

Forward!
Вперёд!
Framåt!

Essays in Honour of Prof Dr Kaj Hobér

Editors

Eric Bylander
Anna Jonsson Cornell
Jakob Ragnwaldh

© The Authors and Iustus Förlag AB, Uppsala, Sweden 2019
Edition 1:1
ISBN 978-91-7737-076-5
Production: eddy.se ab, Visby, Sweden 2019
Cover: John Persson
Photo: Mikael Wallerstedt
Address of the Publisher: Box 1994, 751 49 Uppsala, Sweden
Phone: 018-65 03 30
Website: www.iustus.se, e-mail: kundtjanst@iustus.se
Printed by Dimograf, Poland 2019

Contents

Tabula Gratulatoria	5
Editors' Preface	7
Foreword	9
Charles N Brower and Daae Kim <i>Kaj Hobér and Stockholm. Ensuring that East and West Ever Shall Meet</i>	15
C Mark Baker and Cara Dowling <i>Resolving Climate-related Disputes. The Role of International Arbitration</i>	29
W E Butler <i>Catherine the Great, William Blackstone, and Comparative Law</i>	43
Iain Cameron <i>Russian Constitutional Law and Judgments of the European Court of Human Rights</i>	57
Mattias Dahlberg <i>Russian Tax Treaty Relations. The Examples of Sweden and Cyprus</i>	69

Contents

Joel Dahlquist Cullborg <i>Challenges of Treaty-Based Arbitral Awards in Swedish Courts</i>	83
Rudolf Dolzer <i>International Law and English Law. Res Judicata and the Henderson Doctrine</i>	101
Nils Eliasson <i>Some Reflections on Hong Kong from an Investment Treaty Perspective</i>	111
Ulf Franke and Annette Magnusson <i>The Emergence of an International Arbitral Institution for the 21st century</i>	127
Anna Jonsson Cornell <i>Revisiting Old Ideas in the Quest for New Ones</i>	143
Neil Kaplan <i>The Perfect Chair</i>	155
Herbert Küpper <i>Economics in the Hungarian Constitution</i>	163
Julian D M Lew <i>Determining Relevancy of Facts in International Arbitration</i>	179
Otto Luchterhandt <i>Historical Experience and the Lessons of Armenian Statehood. Taking a Detached View</i>	193
Kristoffer Löf <i>A Story of Corruption. A Case Study of How Bribery Affects the Validity of Performed Commercial Contracts</i>	201
Katlijn Malfliet <i>Ruxit. A Turning of the Plot in Europe-Russia Relations</i>	217
Christoph Schreuer <i>The Active Investor</i>	237

Contents

Patrik Schöldström	
<i>Massive Evidence in Arbitration. A Case with Food for Thought</i>	253
Patricia Shaughnessy	
<i>The Renaissance Arbitrator. The Multi-Tasking Model</i>	263
Daniel Stattin	
<i>Some Comments on Directors' Duties and Cross Border Activities</i>	275
Eva Storskrubb	
<i>Navigating EU Law and the Law of Arbitration. From the Horizon of Commercial Arbitration in Sweden</i>	285
Howard S Sussman	
<i>Kaj Hobér and Clinical Teaching</i>	309
John M Townsend	
<i>The Empty Chair. Arbitration with a Non-participating Party</i>	313
V V Veeder	
<i>A Swedish-British Story. The "Charente" on State Immunity</i>	323
Maria Berg Andersson	
<i>Bibliography of the Writings of Kaj Hobér. 1978–2019</i>	349
Presentation of Contributors	361

Iain Cameron

Russian Constitutional Law and Judgments of the European Court of Human Rights

Introduction

Kaj Hobér has had a long and distinguished career as advocate, arbitrator and professor. Kaj is a prolific author. He is particularly famous in the field of international arbitration, but his works cover a wide variety of different subjects. He has long had an interest in Russian law, including issues of Russian constitutional law. In this article, written in Kaj's honour, I take up a topical subject, and one which Kaj has also been involved in, namely Russian compliance with judgments of international tribunals. However, I take up another aspect of this issue, namely, the relationship between Russian constitutional law and judgments of the European Court of Human Rights (ECtHR). I became interested in this subject in 2016 when the Venice Commission (VC) was asked by the Parliamentary Assembly of the Council of Europe (PACE) to give its opinion on the matter. I was a member of the VC working group which produced the opinion.¹ My article begins with not-

¹ There was an interim opinion, delivered in March before the Constitutional Court delivered its judgment: Venice Commission, Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, CDL-AD(2016)005. This was then followed up in June with the Final Opinion on the Amendments to the Federal Constitutional Law on the

ing very briefly the work of the VC before proceeding to describe the legal situation in Russia which precipitated the opinion. It goes on to summarize the critical points made in the VC opinion (and sketches out subsequent developments). I close with some brief concluding remarks, broadening the perspective and saying something about different national approaches to international law in general.

The Venice Commission

The Commission for Democracy through Law, popularly known as the Venice Commission is a body of the Council of Europe (CE) dealing with constitutional and other legal matters of importance for democratic and rule of law development.² It consists of independent experts in constitutional and international law, appointed by states party to the agreement establishing the VC. All 47 CE states are members, but it is a so-called “open” agreement, and the members include states in North Africa and the Middle-East (e.g. Morocco, Algeria, Tunisia), North and South America (e.g. Brazil, Chile, Mexico and the USA), and Asia (e.g. Kazakstan, South Korea). Most of the VC’s opinions are responses to states voluntarily requesting advice on draft laws amending constitutions and related legal norms. This part of its work resembles that of abstract constitutional review by a constitutional court, although unlike such review, the opinions of the VC are non-binding. The VC examines applicable national law from the perspective of whatever international obligations the state has – and the ECHR has a special role here – but also from the perspective of comparative constitutional law.

CE institutions are also entitled to request opinions on different constitutional issues, both general and regarding specific CE member states. In cases where a CE institution, such as PACE, or the Secretary General, requests a specific opinion, there is no need for the state in question to consent to the VC examining the issue. The opinion on the Russian Constitutional Court’s judgment falls into this category.³ The VC also prepares studies, *amicus curiae* briefs for constitutional courts,⁴ reports, as well as guidelines in dif-

Constitutional Court, CDL-AD(2016)016. My comments in the present article are made purely in a personal capacity.

² For short analyses of the VC and its work see Jeffrey Jowell, *The Venice Commission: disseminating democracy through law*, [2001] *Public Law*, 675, Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe — Standards and Impact*, (2014) 25 *European Journal of International Law*, 579.

³ It was requested by the Legal Affairs committee of PACE.

⁴ In such cases, the VC tends to defer to whatever interpretations a constitutional court has made of national law – it being the expert on the subject.

ferent areas (e.g. electoral systems, the Rule of Law, financing of political parties) based on its earlier opinions. Over the years the VC has assembled an impressive constitutional *acquis* dealing with European constitutional values and “best practices”.

Tensions between the ECtHR and the Russian legal order

The Russian Federation ratified the ECHR in 1998. The relationship between the ECHR and the Russian legal order is a very large subject. Suffice it to say that, as far as the *Rechtsstaat* is concerned, the Russian legal order displays major systemic weaknesses, and these made their presence felt straight away in complaints made to the ECtHR. Many of the worst problems, in terms of the gravity of the violations, have concerned the counter-insurgency campaign in Chechnya.⁵ But endemic corruption, and ineffectiveness, in the legal system meant that the national courts could be unwilling or unable to check the executive power, or organized crime interests acting in collaboration with senior officials. Generally speaking, one can say that courts are fundamental in *maintaining* a *Rechtsstaat* but they have great difficulties in *creating* a *Rechtsstaat* against the wishes of strong élites.

There is a Constitutional Court in Russia, however, it is largely limited to controlling the constitutionality of the laws themselves. Aggrieved individuals have not been satisfied with the Constitutional Court's limited powers to rectify human rights violations (e.g. by awarding damages) and accordingly turned to the ECtHR for an individual remedy.⁶ Here one should note that while the Russian government has routinely paid out compensation which the ECtHR has ordered to be paid, it has not corrected many of the structural deficiencies in the Russian legal order. One cannot fault the ECtHR for this: an international court is usually in an even weaker position than the national courts when it comes to imposing its will upon recalcitrant elites.⁷

⁵ The “Transdniestria” cases have also caused tension, as they establish Russian responsibility for the occupied territory in Moldova. See in particular *Ilaşcu and Others v Moldova and Russia*, No 48787/99, 8 July 2004 and *Mozer v Moldova and Russia* [GC], No 11138/10, ECHR 2016.

⁶ See, e.g. Angela Nußberger, ‘The Reception Process in Russia and Ukraine’, in Helen Keller and Alex Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP, 2008) 604–77.

⁷ The American political thinker Alexander Hamilton famously described the courts as the “least dangerous branch” of government, in that they tended to operate only as a veto over the other branches of government, and lacked power over both the military and economic resources of the state. See further Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale UP, 1986. To quote a less well-known constitutional theorist, Warren

Under international law generally, a state may not invoke national law to avoid complying with its international obligations.⁸ There is a specific obligation to this effect in the ECHR which provides that the ECtHR's judgment is binding on the respondent state (Article 46). In addition, under Article 41, the ECtHR may award "just satisfaction" to an applicant whose Convention rights have been violated, and states are legally bound to comply with such a monetary award. The practice of the ECtHR is nowadays, in appropriate cases, to specify what general measures the state should take to provide remedies for all the present victims, as well as setting out what general goals legislation must achieve to avoid this problem emerging again.⁹ However, unlike monetary awards, whatever general or specific measures it indicates are not legally binding, so the Court cannot insist upon compliance with these. Instead, the Court is careful to leave issues of supervision concerning the execution of its judgment to the Committee of Ministers.¹⁰

One can say that states can, reasonably enough, be expected to be especially sensitive about their constitutions. After all, these are their fundamental laws and they are supposed to give expression to peculiarly national values. One can also say that the ECtHR generally shows deference to supreme courts and constitutional courts.¹¹ But the ECtHR cannot, obviously, state that constitutional provisions are "no-go" areas for it. Still, there can be good reasons for treading particularly carefully around constitutional rights provisions or the judgments of constitutional or supreme courts interpreting

Zevon, what seems to be needed in such circumstances is the simultaneous application of all three instruments of persuasion: lawyers, guns and money.

⁸ Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P C I J, Series A/B, No 44, p 24 "... a State cannot adduce ... its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force". This customary rule is codified in Article 27 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. There is an exception for treaties which have been ratified in manifest violation of constitutional law (Article 46).

⁹ For a Russian example, see *Burdov v Russia (No 2)*, No 33509/04, 15 January 2009 concerning the problem of non-enforcement of judgments in the Russian legal system. See Courtney Hillebrecht, The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change, (2014) 20 European Journal of International Relations, 1100.

¹⁰ See, e.g. *Burmych and Others v Ukraine (striking out)* [GC], nos 46852/13 et al, 12 October 2017.

¹¹ "Where ... the superior national courts have analyzed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law ... and by finding, contrary to their view, that there was arguably a right recognised by domestic law", *Roche v UK* No 32555/96, 19 October 2005, para 120.

constitutional rights catalogues. Nonetheless, the evidence is mixed. There are ECtHR cases where violations have been found.¹² On the other hand, there are cases in which the constitutional nature of the restriction appears to have been weighed in.¹³ The states party have, generally speaking, responded to the rare ECtHR judgments which implicitly require constitutional amendment by making such amendments.¹⁴ For example, in Sweden, constitutional amendments were contemplated as a reaction to the ECtHR judgment in *Holm v Sweden*.¹⁵ The applicant had sued the author of a publication owned by the Social Democratic party (SDP) for defamation. It being a case under the Freedom of the Press Act (TF) it was tried by a jury. Members of the SDP happened to be in a majority on the jury and the author was acquitted.¹⁶ This judgment led to the proposal that the constitutional right to jury trial be abolished where the composition of the jury cannot guarantee a fair trial.¹⁷ In the event, however, the government, and later parliament, considered that a constitutional amendment was not necessary. In the rare cases in which the composition of the jury was a problem could be dealt with by the courts applying the Holm case in conjunction with the general rules on impartiality (*jäv*) in Chapter 4, section 13 of the Code of Judicial Procedure.

In 2013, the ECtHR delivered judgment in the case of *Anchugov and Gladkov v Russia*.¹⁸ This case concerned the right of prisoners to vote in elections: both applicants had been convicted of murder and were serving long sentences. However, all people subject to a longer prison sentence were

¹² See e.g. *Demir and Baykara v Turkey* No 34503/97 12 November 2008, *Wizerkaniuk v Poland* No 18990/05 (ECtHR, 5 July 2011) and the ECtHR's initial rejection of the BVerfG's approach to balancing integrity/expression in *von Hannover v Germany* No 59320/00 24 June 2004, later 'clarified' in *von Hannover (No 2) v Germany* Nos 40660/08 and 60641/08, 7 February 2012.

¹³ See *Leyla Sahin v Turkey* No 44774/98 29 June 2004) (Turkish constitutional requirement of secularism and ban on wearing headscarfs at university), *Dogru v France* No 27058/05 and *Kervanci v France*, No 31645/04 16 December (laïcité and ban on wearing headscarfs at schools), *A, B and C v Ireland* No 25579/05, 16 December 2010 (constitutional rights of the foetus/unborn child, where the Court also referred to a 'firmly held' moral view amongst the population in Ireland), *Lautsi v Italy* [GC], No 30814/06 18 March 2011 (crucifixes on the walls of classrooms not in breach of Article 3, Protocol 1, where the Grand Chamber reversed the judgment of the chamber of 3 November 2009).

¹⁴ Constitutional amendments were carried out as a general measure of execution in e.g. Greece, Hungary, Italy, Slovak Republic and Turkey, see at <<http://www.coe.int/en/web/execution/home>>.

¹⁵ 25 November 1993, A/279-A.

¹⁶ Prop 1997/98:43, s 129–35.

¹⁷ See Domaren i Sverige inför framtiden, SOU 1994:99, del B, p 315 et seq.

¹⁸ Nos 11157/04 and 15162/05, 4 July 2013.

disenfranchised. The ECtHR found that the automatic and indiscriminate disenfranchisement of convicted criminals was in violation of Article 3 of Protocol 1. The ECtHR noted that it was for the contracting states to draw the necessary consequences of the judgment. It may decide either to leave it to the national courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction.¹⁹

In December 2015, Federal Law of the Russian Federation no 7-KFZ introduced amendments to the Federal Constitutional Law no 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation. The amendments permit the President and the government of the Russian Federation to ask the Court for the interpretation of constitutional provisions "in the light of a discovered contradiction between the provisions of an international treaty of the Russian Federation as interpreted by the inter-State human rights body and the provisions of the Constitution". If the Constitutional Court cannot "remove the uncertainty" about the contradiction between the Constitution and the international decision, no measures aimed at enforcement it may be taken within the territory of the Russian Federation.

The Constitutional Court's judgment

On 19 April 2016, the Constitutional Court of the Russian Federation delivered a ruling²⁰ in a case concerning the execution of the Anchugov and Gladkov case. The Constitutional Court found that the ECtHR's interpretation of Article 3 of Protocol 1 "implicitly contemplat[ed] the alteration

¹⁹ Ibid, at para 107.

²⁰ Ruling of the Russian Federation Constitutional Court of Apr 19, 2016, No 12-П/2016, available in English at <http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf>. For commentary see, e.g. Lauri 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-П/2015, *European Constitutional Law Review*, 12: 377–395, 2016 and Natalia Chaeva, The Russian Constitutional Court and its Actual Control over the ECtHR Judgement in Anchugov and Gladkov. EJIL Talk, <<https://www.ejiltalk.org/the-russian-constitutional-court-and-its-actual-control-over-the-ecthr-judgement-in-anchugov-and-gladko/>> accessed 20 March 2019. A useful comparative analysis can be found in Austra Padskocimaite, Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania 2017, 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 651–684.

of Article 32.3 of the Constitution of the Russian Federation²¹, to which Russia [...] gave no consent during [...] ratification [of the ECHR]. A contradiction with the Russian Constitution existed not in respect of the European Convention as such, but only in respect of the interpretation thereof given by the ECtHR to the issue of disenfranchisement of prisoners, “which was an evolutive one rather than a well-established one”.²² In the Court’s view, there was no consensus among Council of Europe member states on this issue, and consensus was necessary before the ECtHR could make an evolutive interpretation of the Convention.

The Constitutional Court disagreed with the ECtHR’s view that the disenfranchisement was automatic and indiscriminate: those convicted of crimes of lesser gravity did not lose voting rights. But, in any event, the Constitutional Court considered that the wording of Article 32.3 of the Constitution meant that it was impossible to execute the ECtHR judgment to exclude from disenfranchisement *some* categories of convicted persons serving a sentence in places of deprivation of liberty. The execution of that judgment was possible to the extent that it meant ensuring justice, proportionality and differentiation of application of the restriction of electoral rights (as this, according to the Constitutional Court was already the case under the current criminal system). Finally, the federal legislator was competent to optimize the criminal system including by transferring individual regimes of serving deprivation of liberty to alternative kinds of penalties not entailing disenfranchisement but that the execution of measures of individual character was impossible.

The analysis of the Venice Commission

The VC considered that the Constitutional Court should not have been tasked with the identification of *all* the means of execution of an international judgment. The choice of the best way of enforcing a decision by an international court is a political and administrative matter, something which is primarily the responsibility of the government. The Constitutional Court should only play the role of a “negative legislator”. A finding of unconstitutionality of a particular modality of execution of a decision of an international court should therefore be the *starting point* for the work of

²¹ This provides that “... citizens detained in a detention facility pursuant to a sentence imposed by a court shall not have the right to vote or to stand for election.”

²² *Supra* note 2, points 4.1–4.3, pp 6–12.

other state powers/organs.²³ Moreover, the finding that a *whole* judgment is “non-executable” is problematic in that it establishes that there is no constitutional manner of execution. This in turn means that the only solution that is compatible with the State’s international obligations is amending the constitution (and that is not an appropriate thing for the Constitutional Court to do). The end result is that the discretionary power of the other State authorities ends up being significantly reduced.²⁴

A better solution would have been to ask the Constitutional Court to rule on the constitutionality of a specific government proposal to implement the judgment of an international court. Such a power for the Constitutional Court would not raise problems under international law, as a negative ruling would simply mean that the issue would be referred back to the other State institutions (the government, the parliament) which are responsible under international law for the enforcement of the judgment.²⁵

Notwithstanding the clear wording of Article 46 of the ECHR, the VC also noted that the 2015 amendments do not exclude that orders for payment of just satisfaction be brought before the Constitutional Court. The VC found it very difficult to conceive that an order for payment of a sum of money may be found to be unconstitutional in the light of Chapters 1 and 2 of the Constitution. Since it could not be totally ruled out, the VC recommended that the law be changed explicitly to exclude orders for payment of sums of money from the competence of the Constitutional Court.²⁶

Comments on the Analysis

It follows from its judgment of 19 April 2016 that the Russian constitutional court was prepared, at least to some extent, to try to reconcile – apparently – conflicting demands made by the ECtHR and the wording of the Russian constitution. However, where these demands were found to be irreconcilable, it would apply the constitution. A constitutional court is established as the guardian of the constitution. It is thus hardly strange that the constitutional court regards the constitution as supreme, and that, when push comes to shove, the constitution must be preferred over whatever international obligations the state has undertaken. On this narrow issue, the Russian constitutional court does not diverge from the practice of other

²³ Final Opinion, para 25.

²⁴ Final Opinion, para 26.

²⁵ Ibid.

²⁶ Final Opinion, para 29.

constitutional courts, such as the German constitutional court (BVerfG), or supreme courts, such as the Swedish supreme court.

Thus, the German Constitution (Grundgesetz, GG) determines that an approval to a treaty of public international law – such as the ECHR – by the German Parliament incorporates the treaty as a Federal statute (Article 59 (2) sentence 2 GG). Following the idea of hierarchy of norms, this means that the ECHR is subordinate to the German constitution.²⁷ However, the BVerfG has repeatedly emphasized the *openness* of the German constitution in relation to international public law.²⁸ According to the BVerfG, provisions of the ECHR not only have the legal status of a Federal statute, but also entail further legal consequences for German law, including provisions of the German constitution. In particular, the provisions of the ECHR serve, on the level of constitutional law, as interpretative aids to determine the contents and the scope of fundamental rights and of rule-of-law principles of the German constitution.²⁹

There has been some misunderstanding about the Order of 14 October 2004, 2 BvR 1481/04 which has been seen as a judgment “hostile” to the ECtHR. At the root of the case was an attempt by the father of a child to obtain custody of a child, following an earlier judgment of the ECtHR finding that the procedure for awarding custody to the mother had violated the father’s procedural rights to be heard in the proceedings.³⁰ The German courts in these subsequent national proceedings had found that, notwithstanding the procedural error in the initial custody decision, custody should remain with the mother (applying the principle of the best interests of the child). The BVerfG found that this did not violate the constitution. The BVerfG thus allowed the German courts, when implementing a judgment of the ECtHR, a measure of discretion in how they do this, but only when

²⁷ Decision of 4 May 2011, 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, and 2 BvR 571/10, para 86, <http://www.bverfg.de/e/rs20110504_2bvr236509en.html>.

²⁸ Order of 14 October 2004, 2 BvR 1481/04, para 33, <http://www.bverfg.de/e/rs20041014_2bvr148104en.html>.

²⁹ Order of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307 (315 f); Decision from 26 February 2008, 1 BvR 1602, 1606, 1626/07, para 52 <http://www.bverfg.de/e/rs20080226_1bvr160207.html>. The BVerfG has otherwise formulated it that the guarantees of the ECHR have “constitutional significance” (Decision of 4 May 2011, 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, and 2 BvR 571/10, para 88, <http://www.bverfg.de/e/rs20110504_2bvr236509en.html>). These issues are developed further in the preliminary opinion. For another overview of the issue, see Ekhart Klein, Germany, in Janneke Gerards & Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in national case-law*, Intersentia 2014.

³⁰ *Görgülü v Germany*, No 74969/01, 26 February 2004.

implementation of a judgment involves balancing between *private* competing interests, and then only if the reasons for reaching such a different solution have been duly argued. This, in fact, is in line with the division of responsibility established by the ECHR. The ECtHR determines at international law whether the state has violated the ECHR. It is for the national authorities (operating within the national division of competences) to determine what needs to be done to implement the judgment.

A similar position is taken under Swedish law. The ECHR does not have the same status as the constitution.³¹ Thus, should the Constitution conflict with the Convention, and this conflict cannot be resolved, the Swedish courts must apply the Constitution.³²

However, there are crucial differences between the situation under German and Swedish law on the one hand and Russian law on the other. In the (unlikely) event that the German Constitutional Court or the Swedish Supreme Court, or Supreme Administrative Court, found an irreconcilable conflict between the constitution and the state's obligations under the ECHR, the task of ensuring conformity between the constitution and these international obligations *then reverts to the legislator*. Under the present Russian law and practice, however, the constitution is "written in stone". Constitutions are admittedly supposed to provide a stable framework for governance, but with the narrow exception of so-called "eternity clauses"³³ constitutions are not written in stone.

Concluding remarks

There is much which can be said about the Russian approach to this issue but I will content myself with saying the following. Constitutional incompatibility is not, and will not be, a common Russian argument for non-compliance. So far, it has only been invoked as regards one other ECtHR case,

³¹ Instrument of Government Chapter 2, section 19 provides that "a law or other regulation may not be issued in conflict with [the Convention]". This means that a law or other regulation, passed after 1995, which conflicts with the Convention, *also conflicts with the Constitution*.

³² See RÅ 2006 ref 87 concerning the exhaustive list of grounds in TF/YGL for not making a document public. There was no possibility of "reading in" a new ground, to protect personal integrity and so precedence was given to the Constitution. This case never went to the ECtHR. Even if a similar case goes to the ECtHR in the future, it is not absolutely clear that the ECtHR would in fact find a violation of the Convention.

³³ See, in particular, Article 79(3) of the GG which declares certain principles to be unalienable: the democracy principle (cf Article 20 GG), the federal structure and the principle of human dignity (Article 1GG).

OAO Neftyanaya Kompaniya Yukos v Russia.³⁴ But it obviously sets a dangerous precedent. The relationship between the ECtHR on the one hand and national legislatures and courts on the others is not without its tensions. It would be strange otherwise. The ECtHR is not all-knowing. Its judgments, like the judgments of any court, can be criticised. If there is a lot of criticism, the ECtHR may choose to back down.³⁵ And the specific question at issue in the *Anchugov and Gladkov* case, prisoners voting rights, is undoubtedly a sensitive issue of national policy, which, as is well-known, was the subject of previous implementation problems in the UK.³⁶

But while courts and legislatures from other states might grumble, the Russian Constitutional Court has chosen a head-on confrontation with the ECtHR. The Russian Constitutional Court rejects the *kompetenz kompetenz* of the ECtHR, in violation of Russia's obligations under Articles 32 and 46 of the ECHR. The Russian Constitutional Court states that ECHR provisions may not be given an evolutive interpretation unless there exists a common European conception on the matter. Since the Russian Constitutional Court came to the conclusion that no such common European conception existed in the case, the existence or non-existence of this must be an issue which can be determined by the national lawmaker, whether legislature, supreme court or constitutional court.

The issue of how “international” international law actually *is*, is a topical issue. International lawyers can miss the fact that a common language might be being used, but that the words refer to quite different things.³⁷ For example, Lauri Mälksoo has argued convincingly that some things in international relations which Western jurists would not regard as binding norms at all, such as “spheres of influence” (as discussed during the Yalta conference) have been taken very seriously in Russian doctrine and practice.³⁸ As regards the present issue, it seems that there is substantial but not complete overlap in meaning when comparing the Russian approach to the approaches of the other states party to the ECHR to whether or not judg-

³⁴ No 14902/04, 31 July 2014 (just satisfaction). A large award of damages was made in the case. The Russian constitutional court was, obviously, unimpressed by the VC argument that it was difficult to see how a constitutional incompatibility could arise in such circumstances.

³⁵ Good examples of this are the Grand Chamber judgments in *Lautsi v Italy* op cit and *A and B v Norway*, Nos 24130/11 and 29758/11, ECHR 2016.

³⁶ Following *Hirst v UK (no 2)* [GC] No 74025/01, 16 October 2005. This was also a dangerous precedent.

³⁷ Anthea Roberts, *Is International Law International?* (OUP, 2017).

³⁸ Lauri Mälksoo, *Russian Approaches to International Law* (OUP, 2015).

ments of the ECtHR are binding.³⁹ The other states party mean “binding”. The Russian approach seems to be that “binding” means “binding unless we decide otherwise”.

³⁹ So far, one should add. Rumbles have been coming from other states, which is why the Russian precedent is disturbing. Thanks to Austra Padskocimaite for helpful remarks on this point.