follow the universally recognized principles and norms of international law, Lithuania was obliged to remove the incompatibility between the provisions of the ECHR and the Constitution. Provided that a reinterpretation of the constitutional doctrine was impossible, the only viable solution was to amend the text of the Constitution. In other words, the conflict between constitutional law and the ECHR was to be solved by the Parliament through a constitutional amendment and not by the constitutional court by way of interpretation.

The ruling of the LCC was not unanimous and two justices expressed dissenting opinions. Both Justice *Egidijus Sileikis* and Justice *Gediminas Mesonis* were critical that the LCC had not given proper consideration to the ECtHR's decision. In the view of Justice *Sileikis*, given the relative rarity of such cases the LCC should have taken the opportunity to formulate a constitutional principle that the Constitution must be interpreted in a manner friendly (favorable) to international law as, for example, in Germany or Poland.<sup>66</sup> The Federal Constitutional Court of Germany is known for having amended its constitutional interpretations following a judgment of the ECtHR. As the *Bundesverfassungsgericht* held in 2011:

"Even if decisions of the European Court of Human Rights, as declaratory case-law, do not lead to a direct change of the legal position, particularly on the level of constitutional law, they may nevertheless have legal significance for the interpretation of the Basic Law. Where constitutional law gives latitude for such interpretation, the Federal Constitutional Court, on the basis of the principle that the Basic Law is open to international law, attempts to avoid violations of the Convention."<sup>67</sup>

As pointed out by Justice *Mesonis*, if the case-law of the ECtHR is not to be considered as a source to be taken into account, it is difficult to imagine which circumstances might constitute the ground for changing constitu-

<sup>66</sup> Dissenting opinion of Justice *Sileikis*, the author's translation.

<sup>67</sup> *Bundesverfassungsgericht*, Judgment of the Second Senate of 04.5.2011 – 2 BvR 2365/09 (preventive detention case).



tional jurisprudence (reinterpretation).<sup>68</sup> In addition, Justice *Sileikis* criticized the LCC's disregard for the principle of the stability of the constitutional text – previously described by the court as “a great constitutional value”.<sup>69</sup> Meanwhile, *Mesonis* reminded of the complexity of the procedure of constitutional amendments, especially bearing in mind the changing and developing jurisprudence of the ECtHR.<sup>70</sup> Furthermore, *Mesonis* argued that, on the one hand, the integrity and stability of constitutional jurisprudence as well as the predictability of the decisions of constitutional courts were undisputed values. However, on the other hand, differences in jurisprudence between the ECtHR and the LCC contributed to legal uncertainty and vagueness in the area of human rights, creating tension in the society and disturbing “the moderate development of the rule of law state”.<sup>71</sup>

Despite the criticism, the position of the LCC was perfectly in line with the recommendation of the Venice Commission: as long as the finding of unconstitutionality of the proposed means of executing the ECtHR's ruling refers the question of execution back to the other state institutions, no issue under international law would arise.<sup>72</sup> In fact, according to the Venice Commission constitutional courts may not even be in the position to indicate all the means of execution to the other authorities. The LCC was quite explicit that the only way to comply with the ECtHR's judgment was by amending the Constitution, which is the prerogative of the Parliament. Such a judgment not only sends a strong signal to the legislator, but also shows that the LCC reflects on its own duty (as a state institution) to abide by the final judgments of the ECtHR. However, given the political character of the case and the complexity of constitutional amendments the LCC took the risk that execution will be delayed or might not happen at all.<sup>73</sup>

In 2012 and 2013 several drafts of the constitutional amendment were submitted to the *Seimas*. In 2015, a new draft law amending the Constitution passed the first, but not the second reading. Although the formal requirements for a constitutional amendment are not impossible to fulfill, in politically sensitive cases and where political will to redress the violation is

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<sup>68</sup> Dissenting opinion of Justice *Mesonis*, the author's translation.

<sup>69</sup> LCC (note 64).

<sup>70</sup> Dissenting opinion of Justice *Mesonis* (note 68).

<sup>71</sup> Dissenting opinion of Justice *Mesonis* (note 68).

<sup>72</sup> Venice Commission (note 4), 8.

<sup>73</sup> Pursuant to Art. 148 of the Lithuanian Constitution, constitutional amendments not related to Chaps. 1 and 14, which require a referendum, must be considered and voted in the *Seimas* twice with a break of a minimum of three months in between. For the amendment to be adopted, no less than two-thirds of all MPs must be in favor of the amendment during both voting occasions.

not strong a constitutional amendment might become a serious obstacle to the domestic implementation of the international court's judgment. Since 2015 the case of *Paksas v. Lithuania* is under enhanced supervision by the CM, meaning that the status of execution is being discussed during the meetings of the CM. It remains to be seen whether this additional pressure will be sufficient to induce the political will necessary for full compliance.

### III. The Case of Russia

Russia applied for CoE membership in 1992 and joined the organization four years later on 28.2.1996. In 1995, the CoE's Parliamentary Assembly suspended Russia's membership application due to the conflict in Chechnya.<sup>74</sup> Although negotiations were resumed in September 1995, the Parliamentary Assembly's Committee on Legal Affairs and Human Rights noted "considerable deficits" with regards to Russia's respect for human rights and the rule of law and concluded that Russia did not fulfill the membership criteria as specified in Art. 3 of the Statute of CoE.<sup>75</sup> Despite falling short of the CoE's human rights standards at the time, Russia was allowed to join the organization in the hope that, with the help of different monitoring mechanisms including the ECtHR, Russia would eventually catch up with the rest of the CoE.

Russia ratified the ECHR on 5.5.1998, but it was not until 2002 that the ECtHR delivered its first judgment against Russia, finding in the case of *Burdov v. Russia* that it had violated the Convention.<sup>76</sup> Since then Russia was found in breach of the ECHR in more than 1,800 cases and as of February 2017, there were nearly 8,000 applications pending against Russia, which comprised 8.9 % of all pending cases before the ECtHR.<sup>77</sup> The largest number of violations by Russia concern Art. 3 (prohibition of torture), Art. 5 (right to liberty and security), Art. 6 (right to a fair trial) and Art. 1 of Protocol 1 (right to property). With more than 1,500 non-executed judgments Russia has one of the most problematic compliance records in the CoE. In her book on compliance with judgments of international courts,

<sup>74</sup> Parliamentary Assembly, Res. 1055, 2.2.1995, Russia's request for membership in light of the situation in Chechnya, <[www.assembly.coe.int](http://www.assembly.coe.int)>.

<sup>75</sup> Parliamentary Assembly's Committee on Legal Affairs and Legal Rights, Opinion, 18.1.1996, Russia's Application for membership of the Council of Europe, <[www.website-pace.net](http://www.website-pace.net)>.

<sup>76</sup> ECtHR, *Burdov v. Russia*, 7.5.2002, Application No. 59498/00.

<sup>77</sup> The number of pending Applications is a decrease as compared to 20 % in 2006, 26 % in 2007 and 28 % of all cases in 2010.

*Courtney Hillebrecht* describes Russia as a “compliance failure”, which by paying monetary awards but disregarding other types of measures (such as correcting structural deficiencies or making legal amendments) engages in “à la carte” or “shallow” compliance.<sup>78</sup>

## 1. The ECHR and Judgments of the ECtHR in the Russian Legal System

The Constitution of the Russian Federation, adopted by a popular referendum on 12.12.1993, constitutes the supreme source of law, with which other legal acts cannot contradict.<sup>79</sup> The Constitution contains a broad list of human rights, formulated in such a way as to meet the standards of international human rights instruments. As noted by the RCC, “human and civil rights and freedoms fixed by the Constitution [...] are, in essence, the same rights and freedoms that are recognized by the Convention”.<sup>80</sup> Art. 17 of the Constitution stipulates that:

“The rights and freedoms of man and citizen according to generally-recognized principles and norms of international law and in accordance with the present Constitution shall be recognized and guaranteed in the Russian Federation.”

Russia’s formal approach to international law can be described as monist since international treaties form an integral part of the national legal system and can be applied directly before the courts.<sup>81</sup> The Constitution appears to be quite open to international law and Art. 15(4) establishes the supremacy

<sup>78</sup> C. *Hillebrecht*, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, 2014, 115.

<sup>79</sup> Art. 15 Para. 1 Constitution of the Russian Federation: “The Constitution of the Russian Federation shall have the highest legal force, direct effect, and be applied throughout the entire territory of the Russian Federation. Laws and other legal acts applicable in the Russian Federation must not be contrary to the Constitution of the Russian Federation.”

<sup>80</sup> RCC, 6.12.2013, No. 27-P.

<sup>81</sup> Art.15 Para. 4 Constitution of the Russian Federation: “Generally-recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system.” According to Art. 5(1) of the 1995 Law “On International Treaties”: “International treaties, generally recognized principles and norms of international law, which are in accordance with the Constitution, form a part of its legal system.” *Lauri Mälksoo* has rightly pointed out that the direct applicability of international law, despite the wording of the Constitution is not uncontested. *L. Mälksoo*, *Russian Approaches to International Law*, 2015, 112.

of international treaties (but not customary international law) over national law:

“If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.”

This legal regulation is without precedent in Imperial Russia as well as in the Soviet law and legal practice.<sup>82</sup> The understanding of these constitutional norms, however, is far from uniform and one of the contested questions concerns the relationship between international and constitutional law, as the provisions of the Constitution are not explicit and allow for different interpretations.<sup>83</sup> However, the RCC recently held that the ECHR had a stronger legal force than federal law, but “not equal to and not stronger than the legal force of the Constitution of the Russian Federation”.<sup>84</sup>

The competence of the RCC includes both abstract norm control and control of the constitutionality of laws in relation to specific cases. The powers of the RCC are regulated by Art. 125 of the Constitution and the 1994 Federal Constitutional Law “On the Constitutional Court of the Russian Federation”. Pursuant to Art. 125(2), the subjects entitled to lodge an application regarding the constitutionality of federal laws, other acts and international treaties, before they enter into force, include the President, the Federation Council (the upper house of the Parliament), the *Duma* (the lower house of the Parliament), one-fifth of the members of the Federation Council or the *Duma*, the Government, the Supreme Court and bodies of legislative and executive power of the subjects of the Russian Federation. Art. 125(4) provides the basis for individual complaints about violations of constitutional rights as well as the right for the courts to petition the RCC about the constitutionality of laws related to a specific case affecting consti-

<sup>82</sup> W. E. Butler, *Russian Law*, 1999, 98.

<sup>83</sup> See A. Nussberger, *Russia and Ukraine*, in: H. Keller/A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, 615 et seq.

<sup>84</sup> RCC, 19.1.2017, No. P-1. In a conference presentation in 2015, *Sergey Mavrin*, Vice-President of the RCC, argued that the structure of Art. 15 of the Constitution, together with the absence of other explicit provisions in the text of the Constitution, demonstrates the intention of the drafters of the Constitution to make international treaties applicable within the Russian legal system only if they “are subordinate to the supreme legal force of the Russian Federation Constitution”. According to Judge *Mavrin*, international treaties and decisions of competent supranational bodies are situated below the Russian Constitution and the legal stances of the RCC, but above federal legislation. S. *Mavrin*, *The Legal Stances of the Constitutional Court of the Russian Federation on the Issue of Implementing the European Convention on Human Rights*, in: *International Conference on “Enhancing National Mechanisms for Effective Implementation of the European Convention on Human Rights”*, 2015, 43 et seq.

tutional rights. In addition, the RCC's jurisdiction includes the resolution of disputes over the scope of authority between different subjects and the interpretations of constitutional provisions.<sup>85</sup>

Since Russia's accession to the ECHR system, national courts have struggled in applying Convention standards when adjudicating cases domestically.<sup>86</sup> The highest Russian courts showed a friendlier and more progressive approach towards the ECHR, both by instructing the lower courts to apply international law and by applying the provisions of the ECHR in their own jurisprudence. According to a 2013 ruling of the Plenum of the Supreme Court, legal positions of the ECtHR contained in its final judgments against Russia are "obligatory" for the domestic courts. Furthermore, the ruling instructed lower courts "to take into consideration" legal positions of the ECtHR expressed in judgments against other countries.<sup>87</sup> In 2007, the RCC stated that the ECHR and judgments of the ECtHR were an integral part of the Russian legal system and as such should be "taken into account" both by the federal legislator and by law-enforcement authorities.<sup>88</sup> This position of the RCC was criticized by Russian human rights lawyers for being "an extremely limited approach" as it restricted the application of the Convention and the case-law of the Strasbourg Court to substantive rights, which were interpreted in accordance with the generally recognized principles and norms of international law.<sup>89</sup>

The apparent openness to international law – both in the text of the Constitution and the rulings of the highest courts – did not always translate into practice, and in the words of *Lauri Mälksoo* "has remained primarily a de-

<sup>85</sup> On the jurisdiction of the RCC see, for example, *P. B. Maggs/O. Schwartz/W. Burnham*, *Law and the Legal System of the Russian Federation*, 6<sup>th</sup> ed. 2015, 78 et seq., 96 et seq.

<sup>86</sup> *A. Burkov*, *The Impact of the European Convention of Human Rights on Russian Law: Legislation and Application in 1996-2006*, 2007.

<sup>87</sup> Plenary Session of the Supreme Court of the Russian Federation, 27.6.2013, No. 21 "On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction". See also ruling of 31.10.1995 No. 8 "On Some Questions of Application by the Courts of the Constitution of the Russian Federation in the Administration of Justice" and ruling of 10.10.2003 No. 5 "On the Application of Universally Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction". The legal status of such rulings is not entirely clear, but in practice they are often treated as binding by lower courts. *P. B. Maggs/O. Schwartz/W. Burnham* (note 85), 25 et seq.

<sup>88</sup> RCC, 5.2.2007, No. 2-P.

<sup>89</sup> RCC (note 88). For analysis of the RCC's judgment, see *K. Koroteev/S. Golubok*, *Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe*, HRLR 7 (2007), 619 et seq.

clared aspiration rather than an everyday legal reality on the ground”.<sup>90</sup> For example, in 2007 *Anton Burkov*, a Russian lawyer and academic, described the RCC’s approach as unsatisfactory due to the fact that the Constitutional Court made references to the Convention, but did not pay sufficient attention to the case-law of the ECtHR.<sup>91</sup> *Peter B. Maggs, Olga Schwartz* and *William Burnham* were more positive and in their latest edition of the book on Russian law noted that the RCC regularly cited and relied on the precedents of the ECtHR. Yet, they also pointed out problems related to domestic enforcement of rulings of the ECtHR, as well as growing dissatisfaction with Strasbourg, especially in the aftermath of the ECtHR’s ruling in the *Markin* case.<sup>92</sup>

In its own account of the ECHR’s impact, the RCC emphasized its “extensive” and “repeated” use of the case-law of the ECtHR.<sup>93</sup> According to the court’s report, it relies on the ECtHR’s rulings to reinforce its arguments and in such a manner that “significantly facilitates similarity of the constitutional and conventional values”.<sup>94</sup> For instance, on 15.11.2016 the RCC decided a case about the constitutionality of provisions of national law, which placed restrictions on family visits for persons sentenced to life imprisonment. The RCC was petitioned after the Grand Chamber found in *Khoroshenko v. Russia* that such restrictions were disproportionate and in breach of Art. 8 of the ECHR.<sup>95</sup> The RCC, taking into account the ruling of the Strasbourg Court, decided to change its earlier interpretation of the national legislation (in 2005 and 2006) and found the provisions excluding the possibility of long-term visits to persons imprisoned for life during the first ten years of their sentence to be unconstitutional. In addition, by ordering that such prisoners should have the possibility to have one long-lasting visit per year until necessary legal amendments are passed, it contributed to the direct execution of the judgment of the ECtHR.<sup>96</sup>

While there are other positive examples of how the RCC uses the ECHR and the case-law of the ECtHR, the RCC’s approach lacks consistency and

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<sup>90</sup> *L. Mälksoo* (note 81), 120.

<sup>91</sup> *A. Burkov* found that until 2004 only 12 out of 54 RCC’s judgments made references to the ECtHR’s case-law. *A. Burkov* (note 86).

<sup>92</sup> *P. B. Maggs/O. Schwartz/W. Burnham* (note 85), 19 et seq., 155 et seq.

<sup>93</sup> RCC, National Report, XVIth Congress of the Conference of European Constitutional Courts, 2013, 8.

<sup>94</sup> National Report (note 93), 8.

<sup>95</sup> ECtHR, *Khoroshenko v. Russia* [GC], 30.6.2015, Application No. 41418/04.

<sup>96</sup> RCC, 15.11.2016, No. 24-P.

often is not independent from political realities in Russia.<sup>97</sup> In the context of the *Markin* and *Anchugov and Gladkov* cases, *Anna Jonsson Cornell* has criticized the RCC's formalistic and state-oriented method of constitutional interpretation, which in her view fails to pay regard to the ECHR and results in decisions contrary to European human rights law.<sup>98</sup>

## 2. The RCC Versus the ECtHR – To Execute or Not to Execute?

The case of *Konstantin Markin v. Russia* was the first one where the ECtHR's interpretation of the Convention clashed with the RCC's interpretation of constitutional rights. The ECtHR found that unequal conditions for the parental leave of men and women in the Russian military were in breach of Art. 14 taken together with Art. 8 of the ECHR.<sup>99</sup> The ruling of the ECtHR was delivered after the RCC earlier declared that such restrictions did not raise issues under the Russian Constitution. Moreover, the Chamber of the ECtHR in its judgment made a direct reference to the RCC's ruling pointing out that it was not "convinced" by the arguments of the RCC. The decision caused a backlash in Russia and new legislation was proposed allowing Russia to ignore judgments of the ECtHR if the RCC confirmed constitutionality of the legal acts that were found flawed by the Strasbourg Court.<sup>100</sup> In the aftermath of the *Markin* ruling, *Valery Zorkin*, the President of the RCC, wrote:

"When the decisions of the Strasbourg Court are questionable from the point of view of the essence of the Convention and directly touch upon national sovereignty and fundamental constitutional principles, Russia has the right to develop 'a defense mechanism' from such rulings."<sup>101</sup>

<sup>97</sup> On the RCC's attitude towards the ECHR and the ECtHR's case-law see *A. Nussberger* (note 83), 619-622; *P. B. Maggs/O. Schwartz/W. Burnham* (note 85), 18 et seq., 155 et seq.

<sup>98</sup> *A. J. Cornell*, In Search for a Theory of Constitutional Interpretation in Congruence with European Human Rights Law, Uppsala Faculty of Law Working Paper 2 (2014), 8.

<sup>99</sup> *Konstantin Markin v. Russia*, 7.10.2010, Application No. 30078/06. Upheld by the Grand Chamber on 22.3.2012.

<sup>100</sup> "Torshin predlagayet zakrepat zakonom prioritet KS nad resheniyami ESpC" [Torshin proposes to secure with law the priority of the Russian Constitutional Court over judgments of the ECtHR], *Vedomosti*, 20.6.2011, <<https://www.vedomosti.ru>>.

<sup>101</sup> *V. Zorkin*, "Predel ustupchivosti" [Limits of compliance], *Rossijskaja gazeta*, 29.10.2010, <[www.rg.ru](http://www.rg.ru)>. The author's translation.

Later in 2015, *Zorkin* described the ECtHR's *Markin* decision as "an impulse" for "elaboration" of the RCC's role in the implementation of the ECHR domestically.<sup>102</sup> The confrontation between the two courts did not immediately result in the legal changes mentioned above, but in 2013 the RCC held that courts of general jurisdiction could turn to it when faced with an ECtHR ruling condemning a piece of legislation, which was earlier recognized as constitutional. In its ruling the RCC raised the possibility that such proceedings could lead to the reapproval of the constitutionality of the law by the RCC but noted that it would look for "possible constitutional means of realization of the judgment of the European Court of Human Rights".<sup>103</sup>

A stronger and more straightforward message from the Constitutional Court came on 14.7.2015, in a ruling delivered at the request of a group of deputies of the *Duma* who questioned the constitutionality of a number of domestic provisions giving effect to international law in the Russian legal system. The RCC pronounced that if an interpretation by the ECtHR of the provisions of the Convention was in conflict with the Russian Constitution, which has supreme force in the domestic legal system, domestic execution of such a ruling would be impossible. In support of its argument the RCC, *inter alia*, referred to the practice of the highest courts in Germany, Italy, Austria and the UK, which, according to the RCC, "in exceptional situations and because of serious reasons have resisted interpretations of the ECtHR".<sup>104</sup>

The legal framework developed by the RCC in its July 14<sup>th</sup> judgment and following its own suggestion was soon codified into law, which formally empowered the RCC to decide whether it was possible or not to execute, in accordance with the Russian Constitution, a decision of an intergovernmental body for the protection of human rights and freedoms.<sup>105</sup> According to Art. 104.3 in the new Chap. XIII.1 of the Law "On the Constitutional Court of the Russian Federation", the RCC would check whether a judgment adopted on the basis of an international treaty, through interpretation

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<sup>102</sup> V. *Zorkin*, Challenges of Implementation of the Convention on Human Rights, in: International Conference on "Enhancing National Mechanisms ... (note 84), 13.

<sup>103</sup> RCC (note 80). Art. 101 of the Law "On the Constitutional Court" was amended in 2014 (amendment No. 9-FKZ) in order to give the right to the courts to petition the RCC regarding the constitutionality of laws challenged by interstate bodies for the protection of human rights and freedoms.

<sup>104</sup> RCC (note 14). The author's translation.

<sup>105</sup> Federal Law No. 7-KFZ amending the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" No. 1-FKZ of 21.7.1994. The amendments entered into force on 15.12.2015. The provisions of the law do not mention the ECtHR specifically.



by its monitoring body, is compatible with the foundations of Russia's constitutional system and constitutional regulation of human and civil rights and freedoms (corresponding to Chaps. 1 and 2 of the Russian Constitution). Art. 105 established the right of the President and the Government to refer to the RCC for an interpretation of constitutional provisions on the basis of a "discovered contradiction" between the Russian Constitution and the provisions of an international treaty as interpreted by an interstate body for the protection of human rights and freedoms.

Pursuant to Art. 104.4 of the Law, having examined the question of whether execution of a particular judgment is possible the RCC can adopt one of the following decisions: 1) to decide that it is possible to execute the decision in question, in whole or in part, in conformity with the Russian Constitution; or 2) to decide that it is not possible to execute the decision in question, in whole or in part, in conformity with the Russian Constitution. The amendment also established that if the RCC decides that the ruling is non-executable, no actions or acts aimed at executing the decision in question can be taken.<sup>106</sup> The provision is a clear violation of Art. 46 of the ECHR, which requires countries to comply with judgments of the ECtHR delivered against them and provides for no exceptions. Pursuant to Art. 27 of the 1969 Vienna Convention on the Law of Treaties, states cannot invoke provisions of internal law as justification for their failure to perform a treaty. In its interim opinion the Venice Commission expressed serious concern about the compatibility of the said amendments with Russia's obligations under international law, but noted that "subsequent practice" of the RCC would be helpful in assessing the amendments properly.<sup>107</sup>

### 3. The RCC's First Verdict: Execution of *Anchugov and Gladkov v. Russia* Is (Im)possible

On 19.4.2016, the RCC rendered its first concrete judgment determining the possibility of executing an international judgment in accordance with the Russian Constitution.<sup>108</sup> The ruling of the RCC, delivered at the request

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<sup>106</sup> Art. 104.4 and Art. 106, Federal Constitutional Law "On the Constitutional Court of the Russian Federation".

<sup>107</sup> Venice Commission (note 4).

<sup>108</sup> RCC, 19.4.2016, No. 12-P. The ruling received a lot of scholarly attention. See, for example, *M. Aksenova*, *Anchugov and Gladkov is not Enforceable: the Russian Constitutional Court Opines in Its First ECtHR Implementation Case*, *Opinio Juris*, 25.4.2016, <<http://opiniojuris.org>>; *K. Dzehtsiarou/Sergey Golubok/Maxim Timofeev*, *The Russian Response to the Prisoner Voting Judgment*, *ECHR Blog*, 29.4.2016, <<http://echrblog>>.

of the Ministry of Justice, concerned the ECtHR's 2013 judgment in the case of *Anchugov and Gladkov v. Russia*, in which the ECtHR unanimously found that a voting ban for prisoners provided in the Russian Constitution was in breach of the right to vote guaranteed by Art. 3 of Protocol No. 1 (right to free elections).<sup>109</sup> Art. 32(3) of the Constitution, establishing that "citizens who are kept in places of imprisonment under a court sentence, shall not have the right to elect and be elected", is placed in Chap. 2 "Human and Civil Rights and Freedoms", which requires a different and especially complex amendment procedure.<sup>110</sup>

In line with its earlier judgments in similar cases, the ECtHR found that even though the states had a wide margin of appreciation with regards to their electoral systems, a general, automatic and indiscriminate ban was outside the acceptable margin of appreciation.<sup>111</sup> The fact that in Russia prisoners were disenfranchised because of the constitutional provision was not accepted as an argument before the ECtHR, which noted that Art. 1 of the ECHR did not make a distinction about different types of rules or measures concerned and

"[did] not exclude any part of a member State's 'jurisdiction' – which is often exercised in the first place through the Constitution – from scrutiny under Convention".<sup>112</sup>

In terms of remedial measures, the ECtHR ruled that it was up to the Russian Government to explore the possible ways to comply with the requirements of Art. 3 of Protocol No. 1. In the words of the ECtHR, compliance could be achieved

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blogspot.de>; *I. Nuzov*, Russia's Constitutional Court Declares Judgment of the European Court "Impossible" to Enforce, I-CONnect, 13.5.2016, <<http://www.iconnectblog.com>>.

<sup>109</sup> ECtHR, *Anchugov and Gladkov v. Russia* (note 16).

<sup>110</sup> Art. 135 of the Russian Constitution establishes that, provided that the proposed amendment has the support of three-fifths of all members of both houses of the Parliament, a decision should be made by the Constitutional Assembly – summoned in accordance with a constitutional law that has still not been adopted – which would either confirm the existing constitutional provisions or propose a draft of a new Constitution. Such a draft could be passed either by two-thirds of all members of the Constitutional Assembly or in a referendum.

<sup>111</sup> For example, *Hirst v. the United Kingdom (No. 2)* [GC], 6.10.2005, Application No. 74025/01. The ECtHR's ruling against the UK resulted in a standoff between Strasbourg and the founding member of the ECHR system, which for more than a decade has failed to comply with a number of judgments concerning prisoners' voting rights.

<sup>112</sup> ECtHR, *Anchugov and Gladkov v. Russia* (note 16), Para. 108.

“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 Convention”.<sup>113</sup>

In its April 19<sup>th</sup> ruling, the RCC observed that Russia was obliged to execute judgments of the ECtHR adopted on the basis of the provisions of the Convention in a case against it and that such judgments formed “an integral part of Russia’s legal system”. Yet, the RCC also pointed out that such judgments:

“... do not abrogate the priority of the Constitution of the Russian Federation for Russia’s legal system, and therefore – in the context of its Art. 15 (Sections 1 and 4) – 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”.<sup>114</sup>

The RCC questioned the ECtHR’s dynamic method of interpretation, arguing that no European consensus existed with respect to restrictions of prisoners’ voting rights. Moreover, it noted that at the time of Russia’s ratification of the ECHR no questions were raised about the possible incompatibility of the provisions in question. Such incompatibility, therefore, must be the result of the interpretation of Art. 3 of Protocol No. 1 by the ECtHR to which Russia did not consent at the time of its accession to the Convention. While the states can be critical of the ECtHR’s interpretation of the Convention, once the case is adjudicated and becomes final they are nevertheless bound to execute the judgment. Moreover, when ratifying the ECHR Russia accepted the ECtHR’s jurisdiction, in accordance with Art. 32, to interpret and apply the Convention.

As some Russian constitutional law experts have argued the provisions of the ECHR and the Russian Constitution could be reconciled through interpretation, for example, if the RCC would interpret Art. 32(3) in line with the principles of necessity and proportionality established in Art. 55(3) of the Constitution.<sup>115</sup> When interpreted in this manner the restrictions on prisoners’ voting rights “should only take place where this is necessary and proportionate to the nature of committed crimes and the aims of punishment, and not as blanket ban”.<sup>116</sup>

<sup>113</sup> ECtHR, *Anchugov and Gladkov v. Russia* (note 16), Para. 111.

<sup>114</sup> RCC (note 108).

<sup>115</sup> G. Vaypan, A New Step in an Ambivalent Relationship between Russia and the European Court of Human Rights: A Comment on the Judgment of the Constitutional Court of Russia of 14 July 2015 No. 21-P, in: K. Hobér/A. Jonsson Cornell/L. Polishchuk, *The Uppsala Yearbook of Eurasian Studies*, 2016, 295.

<sup>116</sup> G. Vaypan (note 115).

The RCC, regrettably, did not apply this method of constitutional interpretation in its judgment and ruled that the restriction found in Art. 32(3) was an absolute one, meaning that “all convicted persons serving sentence in places of deprivation of liberty defined by the criminal law have no electoral rights with no exceptions”.<sup>117</sup> According to the RCC, “bearing in mind the logic of legal interpretation” it was impossible to construe Art. 32(3) in accordance with the ECtHR’s interpretation of the Convention. The RCC held that the constitutional provision in question had to be interpreted literally and that execution of the judgment was impossible in terms of granting voting rights to some persons kept in places of imprisonment. Judge *Sergey Kazantsev* disagreed with this reasoning and in his separate opinion argued for a more flexible interpretation of the constitutional provision, especially since in the given case the ECHR provided for better protection of human rights than the Constitution.<sup>118</sup>

Having found that *Anchugov* was non-executable, the RCC at the same time ruled that execution was “possible and realizable in Russia’s legislation and judicial practice” as far as it related to “justice, proportionality and differentiation of application of the restriction of electoral rights”.<sup>119</sup> The RCC, in disagreement with the ECtHR, seemed to suggest that the existing legal regime was in compliance with the requirements of Art. 3 of Protocol No.1. For example, as pointed out by the RCC, the term “imprisonment” in Art. 32(3) of the Constitution included only specific conditions defined in Arts. 56 and 57 of the Criminal Code, while other types of punishments, which were similar to the deprivation of liberty, did not lead to disenfranchisement. In addition, in terms of criminal law, crimes of minor gravity (punishable by maximum of three years of imprisonment) were punished by the deprivation of liberty only in exceptional circumstances and merely a small percentage of those found guilty were sentenced to imprisonment. Finally, the RCC argued that the Russian courts took into account disenfranchisement when making convictions, which in the words of the RCC “refute the arguments about absence of effective differentiation, proportionality and ‘non-automatism’”.<sup>120</sup> Similar claims, however, had previously been raised by the Russian government and dismissed by the ECtHR because of a lack of factual support.<sup>121</sup>

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<sup>117</sup> RCC (note 108).

<sup>118</sup> RCC (note 108). Separate opinion of Judge *Sergey Kazantsev*. The author’s translation.

<sup>119</sup> RCC (note 108).

<sup>120</sup> RCC (note 108).

<sup>121</sup> ECtHR, *Anchugov and Gladkov v. Russia* (note 16), Paras. 101 and 106.

Nevertheless, in its judgment the RCC recommended for the legislator to introduce changes on the federal law level in order to create more differentiation between different types of crimes and restrictions of voting rights. As an example, the RCC suggested changing “colonies-settlements”, where the sentence for less serious crimes was often served, from being one of the regimes of imprisonment in the sense of Art. 32(3) into a separate type of criminal penalty to which restrictions on voting rights would not apply. However, instead of encouraging state authorities to look for ways to execute the judgment, including the amendment of the Constitution if the ECtHR’s ruling would not be compatible with its current provisions, the RCC only referred to “the realization of the principle of humanism in criminal law” as the motive for the suggested change.

While acknowledging a non-binding nature of such recommendation, the Venice Commission, nevertheless, saw it as a positive aspect of the application of the RCC’s new powers in *Anchugov*.<sup>122</sup> However, in addition to a lack of certainty whether the Russian Parliament would follow the RCC’s recommendation, it is also unclear whether such a reform would be sufficient to satisfy the requirement of proportionality under Art. 3 of Protocol No. 1, something the RCC did not reflect on in its judgment.

#### 4. *OAQ Neftyanaya Kompaniya Yukos v. Russia* and the RCC’s Response

On 19.1.2017 the RCC delivered its second judgment on the possibility to execute, in compliance with the Russian Constitution, the ECtHR’s 31.7.2014 judgment in the case of *OAQ Neftyanaya Kompaniya Yukos v. Russia*.<sup>123</sup> The opinion of the RCC was issued on the basis of the request of the Ministry of Justice on the ground of a “discovered uncertainty” about domestic enforcement of the ECtHR judgment without violating the Russian Constitution.

In contrast to *Anchugov* case, the 2014 ruling of the ECtHR did not concern general measures, but only the question of payment of 1,866,104,634 Euros as just satisfaction for pecuniary damage to the shareholders of the *Yukos* company.<sup>124</sup> On 20.9.2011, the ECtHR decided the case on the merits and ruled that Russia was in breach of the applicant’s rights to a fair trial

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<sup>122</sup> Venice Commission (note 4), 10.

<sup>123</sup> RCC, 19.1.2017, No. 1-P. Judges *Vladimir Yaroslavtsev* and *Konstantin Aranovskiy* wrote separate opinions.

<sup>124</sup> ECtHR, *OAQ Neftyanaya Kompaniya Yukos v. Russia* (note 16), (just satisfaction).

(Art. 6) and property (Art. 1 of Protocol No. 1).<sup>125</sup> Considering the political character of the case and the extraordinary size of the monetary award, Russia's reluctance to comply with the judgment was not unexpected. The Russian authorities have been critical of the ruling from the beginning describing it as "unfair" and "inadequate".<sup>126</sup> During its 1222<sup>nd</sup> meeting in March 2015, the CM stressed the importance of timely compliance with the judgment and invited Russian authorities to take the necessary steps to abide by the deadline for executing the judgment. According to the Venice Commission, a constitutional court should not at all have competence to decide on the constitutionality of individual measures as

"it is very difficult to conceive that an order for payment of a sum of money may be found to be unconstitutional in the light of Chaps. 1 and 2 of the Constitution".<sup>127</sup>

Since the Constitution does not prohibit the payment of just satisfaction for victims of human rights violations, how did the RCC arrive to the conclusion that the execution of the ECtHR's judgment was impossible? In a lengthy ruling the RCC reiterated some of the ideas found in its 14.7.2015 and 19.4.2016 judgments, such as the importance of the "dialogue" between the two legal systems and the readiness on behalf of the RCC to look "for a lawful compromise" for the sake of the European human rights system. The RCC even stressed that its practice demonstrated "the approach aimed at undeviating execution of judgments of the European Court of Human Rights, even if their content is based on application of methods of 'evolutive interpretation'".

Even though the RCC acknowledged that the Russian state had an obligation to implement final judgments of the ECtHR delivered against Russia, it simultaneously argued that in certain situations states could refuse to execute such judgments. According to the RCC, such a situation would arise if a treaty was interpreted in violation of the rules of treaty interpretation established in 1969 Vienna Convention on the Law of Treaties – the RCC specifically invoked Arts. 31(1) and 46(1) – and if such interpretation was incompatible with the provisions of the Russian Constitution. The

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<sup>125</sup> ECtHR, *OA O Neftyanaya Kompaniya Yukos v. Russia* (note 16), (merits). The decision of the Chamber was not unanimous, with the imposition and calculation of penalties relating to the violation of Art. 1 of Protocol 1 being the most contentious issue.

<sup>126</sup> "Minjust nazval reshenie ESPC po vyplatam aktsioneram YUKOS protivorechashim zdravomu smyslu" [Ministry of Justice described the ruling of the ECtHR awarding compensation to Yukos shareholders as contrary to common sense], Interfax, 10.7.2015, <<http://www.interfax.ru>>.

<sup>127</sup> Venice Commission (note 4), 9.

RCC's argument about non-execution of judgments against Russia, which are "beyond" Russia's obligations under the Convention, seems to relate to the issue of *ultra vires* acts by international organizations. However, international law is not entirely clear about the legal consequences of such actions, but the possibility that a state might unilaterally refuse compliance with a judgment of an international court without providing weighty reasons for it seems highly doubtful. Moreover, it is questionable whether an international judicial body can even violate the Vienna rules of interpretation given their flexibility and procedural (rather than substantive) nature.<sup>128</sup> It is also difficult to understand the relevance of Art. 46(1), which regulates one of the grounds for invalidity of treaties, namely, a defect in a state's consent to be bound by a treaty. As pointed out by the Venice Commission, Art. 46(1) concerns *procedural* aspects of ratification, accession, approval or acceptance of a treaty, as provided in constitutional law, rather than violations of substantive provisions of constitutional law.<sup>129</sup>

Additionally, the RCC reasoned that when the ECHR as interpreted by the ECtHR ensured less protection for human rights than the Russian Constitution as interpreted by the RCC, the latter should prevail. Other countries' constitutional courts have invoked a similar line of reasoning, but as was rightly pointed out by *Lauri Mälksoo*, "sound[s] a little artificial in the context of Russia's own troubled history of constitutional control and fundamental rights".<sup>130</sup> In its ruling the RCC placed a great emphasis on the principles of sovereignty, described as a *jus cogens* norm, and the supremacy of the Constitution. The RCC explained that the ECHR constituted a part of the domestic legal system, but was "not equal to and not stronger than the legal force of the Constitution of the Russian Federation".<sup>131</sup>

After introducing the more general principles underlying the judgment, the RCC then turned to analyze the specific case in question. The ECtHR awarded compensation in relation to violations of Art. 1 of Protocol 1 on the basis that some of the penalties imposed on *Yukos* did not meet the criteria of lawfulness, since they were applied as a result of a changed interpretation of the tax law provisions by the RCC (judgment of 14.7.2005 No. 9-P), and that the enforcement fee on those penalties was applied in a disproportionate manner. Thus, the breach of the Convention resulted from the application of legal provisions, rather than the law itself. In its reason-

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<sup>128</sup> See, for example, J. Klabbers, *Virtuous Interpretation*, in: M. Fitzmaurice/O. Elias/P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, 2010, 15 et seq.

<sup>129</sup> Venice Commission (note 4), 31.

<sup>130</sup> *L. Mälksoo* (note 14), 389.

<sup>131</sup> RCC (note 123).

ing, the RCC stressed the constitutionality of Art. 113 of the Tax Code, which establishes a three-year time limit for holding taxpayers liable, and argued that its interpretation that the provision did not apply to bad-faith tax-payers was foreseeable in “the specific historical context” of the Russian tax system. The RCC also emphasized that *Yukos* acted as “a malicious non-payer of taxes” and in this way contributed to the need to take such strict measures against it.

Despite the fact that the ECtHR found the size of the enforcement fee as not meeting the criteria of proportionality, the RCC argued that the fee was in fact proportional and just, given the behavior of the *Yukos* company:

“Evasion of OAO Neftyanaya Kompaniya Yukos of taxpaying in such an unprecedented scale directly threatened the principles of the law-governed democratic social State, which obliged the law enforcer to undertake within the framework of the enforcement proceedings as effective measures as possible.”<sup>132</sup>

Consequently, the RCC ruled that the payment of a large monetary compensation was contrary to the constitutional principles of equality and justice and that the execution of the judgment, in accordance with the Russian Constitution, was impossible. Having established this, the RCC also suggested that Russia was free to manifest its “good will” and compensate the shareholders as long as it did not affect the state budget and property. In response to a number of other issues raised by the Ministry of Justice the RCC decided not to address other “problematic” aspects of the ECtHR’s ruling.<sup>133</sup>

To sum up, whereas in the case of *Anchugov* a conflict between the interpretation of the Convention by the ECtHR and the text of the Russian Constitution was apparent, the *Yukos* case did not raise any obvious incompatibility problems. In its judgment the RCC raised a number of rationales for Russia’s refusal to comply with judgments of the ECtHR, but did not show in a convincing manner the relevance of these arguments to the concrete case of *Yukos*. By disregarding the legal findings and binding effect of the ECtHR’s ruling the RCC’s promise of dialogue existed on paper only.

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<sup>132</sup> RCC (note 123).

<sup>133</sup> In the words of the RCC: “Other would mean the appraisal of the Judgment of the European Court of Human Rights from the standpoint of validity of procedural rules applied in its adoption and procedural decisions delivered on their base.” RCC (note 123).



## IV. Concluding Remarks

National constitutional courts are not only the guardians and interpreters of their countries' constitutions, but also important allies of the ECtHR in bridging the gap between the European human rights and domestic legal systems. Although constitutional courts' contribution to the implementation of the ECtHR judgments relies more in diffusing the Strasbourg jurisprudence in the domestic legal order, rather than directly executing specific judgments, when a conflict between the Convention and the Constitution arises their role can be crucial for the implementation of a single decision.

This paper has analyzed cases where the Constitutional Courts of Lithuania and Russia have not only had to find solutions to potential clashes with the ECHR but also played a *direct* role in domestic (in)execution of the ECtHR's judgments. Both the LCC and the RCC were confronted with situations where domestic execution of the ECtHR's judgments raised a potential conflict with national constitutional law. In the *Paksas* case, the ECtHR and the LCC had different understandings of the permissible restrictions on the passive voting right of a person removed from Presidential office. The LCC's interpretation of the Constitution concerning this right was not compatible with the ECtHR's interpretation of the Convention. In *Anchugov and Gladkov*, the ECtHR's interpretation of limitations on the active voting rights of prisoners differed from the restrictions provided in the text of the Russian Constitution. The final case (*Yukos*) did not raise any obvious conflicts, but such incompatibility was nevertheless "recognized" by the RCC. The finding of such a conflict in *Yukos* is especially problematic since it demonstrates that the RCC is willing to use its powers to decide whether international judgments should be executed or not in a very broad and flexible manner, extending as far as to the payments of monetary compensation. Even though both Constitutional Courts have recognized the importance of the ECHR and the case-law of the ECtHR for constitutional interpretation, neither was willing to use such guidance in the cases in question. As a result, both the LCC and the RCC "rebelled" against Strasbourg by taking decisions contrary to the ECtHR's interpretations of the ECHR.

The cases under comparison also have several important differences. First of all, the RCC was granted a general competence, unprecedented among constitutional courts of the CoE, to rule whether final decisions of international bodies can be enforced domestically, with such a decision made on the basis of their compatibility with the Russian Constitution as interpreted by the RCC. The right of the Ministry of Justice, responsible for domestic execution of the ECtHR's judgments, to trigger the RCC's jurisdiction

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places the Constitutional Court in a peculiar position, where it is asked to support the government in its unwillingness to comply with its international obligations. The problematic aspects of the RCC becoming a “political arbiter” were already highlighted by the Venice Commission. Furthermore, although the LCC refused to reinterpret its earlier position in conformity with the ECtHR’s *Paksas* judgment, at the same time it showed regard for Lithuania’s obligation to comply with the ECtHR’s ruling by going as far as indicating a specific way of executing the ECtHR’s judgment. For the LCC there was no question about *whether* to comply, but *who* should do it and *how*.

In contrast, in Russia’s case the situation is very different, as the RCC talks about the need for a “reasonable balance” between respect for judgments of the ECtHR and Russia’s constitutional identity, but does not seem to take such balancing seriously. Although the RCC’s ambiguous decision in *Anchugov* can be seen as some sort of compromise, it is far from the RCC’s promised dialogue. As a state party to the ECHR, Russia is legally bound to comply with judgments of the ECtHR, and the discussed decisions of the RCC show disrespect for both Russia’s international obligations and the ECtHR. The Russian state can hardly brag about its respect for international law, but such decisions erode the reputation of the RCC as one of the more progressive high courts in Russia.

Even though in both domestic legal orders the Constitution is placed at the apex, the LCC tries to find a balance between the supremacy of the Constitution on the one hand and respect for Lithuania’s international obligations on the other. In Russia’s case, the RCC talks about judicial dialogue with Strasbourg, but it appears that such dialogue should take place on Russia’s terms. In today’s multilayered system of fundamental rights protection, conflicts and disagreements are unavoidable. However, such situations, which lead to a reduced protection of human rights and an arbitrary disregard for international obligations, must fall outside the acceptable boundaries of a constitutional court’s dissent.