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The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: A Reply to Jeffrey Kahn

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1. Introduction

Relations between western countries and the Russian Federation are bad; it remains to be seen whether there will be further deterioration: Russia, for example, threatened to leave the Council of Europe in the summer of 2019.[1] In his article, Jeffrey Kahn analyses the conflict between the European Court of Human Rights (ECtHR) and the Constitutional Court of the Russian Federation (RCC) regarding the implementation of decisions of the ECtHR.[2] In the perception of the Council of Europe and of a number of its member states and international law scholars, this situation is considered as something close to the original sin: Russia is going to refuse to fulful its obligations under the European Convention on Human Rights (ECHR) was the common uproar in the western media;[3] and of course this presumed refusal was deemed to be just one brick in the very wall that Russia is building around itself in its fight for an authoritarian autocracy and against western ideas of pluralism, democracy and the rule of law. So Russia is the villain again and the West is shocked once more by its refusal to 'play by the rules' – western rules, as Russians would say. Kahn is another not very convincing voice in this uproar.

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1 This is due to the suspended rights of Russia. See the declaration of the speaker of the *Duma V. Volodin* case, in June 2017 that Russia would not pay 1/3 of its CoE membership fee for 2017, see *Kommersant*, 16 September 2017, available at www.kommersant.ru>doc3318820; in September 2018 the Minister of Foreign Affairs, S. Lavrov, declared that Russia will pay the membership fees due immediately, if its membership in PACE is restored, see www.news.rambler.ru, 14 Sept. 2018; see furthermore www.coe.int>Portal>FullNews. In the meantime the CoE and the Russian Federation have reached an agreement and Russia will not leave the CoE; see *Zeit Online*, 25 June 2019, available at https://www.zeit.de > Politik.

2 Kahn, 'The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St. Petersburg', in this issue, 933.

3 See the references to a large number of articles in the press in www.humanrights.ch/de/internationale.../russland-egmr-urteile-ignorieren.

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2. The Russian Constitution and International Law

The Russian Constitution is very open to international law. According to Article 15(4), universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system; international treaties prevail over Russian laws. This is a lot, but it does not mean, as Kahn purports, that Russia has a monistic understanding of national and international law. Treaties prevail over the laws, but not the Constitution (and most likely not the constitutional laws[4]). They practically always have to be ratified according to the Federal Law on International Treaties.[5] As far as basic rights are concerned, Kahn (and sometimes the Russian Constitutional Court) is silent on Article 17(1): 'In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and according to the present Constitution.'[6] So the Russian Constitution is very open to international law, but is in no way monistically subordinated to it, as Article 79, which regulates the possibility of the joining of and transfer of powers to associations of states, shows.

3. A Short History of the Russian Constitutional Court and the European Court of Human Rights

The indignation of recent years should not distort the general picture. Until about 2009 the RCC and the ECtHR had a very close and harmonious relationship. Since 1998, when Russia fell within the jurisdiction of the ECHR, the RCC has integrated the adjudication of the ECtHR into its own judicial practice on a broad scope. It began to regularly adopt the decisions of the ECtHR. The Court has also taken into account decisions of the ECtHR concerning other countries. It has, without much ado, accepted the adjudication of the Strasbourg court in those cases where the Court itself had decided otherwise: This also includes cases in which the ECtHR had declared specifically

[4] Constitutional laws, Art. 108 RCC, are similar to the French *lois organiques* and require a special 2/3 majority in both houses of the Federal Assembly; the Constitution provides for those cases in which a subject matter has to be regulated by constitutional law. There is no judicial practice on this question; legal doctrine considers constitutional laws to rank higher than international treaties, see Nußberger/Safoklov in B. Wieser, *Handbuch der russischen Verfassung* (2014), Art. 15 No. 32.

[5] Some legal scholars think that ratification is not necessary. This is in contradiction to Article 125, sec. 2c RCC, which allows constitutional control of international treaties that have not yet obtained legal force (meaning: been ratified). The Russian legislature has regulated accordingly and the RCC has seen no problem with this; see Art. 15 Federal Law No. 101 'On the International Treaties of the Russian Federation'.

[6] Here international law – the general norms and principles – suddenly seem to get elevated to the level of constitutional law. Of course, human rights are mostly regulated in international treaties and conventions; but the RCC has held the UN human rights conventions and the European Convention on Human Rights to have become universally recognized principles and norms of international law, see S. Yu. Marochkin, *The Operation of International Law in the Russian Legal System* (2019), at 75, 83, 116 with references to the judicial practice of the CC in note 20.

'Russian' and identity-suspect regulations to be in violation of the ECHR.[7] And it did this spectacularly against the Russian legislature, when it declared the death penalty, allowed by Article 20(2) Russian Constitution, to be not executable despite the fact that the 6th Additional Protocol to the ECHR had not been ratified.[8] Not only was the CC very faithful in implementing the decisions of the ECtHR, but likewise the legislature and the Russian Federation; admittedly the Russian legislature sometimes needed several tries to comply in a satisfactory way with the decisions of the ECtHR.[9] This whole history of a fruitful and enriching relationship between the courts is completely forgotten, if one, like Kahn, only focuses on the problems of the very recent past and neglects the numerous declarations made by the RCC that the non-implementation of ECtHR decisions must be and will be the absolute exception.

4. Russian Courtways[10] and the Authority of the ECtHR

A. *The Decision on the Possibility of Non-Implementation of Decisions of the ECtHR*

Let us take a look at the three decisions in question and at the analysis and critique by Kahn. The initial decision, stating the possibility of non-implementation of a decision due to a contradiction with the Russian Constitution, was doubtful in the admissibility of the procedure.[11] The Constitutional Court closed its eyes to this problem,

[7] One example here is the procedure of supervision; see the early decisions of the RCC of 2 Feb. 1996 No. 4-P, and of 3 Feb. 1998. For the following development, see note 8.

[8] See the decision of the RCC of 19 Nov. 2009 No. 1344 – O - P; the first decision concerning the temporary non-execution of the death penalty was decision No. 3 – P of 2 Feb. 1999.

[9] One example is the adaptation of the supervision procedure, with a number of ECtHR decisions: for example, ECtHR, *Ryabykh v. Russia*, Appl. no. 52854/99, judgment of 24 July 2003; ECtHR, *Volkova v. Russia*, Appl. no. 48758/99, judgment of 5 April 2005; ECtHR. *Kot v. Russia*, Appl. no. 20887/03, judgment of 18 Jan. 2007. In reaction to these decisions and in contradiction to its own former judicial practice, the Russian Constitutional Court on the one hand underlined the importance of the supervision procedure for the constitutional guarantee of access to courts/effective protection of rights; see the decision of 5 Feb. 2007, No. 2-P subitem 3. On the other hand, the Court supported the position of the ECtHR and of corresponding legislative reforms. In consequence the Russian legislature undertook a number of reforms, which brought the procedure of supervision closer to the procedure of retrial in case of newly discovered facts; see the detailed analysis in M. Pietrowicz, *Die Umsetzung der zu Art. 6 Abs. 1 EMRK ergangenen Urteile des EGMR in der Russischen Föderation* (2010), at 213 ff. As two further examples, see the pilot decision concerning the conditions in prisons in the RF, Ananyev and Others v. Russia, Appl. nos. 42525/07 and 60800/08, judgment of 10 Jan. 2012 and the Case of Burdov v. Russia (no. 2), Appl. no. 33509/04, judgment of 15 Jan. 2009 concerning the non-implementation of court decisions. Kahn just conceals this, see Kahn, *supra* note 2, at 955–956.

[10] 'Courtways' is a play on the title of the famous article by Keenan, 'Muscovite Political Folkways', 45 *The Russian Review* (1986) 115.

[11] According to Art. 125(2g) Constitution RF international treaties underlie constitutional control only prior to obtaining legal force.

most likely because, in view of the tensions after *Markin*,[12] it thought the power of counteraction against the ECtHR was a good idea. On the merits, the decision deals with an unavoidable problem of the effect of international treaties in dualistic systems. In dualistic systems, treaties need an act of transformation – the ratification by law. Laws, including ratification laws, have to give way to constitutions, the latter despite the underlying international treaty. Thus, whenever a provision of a ratified international treaty contradicts the constitution of a contracting party it cannot have effect, unless and until the constitution is changed accordingly.[13] From the point of view of international law this is a deplorable state of things, but it is a logical consequence of a dualistic construction.

The Russian Constitutional Court, basically accepting that by signing the ECHR Russia agreed to the interpretative development of the Convention by the ECtHR, considers certain decisions of the European Court to be judge-made law which changes the content of the Convention (evolutive or innovative interpretation). Presuming there was an innovation, a 'change of treaty' in a non-technical sense, a possibility or procedure of successive constitutional control by the Constitutional Court seems as logical from the point of view of the internal law of the state[14] as it seems illogical from the point of view of international law, especially Article 46 Vienna Convention on the Law of Treaties. The comparative examples, especially from Germany and Austria, cited by the RCC and analysed by Kahn, illustrate that indeed this is not a Russian problem; Kahn, by the way, misjudges the strictness of the position of the German Constitutional Court.[15]

So what is the problem then with this new power of the Russian Constitutional Court? It is not the legal position of Russia and its CC, but rather the catastrophic state of the relationships between the West, including the Council of Europe (CoE), and the Russian

[12] ECtHR, *Case of Konstantin Markin v. Russia*, Appl. no. 30078/06, judgment of 22 March 2012. On the surface *Markin* looks of course ridiculous: taking empirical reality into account, how many Russian soldiers will take a temporary leave from the army to bring up their children? But *Markin* has two hidden sides. One is the emotionalized idea of sovereignty and defence against enemies. The other is very Russian: pretending to want to raise a child and requesting leave for three years could serve as a possibility to get rid of one's contractual obligations as a soldier: At least according to the information given to me by a Constitutional Court judge, Markin continued to live together with his wife.

[13] An example: when the Federal Republic of Germany (FRG) signed the Rome Statute of the International Criminal Court, Art. 16 sec. 2 Basic Law (BL) FRG, which regulates extradition, had to be changed because it was unclear whether the ban on extradition abroad (*Ausland*) encompassed international organizations. Art. 16 sec. 2 BL was changed on 2 Dec. 2000.

[14] After all, a formal change of the treaty would open the possibility of control before the change is ratified.

[15] The *Görgülü* decision, BVerfGE 111, 307, has never been renounced, certainly not in the decision on the preventive extended term of imprisonment; see BVerfGE 109, 133, where the Court held the respective German regulation to be constitutional, and then the renouncement BVerfGE 128, 326 after the ECtHR decision; see the confirmation of Gögelü in BVerfGE 148, 296; see furthermore BVerfGE 141, 1, according to which the legislature is entitled to contradict a ratified international treaty by later legislation; the question whether this also concerns ratified human rights conventions is left open.

Federation; Russia's conservative movement towards traditional values; its farewell to the western understanding of democracy and the rule of law; and the aggressive realization of its political goals. In other words, the problem is the fear that Russia and its CC, the independence of which is secretly doubted, will abuse these new powers for a slow departure from the CoE and, even worse, for eroding the authority of the ECtHR and the cohesion of the CoE. This is a not an unrealistic fear and the Russian media show that when an unpleasant decision of the ECtHR for Russia occurs its politicians are very quick to ask whether implementation is forbidden by the Russian Constitution. But to transform this fear into shutting one's eyes to a justified legal concern of the Russian CC is not convincing.

B. *The* Anchugov *&* Gladkov *Decision*

The implementation of the *Anchugov & Gladkov* decision,[16] the general deprivation of voting rights for detainees, was the first concrete application of the new powers of the RCC. The motion was well chosen: Article 32(3) of the RCC excludes voting rights for 'citizens who are kept in places of imprisonment under a court sentence'. Here there was a clear contradiction between the Russian Constitution and a decision of the ECtHR, and, very conveniently, ECtHR decisions affecting national voting rights had been contentious and actually been disobeyed in other cases and countries as well. Conveniently, Article 32(3) RCC may not be amended, Article 64, 135(1) RCC. To implement the ECtHR decision, Russia would have had to convoke a constitutive assembly, which could either reject the initiated change or accept it with a 2/3 majority. In the latter event, a referendum would be held on this draft of a new Constitution, Article 135(2) and (3). In view of the required referendum, in which the people may decide anything, the decision of the ECtHR neglects the general principle of '*ultra posse nemo tenetur*'. The ECtHR – like Kahn[17] – recognized the problem, but considered it not to be serious and left it to the Russian CC to find a way round it, without however suggesting how this could be achieved.[18] The RCC, at least the majority of its judges,[19] maintaining its traditional Russian diffidence towards judge-made law, has not found such a way; how thoroughly it searched we do not know. There is another aspect, which shows that the ECtHR was strategically not well advised in the *Anchugov*

[16] ECtHR, *Anchugov & Gladkov v. Russia*, Appl. nos. 11157/04 and 15162/05, Judgment of 9 Dec. 2013.

[17] Kahn seems to think that a wide margin of discretion ceded by the ECtHR to Russia is sufficient; but if there is no discretion, a wide margin of discretion will not help. In my opinion, we witness here a strange ambivalence towards Russia in questions of the rule of law. As the rule of law is deficient in Russia, it is, on the one hand, admonished to create a legal order and legal reality that is adequate by rule of law standards. On the other hand, the ECtHR and Kahn expect Russia to generously leapfrog legal obstacles when the fulfillment of external standards is on the agenda. Russians very often have the feeling that they fall under a double standard (двойной стандарт): others (especially the USA) are allowed to do what is forbidden for them or they are expected to do what others consider to be unacceptable. The decision of the ECtHR is located in the direction of a double standard.

[18] The RCC does not have the power to initiate procedures itself; without a plaintiff there was nothing the Court could have done.

[19] The declining opinions of Judges S. M. Kazancev, V. G. Jaroslavcev and K. V. Aranovskij are more generous.

& Gladkov procedure. Anchugov and Gladkov were convicted murderers. The judicial practice of the ECtHR on voting rights has always considered only a complete and unconditional exclusion of all convicts to contradict the ECHR; convicts having committed serious crimes like murder certainly may be deprived of their voting rights. So if Russia had passed a new constitution or changed its legislation, Anchugov and Gladkov might still have been excluded from voting without any violation whatsoever of the ECHR. One wonders why the ECtHR opened this Pandora's box: it cannot have been the restitution of the rights of two poor harassed individuals.

C. *The* Yukos *Decision*

Things are different with the *Yukos* decision.[20] Obviously the case was and is highly politicized and it was clear that Russia would try to find a way not to implement this decision. But to find such a constitutional way was very hard: there is no provision in the Constitution that would clearly forbid an 'unjustified' payment of damages as such and, concretely, to the former shareholders of Yukos. The ECtHR had argued along two lines. On the one hand, it considered the retroactive constitutional reinterpretation of the strict deadlines of Article 113 Tax Code to the detriment of malicious tax evaders[21] to be a violation of Article 6 ECHR. On the other hand, it considered the execution fee to be a fee (implying financial equivalence of the fee to the service rendered by the state) and not, as the Russian Federation maintained, as a sanction, which, due to the lack of equivalence of fee and service, was too high. So let us presume that this decision of the ECtHR was wrong, especially in classifying the sanction as fee.[22] But a 'wrong' decision alone, however unpleasant and outrageous it may be, must be implemented if all instances of appeal are exhausted (which they were not in the *Yukos* case, as Judge Aranovskij pointed out in his dissenting Opinion[23]). To put it clearly, the presumed 'wrong' decision of the ECtHR does not transgress the limits of Article 79 RCC: it does not infringe upon the sovereignty of the Russian Federation, does not enact (direct) limitations of the basic rights and liberties of the citizen – the obligation to pay the damages is an obligation of the Russian state[24] – and does not contradict the basic structures of the constitutional order, as regulated in Chapter 1 RCC. Quite apart from that, it is in no way an evolutionary interpretation, which, as we recall, was the justification for confronting the problem of non-implementation

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

[21] *Ibid.*; the possibility of a different assessment of the case is shown by the Court itself in its resolution of 18 Jan. 2005 (Yukos 1), where the Court did not have any problems with a literal and non-corrective interpretation of Art. 113 Tax Codex RF; the legislature has now regulated the problem of tenacious resistance of the taxpayer; see Art. 113 sec.1.1 Tax Code RF.

[22] One actually wonders whether the classification of a public duty is within the powers of the ECtHR!

[23] Decision of 19 Jan. 2017 No. 1-P – Yukos; Dissenting Opinion of Judge K. V. Aranovskij, subitem 3.6.

[24] If one were to understand the respective part of Art. 79 Russian Constitution literally, then Russia could never join any international organization: Any treaty on double taxation, for example, or any treaty on extradition will automatically limit basic rights. Art. 79 evidently has to be interpreted in a very narrow way; 'limitation' must be understood as a very deep limitation of a basic right analogous to Art. 55 sec. 2 Constitution RF, which forbids laws '…. cancelling or derogating human rights and freedoms'.

of ECtHR decisions. The obligation to pay nearly 2 billion euros does not even come near to those constitutional depths, which might justify the non-implementation of a decision of the ECtHR.

The Constitutional Court nevertheless tried to attain adequate constitutional depths by stating that the decision of the ECtHR was a violation of the principle of equality of taxation and of justice, which prohibits its implementation.[25] These two aspects obviously do not suffice as reasons for the non-implementation of a decision of the ECtHR. Even if one is to accept such a refusal of implementation in general, then this needs a really weighty justification. 'Normal violations' of the principle of equality or of justice do not have this required weight;[26] the Constitutional Court maintains, but fails to show the required intolerable character of the violations. Differing concepts of justice collided in the supervision (надзор) case; the RCC considered the supervision procedure to be a realization of the principle of the correct decision and of justice; the ECtHR gave greater importance to the principle of legal certainty.[27] This ECtHR's disregard for the principle of justice did not serve as a sufficient reason to refuse the execution of its decision; on the contrary, Russia gave in and changed the respective procedural codes. But those were different times!

5. The Russian Constitutional Court: Villain or Rebel not without Some Cause

Kahn is an ardent proponent of international law,[28] and at times a Russia-basher. He ignores the innate problem of the ECHR and the decisions of the ECtHR in dualistic systems.[29] He does not present the constitutional problem of the *Anchugov & Gladkov* decision clearly to the reader. In the *Yukos* case, Kahn's analysis remains strangely shallow and does not disclose the legal shortcomings of this decision. Apart from this, there are additional weaknesses. The quite interesting dissenting votes in *Anchugov & Gladkov* and in *Yukos* should have been mentioned. As a rule, that is when the plaintiff sues against a law/its application; cases come to the ECtHR only after having been decided by the RCC – the author denies this.[30] The position of the German Constitutional Court is misrepresented.[31] The Russian Constitutional Court has nowhere outlined a 'Russian constitutional identity', as Kahn asserts; it has simply asked the ECtHR to

[25] Decision of 19 Jan. 2017 No. 1-P –Yukos, subitems 4.5 (equality of taxation), 5.1 and 5.2 (just and proportional punishment – execution fee as sanction and not, as presumed by the ECtHR, as payment for the additional costs of the compulsory execution).

[26] See the Dissenting Opinion of Judge Aranovskij, *supra* note 23, subitem 1.4, at 49.

[27] See *supra* note 9.

[28] See the agreeing reference to the respective statement of the Venice Commission expecting Russia to change its Constitution, Kahn, *supra* note 2, at 947. From the point of view of international law, such a position seems logical. But ought implies can: So what is a state to do if there is no majority in parliament for a constitutional amendment?

[29] Trying to strengthen his position by menacing with catastrophic scenarios does not help: 47 Council of Europe members confining the effect of the adjudication of the ECtHR, Kahn *supra* note 2, at 940.

[30] Kahn *supra* note 2, at 936.

[31] See note 13.

respect this undefined Russian constitutional identity.[32] To cite a 2003 Supreme Court judgment neglects the fact that the Supreme Court will most likely see things differently in 2019.[33] Last but not least: Kahn ignores a considerable amount of legal literature on the problem in his analysis.[34]

There are two ways to approach the 'judicial practice' (three decisions) of the RCC in matters of non-implementation of ECtHR decisions. One possibility is the international law perspective. The proponents of this perspective will insist on the unconditional implementation of ECtHR decisions: in reaction to any deviation from this principle they will exclaim their '*initiis obsta*' (especially so when the deviator – or should we say heretic – is Russia). Such an approach somewhat lacks contact with reality. Court decisions are sometimes not followed; below a 'critical mass' this does not carry serious consequences for the authority of the court. So perhaps it makes sense to silently accept the non-implementation of some ECtHR decisions, if most decisions are followed?

6. What to Do and Who is Responsible?[35]

I do not want to be misunderstood: Russia's conservative-authoritarian development is a tragedy. But if one wants Russia to remain a member of the Council of Europe, should one react to this refusal of the RCC and Russia to implement some decisions (currently two!) of the ECtHR and if yes, then how? One should not forget that Russia has always been a difficult member of the CoE; back in the 1990s there were strong doubts whether Russia should be accepted because its rule of law was not up to the standards of the CoE.[36] The hope behind accepting Russia's membership was that the integration of Russia into the CoE and being subject to the adjudication of the ECtHR would foster the development of basic rights and the rule of law in Russia. On the whole, this hope has turned out to be justified; the adjudication of the ECtHR has enriched the understanding of the basic rights of the Russian Constitution by the Russian Constitutional Court (and other Russian courts) and has made life easier for the CC because the ECtHR was its 'buddy'. The CC has often spoken and still speaks about its 'cooperative relationship' with the ECtHR. Despite the tensions, these positive effects for Russia and for the CoE still exist. If one just sees these two/three 'outrageous' decisions, then the Russian Court will most likely retreat into a Russian 'nobody understands me'-isolation. So perhaps the best choice at the moment is to stay cool and see whether the refusal to implement ECtHR decisions will continue to be an exception.

[32] Kahn *supra* note 2, at 954.

[33] *Ibid.*, at 955.

[34] See as one example L. Mälksoo and W. Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (2018), with a vast amount of further literature.

[35] This is of course the eternal Russian question: «Что делать?» (What to do) and «Кто виноват?» (Who is responsible?).

[36] See the depiction of the process in W. Rückert, *Das Völkerrecht in der Rechtsprechung des Russischen Verfassungsgerichts* (2005), at 187.

The ECtHR must be asked some questions too. In the *Anchugov & Gladkov* decision the Court was well aware of the Russian constitutional situation: To 'entrust' the task of a creative interpretation of Article 32(3) to the Russian Constitutional Court was a strange and somewhat swollen-headed move; why is the ECtHR silent on the absence of a justified need of legal relief, as the claimants could have been deprived of their voting rights anyway in accordance with the judicial practice of the ECtHR? Even more astonishing is the *Yukos* decision. Highly politicized decisions should be very sound from the legal point of view. Judge Aranovskij, with good cause, criticized problems of the admissibility of the complaint and pointed to the unclear addressees of the damage payment;[37] the doubtful and intrusive categorizing of the execution sanction as a fee with serious financial consequences for Russia is another point. A decision granting a moderate amount of damages might have been politically feasible; this is actually what the Russian Constitutional Court suggested in its decision.[38] In both decisions the ECtHR has leaned, perhaps with the best of intentions,[39] very far out of the window. It is enough that politics has done this for the last couple of years, to no avail at all.

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Jeffrey Kahn continues the debate with a Rejoinder on our EJIL: Talk! blog.

[37] Aranovskij, *supra* note 23, subitem 1.4, p.49 – admissibility; subitem 1.2, p. 47 – addressees.

[38] See the Yukos decision subitem 7, p. 33.

[39] By this I mean that the subtext of the decisions is a (basically justified) general and outspoken disapproval of the authoritarian development in the Russian Federation.