

SOVEREIGNTY, DISSENT, AND THE SHAPING OF INTERNATIONAL CONSENSUS AROUND HUMAN RIGHTS: AN EXAMINATION OF RUSSIAN “DISENGAGEMENT” FROM THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract: This paper examines issues of sovereignty, power, and dissent, and discusses how international consensus around human rights principles should be derived. It examines the so-called rise of disengagement from international law, using the example of Russia. This paper discusses the issue of whether Russia is truly headed towards disengagement from international legal norms and institutions through utilization of discourses of “traditional values,” “local norms,” and “local constitutional identities.” This paper concludes that, rather than pursuing a “hard disengagement,” Russia is instead attempting to redefine the current rules of engagement with the international community and international judicial bodies through calls for the re-examination of existing power structures and the role of dissenting voices in international law. However, despite the validity of some of

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these claims, Russia is engaging domestically in precisely the practices that it aims to critique internationally. The outcome is reduced human rights protection for Russian citizens, especially when it comes to minority rights. The paper concludes that in order to reduce the current fragmentation of international law, a greater engagement through consensus building needs to be undertaken. The very process of contestation can be transformed into collective meaning making, if both the national and the international orders are willing to cede some of their respective powers.

Keywords: sovereignty, power, dissent, international law, fragmentation

I. INTRODUCTION

In view of recent events, such as Brexit, Catalan calls for independence from Spain, China's reassertion of its dominance in Asia *vis-à-vis* the United States, and Russia's annexation of Crimea, increasing attention is being paid to so-called processes of national disengagement from international law and its increasing fragmentation.¹ If the process of expanding international legal rules and institutions continues to reverse, an increased "thickening of legal borders" and a more dominant role of state-made law are likely consequences.² However, when questions of national disengagement from international law are raised, it is important to keep in mind that international law itself is rather fragmented and does not consist of one coherent set of rules or institutions.³ Moreover, the very idea of international law is mired in ambiguity, reflecting a struggle between "international law as a tool used by the powerful to coerce the weak, and international law as a body of rules constituting an 'international society' whose [member states] are fellow subjects of its laws."⁴

This paper aims to examine issues of sovereignty and dissent and discusses how international consensus around human rights principles should be arrived at. It discusses the issue of whether Russia is truly headed towards disengagement from international legal norms and institutions through the utilization of discourses of "traditional values," "local norms," and "local constitutional identities." It concludes that rather than pursuing a "hard disengagement," Russia is attempting to redefine the current rules of engagement with the international community and with international judicial bodies through calls for the re-examination of existing power structures and the role of dissenting voices. These calls for re-examining the

¹ See generally Martti Koskeniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002) (discusses the substantive fragmentation of international law).

² William Twining, *Responding to Globalization*, 49 OSGOODE HALL L. J. 353, 366 (2011).

³ Terry Nardin, *International pluralism and the rule of law*, 26 REV. INT'L STUD. 95, 96 (2000).

⁴ *Id.*

boundaries of sovereignty and human rights are certainly not unique to Russia. Despite the validity of some of these claims, Russia is engaging domestically in precisely the practices that it aims to critique internationally. The outcome is reduced human rights protection for Russian citizens, especially when it comes to minority rights.

Part II deals with the issue of international law being used as an instrument of the few powerful states to pursue their agendas and judicial governance reproducing power inequalities that it is supposed to alleviate. Hence, the perception of international law as an instrument of exclusion is examined in relation to the shifting concept of state sovereignty. In turn, this part also deals with the interconnected nature of sovereignty, judicial governance, and the nature and scope of human rights. Part III looks at Russian attempts to reassert its “moral sovereignty” through domestic constitutional law, utilizing discourses of “traditional values,” “local norms,” and “local constitutional identities.” It reviews the Russian Constitutional Court’s September 23, 2014 decision to uphold federal “gay propaganda” legislation, and the response by the European Court of Human Rights (ECtHR) in its June 20, 2017 decision. Part IV looks at the connection between the issue of “moral sovereignty” in regard to the substantive nature of human rights and the way this issue has shaped the relationship between the Russian Constitutional Court and the ECtHR. This part looks at the case of prisoner voting rights and the “judicial tug-of-war” between the Russian Constitutional Court and the ECtHR, which resulted in the Russian Constitutional Court—for the first time in its modern history—holding a hearing to consider the possibility of implementing a particular decision emanating from the Strasbourg Court and evaluating its alignment with the Russian Constitution. Part V considers whether Russia has truly “disengaged” from the ECtHR and broader international human rights principles. The paper concludes that to reduce the current fragmentation of international law, a greater engagement through consensus building needs to be undertaken. The very process of contestation can be transformed into collective meaning making,⁵ if both the national and the international orders are willing to cede some of their respective powers.

II. POWER, SOVEREIGNTY, AND DISSENT IN INTERNATIONAL LAW

When the fragmentation of international law and its failures to achieve consensus around normative values that shape abstract legal principles are discussed, reference is frequently made not to the actual defects of legal principles, but to the fact that international law is used as an instrument of a few powerful states to pursue their agendas.⁶ That is, the failure of international law is examined in relation to its inability to constrain the pursuits of the powerful.⁷ Therefore, both

⁵ Mohsen al Attar, *Reframing the ‘Universality’ of International Law in a Globalizing World*, 59 MCGILL L. J. 95, 135 (2013).

⁶ See Nardin, *supra* note 3, at 109.

⁷ *Id.*

international legal norms and adjudicative bodies become synonymous with an alternative means of governance by the dominant states, rather than standing in opposition to state power and sovereignty. Hence, governance through international law becomes a sophisticated means of achieving political domination.⁸ In other words:

[T]ransnational lawmaking continues to operate as a technique for the projection of parochial preferences and their consolidation into justiciable legal claims. . . . [T]he articulation of global norms and principles is often little more than the expression of special interests, amplified through a bullhorn and superimposed on the world as a universal good. . . . Double-standards, tiered treatment, contradictory and hypocritical obligations are common within the regime, all of which are dressed up as objective universality yet all of which seem to consistently contribute to preserving the economic ascendancy of the usual suspects.⁹

Instead of politics being evaded by resorting to impartial adjudication and solid legal reasoning, international law is being increasingly discussed in various jurisdictions as not only a reflection of the identities and interests of the powerful but also a “social artifact that reinforces identities, interests, and power.”¹⁰ Thus, international law is perceived as propagating certain political ends “through the seeming objectivity of legal methods.”¹¹ International law, then, becomes a tool of politics.¹² Giving preference to one meaning over many others, often as a result of political privilege, is seen as preventing constructive dialogue between local courts and international adjudicative bodies and instead imposing a single position as the “correct or even scientific one.”¹³ International lawyers and judges, through their arguments and decisions, reproduce and perpetuate this current ideology of international law.¹⁴ Hence, international legal arguments change or are interpreted in a new way to reflect changes in the political interests of powerful states. The inconsistency of arguments over time is not then seen as a problem because international law is perceived as being driven by a desire to defend the national

⁸ See Nikolas M. Rajkovic, ‘Global Law’ and governmentality: Reconceptualizing the ‘rule of law’ as rule ‘through’ law, 18 EUR. J. INT’L REL. 29, 31 (2010).

⁹ al Attar, *supra* note 5, at 119–20.

¹⁰ Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64, 82 (2006).

¹¹ Rajkovic, *supra* note 8, at 34.

¹² L.A. Muselyan, *Krizis Mezhdunarodnogo Prava: Tsivilizatsionnyi I Geopoliticheskie Faktory*, 4 VESTNIK PERMSKOGO UNIVERSITETA 211, 214 (2014).

¹³ al Attar, *supra* note 5, at 98.

¹⁴ Steinberg & Zasloff, *supra* note 10, at 83.

interests of the powerful, rather than consistency.¹⁵ This international “judicial governance” relies quite heavily on the appearance of “legality” and supposedly operates to restrain unjust exercises of state power, thus ultimately leading the international community closer to the global rule of law.¹⁶ However, despite the seemingly lofty goal of judicial oversight of nation-states, concerns are voiced that “judicial governance may end up reproducing the politics that it is intended to deny.”¹⁷ In a sense, judicial governance has the potential to become not a constraint on the power of nation-states but rather a sophisticated vehicle through which the interests of certain powerful players can be propagated globally. Judicial reasoning emanating from international adjudicative bodies is then granted force to enact change, since the legitimacy of the law “tends not only to be taken for granted but also to be viewed as foundational to other forms of human activity.”¹⁸

While neither question of power nor consensus-building efforts of international law and legal institutions through international adjudication can be disregarded, international law is not just about pure power or cooperation.¹⁹ An examination of issues of national disengagement from international law and legal institutions and the fragmentation of international legal norms should also involve considerations regarding the autonomous capacity of international law. That is, could international law, exercised through judicial reasoning, facilitate cooperation that would not have occurred otherwise? Does international law have the independent power to contribute to a world order where certain values, rooted in human rights principles, are widely shared and where private choice, rather than coercion, is promoted?²⁰ It is clear that the question of autonomous capacity of international law, exercised through judicial reasoning, is inextricably connected to questions of how the competing values across different societies can be weighed, how the realization of these values should occur in foreign jurisdictions, and what the implications for state sovereignty are.²¹ After all, international law is constructed in many different nation-states, and domestic law, as well as domestic legal culture, influence how international law is perceived and received at local levels.²² Thus, to understand the realities of regional fragmentation of international law (which is not a new phenomenon), the views of the “others” need to be studied and taken seriously, without them necessarily being promoted or approved. International law needs to go beyond being primarily a “conversation between

¹⁵ Lauri Mälksoo, *Comparative International Law: Lessons Learned from Russia*, 109 PROC. AM. SOC’Y INT’L L. 93, 94 (2015).

¹⁶ See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 101–02 (2004).

¹⁷ Rajkovic, *supra* note 8, at 39.

¹⁸ Greta Olson & Sonja Schillings, *On Un-Doing Law*, ON CULTURE: THE OPEN J. FOR THE STUDY OF CULTURE, Summer 2017, at 2, 3.

¹⁹ See Steinberg & Zasloff, *supra* note 10, at 86.

²⁰ Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 11 (1959).

²¹ See Steinberg & Zasloff, *supra* note 10, at 77.

²² Mälksoo, *supra* note 15, at 94.

Western states and/or mostly Anglo–Saxon scholars in English.”²³ International law is being increasingly viewed at local levels as deepening the problem of exclusion by promoting the ability of powerful actors to co-opt any sort of resistance within the field.²⁴

A good starting point for scrutinizing regional fragmentation is an examination of the judicial reasoning emanating from international adjudicative bodies and the supposed purpose of such reasoning to diffuse state power and redefine the very concept of national sovereignty.²⁵ In a sense, judicial reasoning emanating from international adjudicative bodies needs to be re-examined in regard to its capacity to determine “who and what counts,”²⁶ as well as its ability to universalize values across jurisdictions. This “undoing” of international law is a necessary precondition to better understanding regional fragmentation processes, especially in jurisdictions outside of the Western group of states.²⁷ Cosmopolitanism cannot simply ignore or displace jurisdictional differences.²⁸ However, it will have an easier task of keeping them in bounds if “local translation and specific application” of universal principles are scrutinized.²⁹ Frequently, lawyers and judges stop examining the social evolution of norms once they have been determined through judicial discourse.³⁰ Hence, many jurisdictions instead view the international legal project rooted in aspirations to universal objectivity as a pretext for a “hollowing out of their . . . sovereignty” and even legal colonialism by the West.³¹ If the international legal regime is in fact driven by the “ethos of standardization,” and this standardization is achieved through a consensus-seeking process, then how should acceptance be defined?³² What is the margin of appreciation that the state is allowed to possess when it comes to a “consensus-based” standard? And what voice does it have in terms of contributing to consensus building, rather than simply acquiescing to the current situation?³³ In other words,

²³ Mälksoo, *supra* note 15, at 95.

²⁴ Prabhakar Singh, *International Law as “Intimate Enemy”*, 17 OR. REV. INT’L L. 377, 381 (2012).

²⁵ *See generally* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L. J. 191 (2003).

²⁶ Olson & Schillings, *supra* note 18, at 8.

²⁷ Barbara Stark, *International Law From the Bottom Up: Fragmentation and Transformation*, 34 U. PA. J. INT’L L. 687, 713–14 (2014).

²⁸ Samuel Moyn, *Human Rights in the Absence of Virtue*, 13 J. INT’L L. & INT’L REL. 26, 26–27 (2017).

²⁹ *Id.*

³⁰ Fred Grunfeld, *International Law and International Relations: Norm and Reality or Vice Versa*, 3 AMSTERDAM L. F. 3, 3 (2011).

³¹ al Attar, *supra* note 5, at 109.

³² *See* Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 105 (2002).

³³ *See id.* at 119–20.

how can real dialogue be assured, rather than a perpetuation of the current state of “disagreeability” between national and international judicial bodies?³⁴

The arguments about the nature and contours of sovereignty in international law are long-standing.³⁵ The ever-increasing challenges to conceptualizing national sovereignty indicate that rather than viewing international law as eroding sovereignty (which is doubtful), it can instead be conceptualized as, at best, evolving the nature of sovereignty.³⁶ That is, sovereignty does not lose its meaning in international law, but rather the meaning of sovereignty is perhaps beginning to shift,³⁷ in part due to governance through law by various international adjudicative bodies. Arguably, the introduction of, and increased importance placed on, human rights norms and individual accountability in international law have presented some of the key challenges to the “traditional” concept of sovereignty based on the idea of protection from outside influences and “keeping things in.”³⁸ International legal institutions, at least in theory, have attempted to shift the conceptualizations of sovereignty from being a “zero-sum” competition between national sovereignty and human rights, to instead being about “the contestable boundaries that define and exclude ‘legitimate’ actions that can be performed by sovereign entities.”³⁹ This evolution of sovereignty gives a primary place to international adjudicative bodies being tasked with determining and supervising the permissible exercises of sovereignty by nation-states.

Not surprisingly, this disaggregation of nation-states and, in turn, sovereignty itself, has proven to be contentious, and claims of unequal application, exceptionalism of the powerful, and double standards continue to dominate amongst nation-states that cling to a more traditional concept of sovereignty as a mode of resistance to both international law and to the interests of select Western states that are proclaimed to be advanced through international legal reasoning.⁴⁰ Some national jurisdictions, in a struggle to redefine sovereignty, have proposed that sovereignty is no longer just about territorial integrity but extends to other matters, such as morality and the nature of human rights.⁴¹ The argument is made that rather than the international community using judicial reasoning to dictate how sovereignty should be evolving, it is up to nation-states to determine the precise

³⁴ Muselyan, *supra* note 12, at 217.

³⁵ Carly Nyst, *Solidarity in a Disaggregated World: Universal Jurisdiction and the Evolution of Sovereignty*, 8 J. INT’L L. & INT’L REL. 36, 47 (2012).

³⁶ *Id.* at 48.

³⁷ *Id.*

³⁸ *Id.* at 48–49.

³⁹ *Id.* at 49.

⁴⁰ Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT’L L. 141, 165 (2004).

⁴¹ V.V. Ershov, Rector, Russ. St. U. Just., *Sovremennye Teoreticheskie I Prakticheskie Problemy Pravoponimaniya, Pravotvorchestva I Pravoprimeneniya* [Modern theoretical and practical problems of legal understanding, lawmaking and law enforcement] 2 (May 17–18, 2016).

boundaries of this concept.⁴² The core of this argument is centered on the question of who has the central function of so-called “norm-entrepreneurs.” On the one hand, some nation-states see their constitutional courts as primary “vehicles for norm socialization.”⁴³ On the other hand, international tribunals, such as the ECtHR, frequently relying on the broad consensual nature of international standards, view themselves as responsible for advancing an evolution of norms through legal processes.⁴⁴ The question of norms and values is inextricably connected to the question of human rights, which in turn raises one of the key issues in this debate, namely, who do human rights belong to? The obvious answer is—to individuals. That is, the individual person is a “bearer of rights.”⁴⁵ However, what avenues are open to individuals to reassert their ownership if their rights are challenged or violated—especially if violations are systemic? In other words, when it comes to constitutionally guaranteed human rights, which judicial authority is in the best position, or even has the authority, to provide redress and to speak about the substantive nature of constitutionally protected rights? Thus, issues of the scope and substance of human rights link back to the evolving nature of sovereignty and judicial governance. Both international and domestic law are evolving due to changing social realities,⁴⁶ and thus both are in the process of trying to advance their particular visions of sovereignty and the contours of human rights. The unintended fallout of this contest is that human rights become further politicized through their reinforced connection to the issue of sovereignty, including “moral sovereignty,” making the situation worse for those individuals who are struggling to reclaim their human rights but end up as pawns in this competition.⁴⁷

III. RUSSIA’S REASSERTION OF SOVEREIGNTY THROUGH DOMESTIC CONSTITUTIONAL LAW

The Russian annexation of Crimea and the war in Eastern Ukraine have highlighted and heightened normative differences between Russia and the West, especially when it comes to the contours of human rights and the role of the nation-state in interpreting international human rights norms.⁴⁸ Russian legislative and judicial bodies increasingly discuss the idea of “local norms,” “traditional values,” and “local constitutional identities” as a way of resisting the idea of the universality

⁴² Muselyan, *supra* note 12, at 217.

⁴³ Nyst, *supra* note 35, at 52.

⁴⁴ *Id.*

⁴⁵ Twining, *supra* note 2, at 359–360.

⁴⁶ Muselyan, *supra* note 12, at 220.

⁴⁷ Alexandra V. Orlova, *Privatizing Homosexuality: Russia’s Reassertion of ‘Moral Sovereignty’ over Gay Rights*, 11 HUM. RTS & INT’L LEGAL DISCOURSE 121, 172 (2017).

⁴⁸ Maria Lipman, *How Russia has come to loathe the West*, EUR. COUNCIL ON FOREIGN REL. (Mar. 13, 2015), https://www.ecfr.eu/article/commentary_how_russia_has_come_to_loathe_the_west311346.

of international law and reasserting domestic “moral sovereignty.”⁴⁹ Thus, emphasizing the unique “Russian vision” of human rights becomes a way to cling to the idea of state sovereignty and its role as the “cornerstone of the international system,”⁵⁰ especially when relations with the West are at a low point and Western actions are perceived as attempts to undermine Russian independence.⁵¹ As with the traditional concept of state sovereignty, which grants the state the ultimate right and power to regulate its internal affairs without foreign interference, the concept of “moral sovereignty” is utilized to describe the supposed right claimed by the Russian state to make decisions, without foreign interference, about matters that concern morality within Russia.⁵² This concept of “moral sovereignty” has been pursued in the legal realm by references to “traditional values,” “local customs and norms,” and “local constitutional identities.”⁵³ Such referencing is an extension of a broader Russian geopolitical agenda and a desire to redefine relations with Western institutions through the reexamination of the underlying values of international norms, as a way of reasserting its importance in global decision making.⁵⁴ This reassertion of “moral sovereignty” became particularly apparent in the Russian Constitutional Court’s review of the federal “gay propaganda” legislation in its September 23, 2014 ruling⁵⁵ and the subsequent June 20, 2017 response by the ECtHR.⁵⁶

A. Russian Constitutional Court Ruling N. 24–P (2014)

Since 2006, Russia has been enacting so-called “anti-gay” laws that aim to regulate and prevent the “propaganda” of non-heterosexuality and/or gender variance to minors.⁵⁷ Nine regional jurisdictions have amended their administrative codes to prohibit propaganda of homosexuality to minors.⁵⁸ Both the Supreme

⁴⁹ Orlova, *supra* note 47, at 140.

⁵⁰ John Laughland, *The Crooked Timber of Reality: Sovereignty, Jurisdiction, and the Confusion of Human Rights*, 90 THE MONIST 3, 6 (2007).

⁵¹ See Lipman, *supra* note 48.

⁵² Orlova, *supra* note 47, at 139.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 23 sentyabryaya 2014 g. [Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014], No. 24–II/2014.

⁵⁶ See generally Bayev and others v. Russia, App. No. 67667/09, 2017 EUR. CT. H.R. 572 (2017).

⁵⁷ Paul Johnson, “Homosexual Propaganda” Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?, 3 RUSS. L. J. 37, 40–42 (2015).

⁵⁸ The regional “anti-gay” laws were enacted in the Republic of Bashkortostan; the regions of Arkhangelsk, Kostroma, Krasnodar, Magadan, Novosibirsk, Ryazan, Samara, and the City of St. Petersburg. The Irkutsk and Kaliningrad regions enacted laws that do not

Court of Russia as well as the Russian Constitutional Court have upheld these regional legislative provisions in their various decisions.⁵⁹ Both the Russian Constitutional Court as well as the Russian Supreme Court have referred to so-called “traditional values” in their attempt to limit the influence of international (in particular European) human rights norms on Russian domestic law.⁶⁰ Both courts have also attempted to draw a distinction in their reasoning between homosexuality per se and homosexual conduct, and both have argued that the aim of regional legislative provisions was to condemn only the latter and thus to regulate activities aimed at “propagandizing homosexuality among minors.”⁶¹ Given the overwhelming failure of numerous court challenges to the regional “anti-gay” laws,⁶² it is not surprising that federal legislation directed at “protecting” minors from “homosexual propaganda” followed suit.

The 2013 federal legislation replaced the word “homosexuality” with “non-traditional sexual relations,” arguably a much broader concept.⁶³ The federal legislation amends a number of federal laws, the most significant of which involves amendments to the Code of Administrative Offences of the Russian Federation.⁶⁴ A new section (s.6.21) was added to the Code of Administrative Offences titled

specifically mention homosexuality, but rather frame the protection in broad terms. *See* Kaliningradskoye oblastnoye parvo [Kaliningrad Regional Law, “On the Protection of the Population of the Kaliningrad Region from Information Products Harming the Spiritual and Moral Development”] 2013, N. 199 (Some of these regional laws were repealed due to the passage of the federal “anti-gay” law that is discussed later in this work).

⁵⁹ *See* Postanovleniye Verkhovnogo Suda Rossii ot 15 avgusta 2012 g. [Ruling of the Supreme Court of Russia of Aug. 15, 2012], N. 1–APG12–11; *see also* Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 yanvarya 2010 g. [Ruling of the Russian Federation Constitutional Court of Jan. 19, 2010], No. 151–O–O; *see also* Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 9 dekabr 2013 g. [Ruling of the Russian Federation Constitutional Court of Dec. 9, 2013], N.1718–O.

⁶⁰ Orlova, *supra* note 47, at 138.

⁶¹ *See* Ruling of the Supreme Court of Russia of Aug. 15, 2012; *see also* Ruling of the Russian Federation Constitutional Court of Jan. 19, 2010; *see also* Ruling of the Russian Federation Constitutional Court of Dec. 9, 2013.

⁶² Both the Supreme Court of Russia and the Russian Constitutional Court have upheld regional “anti-gay” laws. *See* Ruling of the Supreme Court of Russia of Aug. 15, 2012; *see also* Ruling of the Russian Federation Constitutional Court of Jan. 19, 2010; *see also* Ruling of the Russian Federation Constitutional Court of Dec. 9, 2013.

⁶³ Orlova, *supra* note 47, at 128.

⁶⁴ *See* Federal’nyy zakon Rossiyskoy Federatsii: O zashchite detey ot informatsii, prichinyayushchey vred ikh zdorov’yu i razvitiyu [Federal Law “On the Protection of Children from Information Harmful to their Health and Development”] 2013, No. 135–FZ, §3 [hereinafter On the Protection of Children from Information Harmful to their Health and Development].

“Promotion of Non-Traditional Sexual Relations among Minors.”⁶⁵ This section reads as follows:

Propaganda of non-traditional sexual relations among minors that is manifested in the dissemination of information that encourages the formation of unconventional sexual attitudes; promotes the attractiveness of non-traditional sexual relations; creates distorted ideas among minors about the social equivalence of traditional and non-traditional sexual relations or promotion of information that causes interest in such relations, if such actions fall outside the scope of criminal law, are punishable⁶⁶

Both regional laws as well as the federal law prohibiting “homosexual propaganda” to minors have been (for the most part) widely supported by the Russian population.⁶⁷

Given the wide popular support for both regional and federal legislation prohibiting “homosexual propaganda” to minors and the rulings of both the Russian Constitutional Court, as well as the Russian Supreme Court upholding the validity of regional laws, the 2014 Russian Constitutional Court decision that declared parts of the 2013 federal legislation to be constitutional was almost inevitable.⁶⁸ The ruling concentrated on the constitutionality of the new section—s.6.21(1)—added to the federal Code of Administrative Offences by the 2013 federal legislation.⁶⁹ The petitioners—three gay rights activists who were subjected to administrative fines under s.6.21(1)—argued that s.6.21(1) violated various constitutional guarantees prescribed by the Russian Constitution in Articles 15(4) (priority of international law, when in conflict with Russian domestic law); 17(1) (guarantees human rights to be in accordance with accepted principles and norms of international law as well as the Russian Constitution); 19(1) and (2) (equality before the law); 21(1) (guarantee of personal dignity); 29(1), (2), and (4) (freedom of expression); and 55(3) (limitation/proportionality clause).⁷⁰ The petitioners argued that s.6.21(1) contained a prohibition on the dissemination of any information

⁶⁵ КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ ОБ АДМИНИСТРАТИВНЫХ ПРАВОНАРУШЕНИЯХ [KOAP RF] [Code of Administrative Violations] No. 195-FZ, § 6.21 (Russ.) [hereinafter Russian Code of Administrative Violations].

⁶⁶ *Id.*

⁶⁷ A.P. Dyachenko & E.I. Tsymbal, *The social conditionality of the ban on propaganda for homosexuality*, LEX RUSSICA (2013), <https://translate.google.com/translate?hl=en&sl=ru&tl=en&u=http%3A%2F%2Fwww.center-bereg.ru%2F37.html> (translation from Russian).

⁶⁸ See Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 27–29.

⁶⁹ See On the Protection of Children from Information Harmful to their Health and Development, §3.

⁷⁰ Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 4, § 1.2.

regarding homosexuality among minors, including information that simply noted the social equivalency of homosexual and heterosexual relations, and thus was not based on reasonable grounds.⁷¹ The petitioners contended that such a prohibition was based on a stereotypical view of homosexual relations that considers those relations immoral, demeans the personal dignity of non-heterosexual individuals, and constitutes discrimination based on sexual orientation.⁷²

The issue before the Russian Constitutional Court was that of international legal norms and “European consensus” as laid out in Article 15(4) of the Constitution of the Russian Federation,⁷³ in which priority is given to international law if it comes into conflict with Russian domestic law.⁷⁴ Article 15(4) states the following:

The universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.⁷⁵

Therefore, as expressed by this constitutional principle, if particular norms or obligations have acquired the status of a universally recognized norms of international law or have been specifically prescribed in a treaty ratified by the Russian Federation, they should be interpreted by the Russian courts as a part of the Russian legal system.⁷⁶ Among the international treaties pertinent to the discussion of non-heterosexual rights in the Russian Federation, the European Convention on Human Rights (ECHR) is one of the most relevant,⁷⁷ as it directly addresses issues of freedom of expression (Article 10), freedom of assembly (Article 11), and equality before the law (Article 14).⁷⁸ These are key international norms, intended to guarantee rights that the 2013 Russian federal legislation violates. Because the

⁷¹ Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 4, § 1.2.

⁷² *Id.*

⁷³ *Id.*; KONSTITUTSIYA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15, §4 (Russ.) [hereinafter Russian Constitution].

⁷⁴ P.A. Laptev, *Mezhdunarodnyi Dogovor Rossiiskoi Federatsii I Konstitutsiya Rossiiskoi Federatsii: Problema Ierarhii* [The International Treaty of the Russian Federation and the Constitution of the Russian Federation: a problem of hierarchy], ROSSIISKAYA USTITSIYA, 2009, at 2.

⁷⁵ Russian Constitution, art. 15, §4.

⁷⁶ Laptev, *supra* note 74.

⁷⁷ See generally European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR Rome, 4XI. (1950) [hereinafter ECHR].

⁷⁸ ECHR, arts. 10, 11, 14.

Russian Federation has both signed and ratified the ECHR,⁷⁹ it is bound to abide by the jurisprudence of the body tasked with interpreting the Convention, the ECtHR.

In a number of generic statements made in response to petitioners' arguments, the Russian Constitutional Court demonstrated its awareness of the current international standards around issues of sexual orientation.⁸⁰ The Court stated, for instance, that individuals who had reached the age of majority (eighteen years old) were free to choose and engage in various types of sexual behavior.⁸¹ This included such behavior that the majority of the population might disapprove of because of the prevailing moral, religious, socio-cultural, or historic views within a given society at a particular time.⁸² The Court also acknowledged the duty of the state to guarantee its citizens protection from discrimination on the grounds of sexual orientation.⁸³ The Court went on to state that questions regarding sexual orientation cannot be excluded from public debate in a democratic society and acknowledged the fact that in order to raise public awareness of violations of the rights of sexual minorities, all legal methods, such as the holding of public meetings and the use of mass media, could be employed.⁸⁴ The Constitution of the Russian Federation, the Court stated, does not limit freedom of expression on the basis of ideology or world view, nor does it allow the majority to impose its beliefs or preferences upon the minority;⁸⁵ therefore, the Constitution does not contain grounds for prohibiting public discussions of sexual relations (including non-traditional ones). Further, as a constitutional democracy, the Russian Federation presupposes the free expression of a multiplicity of views, although the form in which information regarding sexual relations is presented cannot insult the public morals of either the majority or the minority (those of non-traditional sexual orientation).⁸⁶ However, in the substantive part of its ruling, the Court (not unexpectedly) departed from these relatively positive commitments to freedom of expression and non-discrimination on the grounds of sexual orientation.⁸⁷ Two distinct streams of reasoning seemed to guide the Constitutional Court in its ultimate decision on the constitutional validity of s.6.21(1) of the federal Code of

⁷⁹ See Federal'nyi zakon O ratifikatsii Yevropeyskoy konventsii o pravakh cheloveka i dopolnitel'nykh protokolakh k Konventsii [Federal Law "On Ratification of European Convention on Human Rights and Additional Protocols to the Convention"], 1998, N.54-FZ [hereinafter On Ratification of European Convention on Human Rights and Additional Protocols to the Convention].

⁸⁰ Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 7–8, § 2.1.

⁸¹ *Id.* at 8.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 9, § 2.2.

⁸⁵ Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 9, § 2.2.

⁸⁶ *Id.*

⁸⁷ See *id.* at 14, § 3.

Administrative Offences.⁸⁸ First, it used the concept of so-called “traditional values” as a way to distance itself from the current international (particularly European) norms prevalent in ECtHR jurisprudence and the associated idea of “European consensus,” as applied to questions of freedom of expression and non-discrimination for reasons of sexual orientation. The “traditional values” criteria were used with the aim of garnering widespread public support for state regulation of matters pertaining to sexual orientation.⁸⁹ Second, the Court used the criteria of proportionality to engage in a balancing of rights analysis substantially more comprehensive than in previous judgments.⁹⁰

In its discussion of the “traditional values” argument, the Russian Constitutional Court began by establishing that there is a lack of international consensus in terms of specifying the limits of sexual autonomy and freedom of expression in the dissemination of information pertaining to sexual orientation and certain types of sexual relations—which cannot take precedence over the personal dignity of other individuals and must conform to Russian society’s prevalent public morals at this period in time.⁹¹ In view of the roles that family, maternity, and childhood (in the traditional understanding of these terms) play in guaranteeing the continuity of generations and preserving the Russian Federation’s multinational character, the state is obligated to protect the values that uphold them. The traditional interpretation of these values—along with the national and multi-confessional character of the Russian society and its socio-cultural and other historical characteristics—gives the Russian Federation the right to determine the legislative regulation of sexual relations, bearing in mind both constitutional and international norms around individual autonomy and freedom of expression.⁹² Referencing its earlier decision,⁹³ in which it had asserted that the content of human rights norms and their legal regulation could be established only in accordance with “specifically established concrete societal norms,” the Court stated that the Russian Federation’s legislative approach to demographic and social issues in the sphere of family relations was based on the understanding of marriage as the union of a man and a woman, and the belief that the main purpose of a family was to give birth to and raise children.⁹⁴ This interpretation conformed to the Constitution of the Russian Federation and contravened neither the International Covenant on Civil and Political Rights nor the ECHR, which permit families to be established according

⁸⁸ Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 17, § 3.2.

⁸⁹ *See id.*

⁹⁰ *Id.* at 19, § 3.2.

⁹¹ *Id.* at 11, § 2.2.

⁹² *Id.* at 11–12, § 2.2.

⁹³ *See Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 24 octyabr 2013 g.* [Ruling of the Russian Federation Constitutional Court of Oct. 24, 2013], No.1718–O.

⁹⁴ Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 13–14, § 3.

to the national laws governing the exercise of this right.⁹⁵ Thus, the Russian Federation is required by neither its constitution nor international obligations to create conditions for the propaganda, support or recognition of same-sex unions,⁹⁶ nor do the state's regulations pertaining to the freedom of expression oblige it to create conditions in which types of unions not contained within the traditional understanding of marriage are recognized as equal.⁹⁷ To uphold the protections granted to family, maternity, and childhood in the Russian Constitution, it is vital that children be shielded from influences that might have an unfavorable effect on their morality and psyche (even if such influences are not illegal) and, specifically, from information that might harm their health and development. Contained in this definition would be information aimed at aggressively imposing certain models of sexual behavior or contributing to "deformed views" of family models that depart from those deemed socially acceptable in Russian society.⁹⁸ Therefore, it is not surprising that the Court confirmed s.6.21(1) of the federal Code of Administrative Offences to be within the scope of the state's authority to protect minors from such information as might negatively affect them; this section authorizes the imposition of administrative penalties for the "promotion of non-traditional sexual relations among minors."⁹⁹

In its second stream of reasoning to support its decision on the constitutional validity of s.6.21(1) of the Federal Code of Administrative Offences, the Court engaged in proportionality analysis, purporting that the measures undertaken under the section were proportional.¹⁰⁰ It argued that, given the vulnerable status of minors and the federal legislator's duty to protect the rights of the child—as guaranteed by both the Russian Constitution and Russia's international obligations—it was the federal legislator's responsibility to shield minors from the influence of information that might push them towards non-traditional sexual relations.¹⁰¹ Such relations, the Court contended, undermined the formation of family relations as they are traditionally understood in Russia and expressed in the Russian Constitution.¹⁰² Therefore, on the presumption of potential harm to minors, the federal legislator was justified in regulating the dissemination of information regarding non-traditional sexual relations. It was the view of the

⁹⁵ See G.A. Res. 14668, International Covenant on Civil and Political Rights, art. 23 (Dec. 19, 1966); ECHR, art. 12.

⁹⁶ See Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 16 noyabr 2006 g. [Ruling of the Russian Federation Constitutional Court of November 16, 2006], No. 496–O, § 2.2; see Ruling of the Russian Federation Constitutional Court of Jan. 19, 2010.

⁹⁷ Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 14, § 3.

⁹⁸ *Id.* at 14–15, § 3.1.

⁹⁹ See *id.* at 15, § 3.2.

¹⁰⁰ See *id.* at 19.

¹⁰¹ *Id.* at 17, § 3.2.

¹⁰² Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 17, § 3.2.

Court that, because these measures were limited in scope, being directed only at minors, they did not negate the constitutional right of freedom of information in this sphere, and they reflected the balance of constitutional principles.¹⁰³

It is clear that due to both Article 15(4) of the Russian Constitution making international legal norms part of the Russian legal landscape and the growing European consensus around protecting non-heterosexual rights and not shielding minors from information about non-heterosexual practices (but rather viewing exposure to such information as a benefit in a democratic society), the Court has very much echoed the position of the Russian federal government in regard to infusing human rights with so-called “traditional values,” supposedly as a way to further promote and protect human rights, while taking into account local norms, prevalent in a particular society. This resort to “traditional values” is reflective of Russia’s fear of compelled constitutionalism executed through the decisions of the ECtHR, such as the June 20, 2017 decision of the Strasbourg Court in *Bayev and Others v. Russia*.¹⁰⁴

B. Bayev and Others v. Russia (2017)

The June 20, 2017 ECtHR decision addressed the issue of the federal legislative ban on “propaganda of non-traditional sexual relations aimed at minors” that the Russian Constitutional Court in its 2014 judgment had deemed to be constitutional.¹⁰⁵ The applicants alleged that the legislative ban violated their right to freedom of expression and was discriminatory.¹⁰⁶ The ECtHR noted that besides the general “chilling effect” of the ban that required LGBT individuals to be aware of the presence of minors in their daily activities, in order to “conceal their sexual orientation from them,” this ban had already been enforced against the applicants in the administrative proceedings.¹⁰⁷ Thus, the ECtHR (much like the Russian Constitutional Court) engaged in the proportionality assessment of the Russian governmental measures. It reviewed whether, in a democratic society, the ban on “propaganda of non-traditional sexual relations aimed at minors” could be considered necessary and legitimate for the protection of the morals, health, and the rights of others.¹⁰⁸

In terms of the protection of morals, the ECtHR stated that social acceptance of homosexuality was not incompatible with maintaining “family

¹⁰³ Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014, at 17, § 3.2.

¹⁰⁴ See *Bayev and Others v. Russia*, App. No. 67667/09, 2017 Eur. Ct. H.R. 572 (2017).

¹⁰⁵ *Id.* (citing the Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014).

¹⁰⁶ *Id.* § 3.

¹⁰⁷ *Id.* §§ 61–62.

¹⁰⁸ See *id.* §§ 61–82 (discussing The Court’s assessment of the case).

values” as the foundation of society and asserted that states must take societal developments into account and acknowledge various choices when it comes to family and private life.¹⁰⁹ Furthermore, the “steady flow of applications” to the Court from LGBT individuals who wished to access marriage, adoption, and parenthood demonstrated that many LGBT individuals wanted to participate in, rather than threaten, “family values.”¹¹⁰ Finally, while the ECtHR noted the Russian government’s assertion that the majority of Russians “disapprove of homosexuality and resent any display of same-sex relations,” it would be incompatible with the underlying values of the ECHR “if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.”¹¹¹ The Court found particularly troublesome various attempts within Russia to draw parallels between homosexuality and pedophilia.¹¹² In terms of protecting health and addressing the demographic situation, the ECtHR stated that restrictions on the freedom of expression dealing with LGBT issues were not conducive to improving the public health situation.¹¹³ To the contrary, the Court stated that “disseminating knowledge on sex and gender identity issues and raising awareness of any associated risks and methods of protecting oneself against those risks, presented objectively and scientifically,” would constitute an indispensable part of public health policy and disease prevention.¹¹⁴ Furthermore, with regard to reversing negative demographic trends, the Court indicated that population growth depended on a “multitude of factors” and that it was hard to see how the suppression of information about homosexuality would have a direct impact on demographic trends.¹¹⁵ The Court noted, “Social approval of heterosexual couples is not conditional on their intention or ability to have children.”¹¹⁶ Finally, in terms of protecting the rights of others—namely children—to avoid their becoming gay and more vulnerable to abuse, as well as having access to information on LGBT lifestyles (deemed to be against the educational choices of the vast majority of Russians), the Court stated that no protection of rights was achieved.¹¹⁷ The Court noted the vagueness of the terminology utilized in the ban, which allowed any information that did not depict homosexuality in a negative light to be framed as “homosexual propaganda.”¹¹⁸ The Court also stated that the Russian government had failed to explain why minors would be more vulnerable to abuse in the context of homosexual relations than in heterosexual ones.¹¹⁹ The absence of evidence

¹⁰⁹ *Bayev and Others*, 2017 Eur. Ct. H.R. 572, § 66.

¹¹⁰ *Id.* § 67.

¹¹¹ *Id.* § 70.

¹¹² *Id.* § 69.

¹¹³ *Id.* § 72.

¹¹⁴ *Bayev and Others*, 2017 Eur. Ct. H.R. 572, § 72.

¹¹⁵ *Id.* at § 73.

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 75.

¹¹⁸ *Id.* § 76.

¹¹⁹ *Bayev and Others*, 2017 Eur. Ct. H.R. 572, § 79.

pointed to a “manifestation of predisposed bias.”¹²⁰ Finally, when it came to matters such as public discussion of sex education—where choices involve a careful balancing of parental views, educational policies, and the right of third parties to freedom of expression—the Court declared, “The authorities have no choice but to resort to the criteria of objectivity, pluralism, scientific accuracy and, ultimately, the usefulness of a particular type of information to the young audience.”¹²¹ Thus, exposure to diversity, equality, and tolerance would promote rather than reduce social cohesion.¹²²

The ECtHR concluded that the adoption of the “homosexual propaganda” ban would “reinforce stigma, prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.”¹²³ The Court stated that Russian federal legislative provisions designed to ban “homosexual propaganda” embodied a “predisposed bias by the heterosexual majority against the homosexual minority.”¹²⁴ Thus, the Court found that Article 10 (freedom of expression) both alone and in conjunction with Article 14 (protection from discrimination) was violated.¹²⁵ The 2014 judgment of the Russian Constitutional Court and the 2017 decision of the ECtHR constitute a judicial “tug-of-war” over the issue of which court will have the final word over the content of abstract human rights principles outlined in the ECHR. That is, what is the extent of “moral sovereignty” that each state is allowed to exercise when dealing with international legal norms? And how should relations between the state and its own citizens as well as individuals and international legal bodies be governed when it comes to human rights complaints? Both the Russian Constitutional Court and the ECtHR relied on majoritarian logic—one in the shape of “traditional values” of the majority of the Russian population and the other on the “European consensus”—to lay claims to authority over defining the substantive nature of human rights principles.

IV. THE RUSSIAN CONSTITUTIONAL COURT VS. THE EUROPEAN COURT OF HUMAN RIGHTS

The issue of “moral sovereignty” in regard to the substantive nature of human rights is closely connected to the way in which the Russian Constitutional Court has interpreted the relationship between the Russian Constitution and international legal principles in general, and decisions by the ECtHR interpreting these human rights principles contained in the ECHR in particular. In a sense, the debate about human rights is inextricably linked to the debate over the nature of

¹²⁰ *Bayev and Others*, 2017 Eur. Ct. H.R. 572, § 79.

¹²¹ *Id.* § 82.

¹²² *Id.*

¹²³ *Id.* § 83.

¹²⁴ *Id.* § 91.

¹²⁵ *Bayev and Others*, 2017 Eur. Ct. H.R. 572, § 92.

sovereignty. The point of tension arose from the July 4, 2013 ECtHR judgment in *Anchugov and Gladkov v. Russia*;¹²⁶ the subsequent July 14, 2015 constitutional reference to the Russian Constitutional Court;¹²⁷ and the April 19, 2016 Russian Constitutional Court decision,¹²⁸ which dealt with the possibility of executing the *Anchugov and Gladkov* judgment that emanated from the ECtHR.

A. Anchugov and Gladkov v. Russia (2013) and Russian Constitutional Court Reference (2015)

The ECtHR, in its *Anchugov and Gladkov v. Russia* decision, considered the two applications against the Russian Federation logged by Mr. Anchugov and Mr. Gladkov, who complained that since they were convicted prisoners and were serving their sentences in detention, they were prohibited by Article 32(3) of the Russian Constitution from voting in elections. Article 32(3) of the Russian Constitution reads as follows: “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.”¹²⁹ Article 32(3) is located in Chapter II of the Russian Constitution, which means that the only way to amend this constitutional provision would be through the adoption of a new constitution.¹³⁰

Both applicants were charged with and convicted of a number of very serious offenses, such as murder, aggravated robbery, and participation in an organized criminal group.¹³¹ In their complaints, Anchugov and Gladkov relied on Article 10 of the ECHR (freedom of expression) and Article 3 of Protocol No.1 (right to vote), taken alone and in conjunction with Article 14 of the ECHR (non-discrimination provision).¹³² Both of the applicants attempted to launch challenges of Article 32(3) of the Russian Constitution before the Russian Constitutional

¹²⁶ See generally *Anchugov and Gladkov v. Russia*, App. Nos.11157/04 & 15162/05, Eur. Ct. H.R. 2013.

¹²⁷ See generally *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iyul 2015 g.* [Ruling of the Russian Federation Constitutional Court of July 14, 2015] N.21–II/2015.

¹²⁸ See generally *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 aprel 2016 g.* [Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016] N.12–II/2016.

¹²⁹ Russian Constitution, art. 32(3).

¹³⁰ *Id.* art. 135(1)–(3). Article 135(1) provides that any provisions located in Chapter II of the Russian Constitution “may not be revised by the Federal Assembly.” In turn, Articles 135(2) and (3) describe a process of convening the Constitutional Assembly, should a proposal to amend provisions located in Chapter II of the Constitution be put forward and the role of the Constitutional Assembly to either “confirm the invariability” of the entire Constitution or “draft a new Constitution” which must be adopted by the two thirds of the Constitutional Assembly and submitted to a public referendum.

¹³¹ *Anchugov and Gladkov*, Eur. Ct. H.R. 2013, §§ 7, 12.

¹³² *Id.* § 3.

Court.¹³³ However, the Russian Constitutional Court replied that the complaints fell outside of its competence¹³⁴ and that it had “no jurisdiction to check whether certain constitutional provisions were compatible with others.”¹³⁵ At the ECtHR, the Russian government argued that the Russian Constitution was the supreme legal authority within the territory of the Russian Federation, and thus it took precedence over all other legal instruments and provisions, including provisions of international law, which included the provisions of the ECHR.¹³⁶ Hence, the review of the compatibility of Article 32 of the Russian Constitution with the provision of the ECHR fell outside the competence of the ECtHR.¹³⁷ Responding to the issue of the admissibility of the case, the ECtHR stated that Article 1 of the ECHR required states parties to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”¹³⁸ More specifically, the ECtHR emphasized that Article 1 did not make distinctions between types of rules or measures and thus did not exclude any part of member state’s jurisdiction from review under the ECHR.¹³⁹ The ECtHR then asserted the superiority of international law over the Russian Constitution, stating, “It is, therefore, with respect to their ‘jurisdiction’ as a whole—which is often exercised in the first place through the Constitution—that the State parties are called upon to show compliance with the Convention.”¹⁴⁰

On the merits of the case, the ECtHR stated that restrictions on electoral rights could be imposed on individuals in certain circumstances, such as an individual having seriously abused a public position.¹⁴¹ However, the decision to bar individuals from voting should not be made lightly, and the principle of proportionality “requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.”¹⁴² The ECtHR then referred to its earlier decisions in the *Hirst v. United Kingdom*¹⁴³ and *Scoppola v. Italy*¹⁴⁴ judgments and stated that when disenfranchisements affect a group of people “generally, automatically and indiscriminately” based solely on the fact that they were serving a prison sentence, and without taking into account the nature and gravity of their offense, surrounding circumstances and length of sentence, Article 3 of Protocol No.1 would be violated.¹⁴⁵ The ECtHR commented that the situation

¹³³ See *Anchugov and Gladkov*, Eur. Ct. H.R. 2013, § 3.

¹³⁴ *Id.* § 19.

¹³⁵ *Id.* § 21.

¹³⁶ *Id.* § 48.

¹³⁷ *Id.*

¹³⁸ See *Anchugov and Gladkov*, Eur. Ct. H.R. 2013, § 50.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* § 97.

¹⁴² *Id.*

¹⁴³ See generally *Hirst v. The United Kingdom (No.2)*, App. No.74025/01, Eur. Ct. H.R. 2005.

¹⁴⁴ See generally *Scoppola v. Italy (No.3)*, App. No. 126/05, Eur. Ct. H.R. 2012.

¹⁴⁵ *Anchugov and Gladkov*, Eur. Ct. H.R. 2013, § 100.

in the current case was very similar to the situation in the *Hirst* judgment.¹⁴⁶ While the ECtHR accepted that the purported aim of the Russian government under Article 32(3) of the Russian Constitution was to enhance civic responsibility and respect for the rule of law, as well as to ensure the proper functioning of civil society and the preservation of the democratic regime, the ECtHR was not satisfied with the proportionality of the blanket prohibition on prisoner voting rights contained in Article 32(3).¹⁴⁷

The ECtHR pointed out that although states have a wide margin of appreciation when it comes to the issue of prisoner voting rights, this margin of appreciation was not “all embracing.”¹⁴⁸ The right to vote cannot be conceived as a privilege, but rather should be presumed in democratic societies. Hence, “valid and convincing reasons should be put forward for the continued justification of maintaining such a general restriction on the right of prisoners to vote as that provided for in Article 32(3) of the Russian Constitution,” which contains a blanket restriction on all convicted prisoners serving their prison sentence.¹⁴⁹ The ECtHR stated that the Russian government had not submitted any relevant material to demonstrate that competing interests had been weighed at any point prior to Article 32(3) of the Russian Constitution coming into being to assess the validity of the blanket prohibition of convicted prisoners’ voting rights.¹⁵⁰ The ECtHR also stated that, while the Russian courts might take all the circumstances surrounding the offence into account during sentencing, no evidence had been presented to demonstrate the Russian courts’ taking into account that a custodial sentence would automatically involve the disenfranchisement of the offender.¹⁵¹ In other words, there was no evidence that Russian courts engaged in the proportionality assessment of disenfranchisement in light of the individual circumstances of each offender’s case.¹⁵² Given these conclusions, the ECtHR stated that the Russian government had “overstepped its margin of appreciation” and had “failed to secure the applicants’ right to vote,” thus violating Article 3 of Protocol No.1.¹⁵³

In summary, the ECtHR acknowledged that states are free to choose the means that they use domestically to discharge their obligations under Article 46 of the ECHR, which requires states to abide by the final judgment of the ECtHR to which they are parties.¹⁵⁴ While the ECtHR acknowledged that various approaches may be taken to address the issue of prisoner voting rights, the Court stated:

¹⁴⁶ *Anchugov and Gladkov*, Eur. Ct. H.R. 2013, §101.

¹⁴⁷ *Id.* §§ 102–103.

¹⁴⁸ *Id.* § 103.

¹⁴⁹ *Id.* §§ 103, 105.

¹⁵⁰ *Id.* § 109.

¹⁵¹ *Anchugov and Gladkov*, Eur. Ct. H.R. 2013, § 106.

¹⁵² *Id.*

¹⁵³ *Id.* § 110.

¹⁵⁴ *Id.* § 107.

In the present case, it is open to the respondent Government to explore all possible ways in that respect and to decide whether their compliance with Article 3 of Protocol 1 can be achieved 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 in such a way as to coordinate their effects and avoid any conflict between them.¹⁵⁵

The pronouncement of the ECtHR in regard to possible means that the current situation regarding prisoner voting rights can be remedied once more highlights the fact that the ECtHR views its interpretations of the provisions and norms of the ECHR as superior to domestic constitutional courts' interpretation of these norms, even if these norms are contained in a state's domestic constitution.

In December 2015, Russia adopted a federal legislation (The Amended Law on the Constitutional Court)¹⁵⁶ that empowered the Russian Constitutional Court to declare judgments of the ECtHR unenforceable when implementation would result in conflict with the Constitution of the Russian Federation.¹⁵⁷ Furthermore, in June 2015, ninety-three Russian Duma deputies submitted a constitutional reference to the Russian Constitutional Court, asking it to clarify the constitutionality of several pieces of legislation, including the federal law titled "On Ratification of the ECHR" as well as the federal law "On International Treaties."¹⁵⁸ The deputies asserted that several provisions of these federal laws obliged Russian authorities to implement judgments of the ECtHR, even when these judgments conflicted with the Russian Constitution.¹⁵⁹ The Russian Constitutional Court, in its July 14, 2015 judgement, concluded that although the Russian Constitution and the ECHR were both based on the same basic values, in the event of conflict, preference should be given to the Russian Constitution.¹⁶⁰ Thus, if the decision of the ECtHR, as it interpreted rights contained in the ECHR, violated norms and principles established by the Russian Constitution, then Russia was not obliged to implement such a decision.¹⁶¹ The Russian Constitutional Court stressed that Russia's participation in the international community, which included international treaty relationships, did not void its sovereignty and independence in conducting

¹⁵⁵ *Anchugov and Gladkov*, Eur. Ct. H.R. 2013, § 107.

¹⁵⁶ *See generally* Federal'nyi Konstitutsionnyi zakon [Federal Constitutional Law "On introducing amendments to the Federal constitutional law 'On the Constitutional Court of the Russian Federation'"] 2015, No. 7–FKZ.

¹⁵⁷ *Id.* art. 1(3).

¹⁵⁸ *See generally* Ruling of the Russian Federation Constitutional Court of July 14, 2015.

¹⁵⁹ *Id.* § 1.

¹⁶⁰ *Id.* § 2.2

¹⁶¹ *Id.* § 2.2.

international affairs.¹⁶² The harmonization of Russian domestic legal principles with principles espoused by the ECHR, which is in turn interpreted by the ECtHR, is possible only to the extent that it does not contradict the Russian Constitution.¹⁶³ Cooperation between European and Russian constitutional orders cannot happen in conditions of subordination and has to occur through dialogue between these constitutional orders.¹⁶⁴ The Russian Constitutional Court asserted that the ECtHR needed to respect “national constitutional identities,” as only such respect would guarantee the effectiveness of ECHR principles in domestic legal systems.¹⁶⁵

To summarize, the Russian Constitutional Court stated that the ability of the Court to disagree with the decisions of the ECtHR was reflective not of the desire of the Court to isolate itself from the decisions of the ECtHR, which are based on “European consensus,” but rather of the desire for a mutually respectful and constructive dialogue between the two courts.¹⁶⁶ The Russian Constitutional Court was ready to seek compromises to uphold the relationship between the Russian and European legal systems, but the degree of the compromise would be determined by the Russian Constitutional Court in accordance with domestic constitutional principles.¹⁶⁷

Given the stance of the ECtHR in regard to the superiority of international law over domestic constitutions, and the 2015 Russian federal law that asserted the priority of the Russian Constitution over international law, as well as the 2015 constitutional reference decision by the Russian Constitutional Court, the Court’s April 19, 2016 judgement is unsurprising. The 2015 constitutional reference decision, while not dealing with any specific case, set out the terms of engagement between the Russian Constitutional Court and the ECtHR and more broadly highlighted key themes in terms of Russian engagement with international human rights principles, centered on protecting domestic sovereignty, including moral and legal sovereignty from “Western meddling.”¹⁶⁸

B. Russian Constitutional Court Decision No. 12–P (2016)

On April 19, 2016, the Court issued its judgment:

[I]n the case concerning the resolution of the question of possibility to execute the Judgment of the European Court of Human rights of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* in accordance with the Constitution of the Russian

¹⁶² Ruling of the Russian Federation Constitutional Court of July 14, 2015, § 2.2.

¹⁶³ *Id.* § 4.

¹⁶⁴ *Id.* § 6.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Ruling of the Russian Federation Constitutional Court of July 14, 2015, § 6.

¹⁶⁸ Orlova, *supra* note 47, at 139.

Federation in respect to the request of the Ministry of Justice of the Russian Federation.¹⁶⁹

This decision is very significant, since, for the first time in its modern history, the Russian Constitutional Court held a hearing regarding the question of implementing a particular decision of the ECtHR and its alignment with the Russian Constitution.¹⁷⁰ The Court once again re-emphasized the priority of the Russian Constitution and stated that “judgments of the European Court of Human Rights . . . including those containing proposals on the need to make amendments to the national legal provisions, do not abrogate the priority of the Constitution of the Russian Federation for Russia’s legal system.”¹⁷¹ The Court also repeated the earlier conclusions that it had reached in a 2015 constitutional reference case¹⁷² regarding the impossibility of interaction between the European conventional and the Russian constitutional legal orders “in the conditions of subordination.”¹⁷³ Only dialogue between these two systems would serve to achieve the appropriate balance and the effectiveness of ECHR norms within the Russian legal order. In other words, the Russian Constitutional Court reemphasized the need for the ECtHR to respect national constitutional identities in its decisions.¹⁷⁴ The Court also referenced its obligation to “find reasonable balance” between the “letter and spirit” of a judgment of the ECtHR, the fundamental principles of the constitutional order of the Russian Federation, and the “legal regulation of human and civil rights and freedoms established by the Constitution of the Russian Federation.”¹⁷⁵ Despite referencing the need for balance, the Court then proceeded to state that “in order to be stable[,] legal democracy needs effective legal mechanisms able to guard it, apart from other things, against abuses and criminalization of public authority”; hence, to secure such stability, the state is entitled to restrict certain electoral rights.¹⁷⁶

Given the Russian Constitutional Court’s 2015 constitutional reference decision, the eventual conclusion regarding the impossibility of implementing the ECtHR’s *Anchugov and Gladkov v. Russia* judgment was predictable. In part, the outcome of this judgment was driven by the direct conflict between the ECtHR decision and Article 32 of the Russian Constitution, the fact that the Constitution was adopted via referendum by all the citizens of the Russian Federation, and the

¹⁶⁹ Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 1.

¹⁷⁰ Peter Roudik, *Russian Federation: Constitutional Court Allows Country to Ignore ECtHR Rulings*, GLOB. LEGAL MONITOR (May 18, 2016), <http://www.loc.gov/law/foreign-news/article/russian-federation-constitutional-court-allows-country-to-ignore-echr-rulings/>.

¹⁷¹ Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 10–11, § 4.2.

¹⁷² See generally Ruling of the Russian Federation Constitutional Court of July 14, 2015.

¹⁷³ Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 5, § 1.2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 6, § 2.

fact that Article 32 is located in Chapter II of the Constitution, which can be changed only via the adoption of a new Constitution.¹⁷⁷ Despite this direct conflict between the decision of the ECtHR and the specific provision of the Russian Constitution, the Russian Constitutional Court spent the majority of its decision arguing that the ECtHR did not understand the situation in Russia in regard to prisoner voting rights and that, in fact, the Russian approach to sentencing, as well as Article 32 of the Constitution, had a long history of taking issues of differentiation and individualization into account when it came to restrictions on voting rights.¹⁷⁸ Hence, while the conclusion of the judgment looks like a “hard disengagement” from the principles of international law in favor of domestic constitutional interpretation, a closer examination reveals that the Court was trying to fit its conclusions within the principles set out by the ECtHR. Thus, international law and its interpretation by the ECtHR is clearly not disregarded; rather, it is repeatedly referenced in order to explain and justify the approach taken by the Court.

The Russian Constitutional Court spent a significant part of its judgment describing two cases, previously heard by the ECtHR, dealing with limitations of prisoner voting rights.¹⁷⁹ The Court purported that the Russian approach to prisoner voting rights was distinct from the British approach in *Hirst*,¹⁸⁰ and instead, was consistent with the Italian approach in *Scoppola*.¹⁸¹ In order to justify its conclusion that the Russian approach to prisoner voting rights was in line with the *Scoppola* approach, the Court engaged in an examination of 100 years of Russian legislative history around this topic, including the development of the 1993 Russian Constitution, which contains Article 32.¹⁸² The Court noted that during the drafting of the 1993 Russian Constitution there existed a possibility to “turn down an absolute ban to participate in elections, established for citizens kept in places of deprivation of liberty under a court sentence”; however, this possibility was deliberately not pursued.¹⁸³ The Court noted, “[i]t is necessary to admit that the constitutional legislator in this case expressed his will quite clearly and definitely, having extended the restriction established by him to all convicted persons

¹⁷⁷ Ivan Kleimenov, *Judgment of the Constitutional Court of the Russian Federation no 12-P/2016: Refusal to Execute Judgments of ECtHR or the Search for Compromise between Russian and International Law?* 32 QUESTIONS INT’L L. 19, 24–25 (2016).

¹⁷⁸ *Id.* at 26.

¹⁷⁹ Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 3, § 1.1; *id.* at 6, § 2; *id.* at 7, § 3.

¹⁸⁰ *Id.*; see *Hirst*, Eur. Ct. H.R. 2005 (discussing that the ECtHR found that the case was problematic due to the presence of an automatic deprivation of voting rights for all prisoners without any differentiation).

¹⁸¹ See Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 8, § 3 (commenting that the approach to prisoner voting rights in the *Scoppola* case was upheld by the ECtHR due to it being differentiated and individualized); see also *Scoppola*, 2012 Eur. Ct. H.R. 868.

¹⁸² See Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 9–11, § 4–4.2.

¹⁸³ *Id.* at 10, § 4.1.

belonging to this category.”¹⁸⁴ However, the issues of differentiation and individualization of restrictions on prisoner voting rights in Article 32 were not disregarded in the drafting process, since the initial references to citizens subjected to “restriction of liberty” were specifically substituted for the term “detained in a detention facility” pursuant to a court sentence; this term is much narrower in scope and includes only punishments of imprisonment for a fixed term as well as life imprisonment.¹⁸⁵ Thus, a person cannot be deprived of his or her voting rights without a court sentence.¹⁸⁶ So, due to the very restricted meaning of the wording “citizens who are kept in places of deprivation of liberty under a court sentence” contained in Article 56(1) of the Russian Criminal Code, restrictions in Article 32 do not apply to persons detained in detention centers awaiting sentencing.¹⁸⁷ Furthermore, due to Article 56(1) of the Russian Criminal Code, a sentence in the form of deprivation of liberty may be imposed on a first-time offender convicted of a crime of small gravity only in extremely rare circumstances, as outlined in Article 63 of the Criminal Code, and only after a comprehensive assessment of the nature and surrounding circumstances of the offense.¹⁸⁸ After referencing the above provisions of the Russian Criminal Code, the Court concluded that Russian criminal law “practically fully excluded the possibility of application of deprivation of liberty to persons having committed crimes of small gravity for the first time in the absence of aggravating circumstances.”¹⁸⁹ In addition to the “criminal law” arguments, the Court also referenced statistics to demonstrate that only a small number of people found guilty of lesser-gravity crimes had been sentenced to actual imprisonment, with a resultant deprivation of voting rights.¹⁹⁰ Taking into account the principles of criminal law and sentencing statistics, the Court concluded that the limitation of prisoner voting rights is both individualized and differentiated in the Russian legal and judicial system.¹⁹¹

The Court attempted to demonstrate through its reasoning that Russia had already adopted the *Scoppola* approach to deal with prisoner voting rights.¹⁹² It further emphasized that its objections to the ECtHR’s reasoning in the *Anchugov and Gladkov* case took into account the “multiannual experience of a constructive cooperation and mutually respective dialogue” between the ECtHR and the Russian Constitutional Court, and that by objecting to the conclusions of the ECtHR, the

184 Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 10, § 4.1.

185 Kleimenov, *supra* note 177, at 29.

186 *Id.* at 30.

187 Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 15, § 5.1.

188 *Id.* at 16, § 5.2.

189 *Id.* at 15, § 5.2.

190 *Id.* at 17–18, § 5.3.

191 *Id.* at 18, § 5.3.

192 Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 16, § 5.2.

Russian Constitutional Court was seeking “to make contribution to the crystallization of the developing practice of the European Court of Human Rights in the field of suffrage protection, whose decisions are called upon to reflect the consensus having formed among States Parties to the Convention.”¹⁹³ From this statement, it is clear that the Russian Constitutional Court wants to be involved in a substantive capacity in the shaping of the “European consensus” utilized by the ECtHR in order to legitimize its decisions. While the Russian Constitutional Court clearly disagreed with the ECtHR’s characterization of the Russian approach to prisoner voting rights, the Russian Constitutional Court stated that, in the spirit of cooperation with the ECtHR and the Convention system, there might be room for further criminal law sentencing reform in order to “optimize the system of criminal penalties” and the utilization of “alternative kinds of penalties” to reduce cases of incarceration.¹⁹⁴ However, the Court stated that it was up to the legislator to make these changes.¹⁹⁵ Finally, the Court criticized the judgment of the ECtHR as an act of “*in abstracto* review of a norm,”¹⁹⁶ stating that the decision by the ECtHR in the *Anchugov and Gladkov* case was an “act of abstract normative control” by the Strasbourg Court.¹⁹⁷ Thus, the ECtHR was engaging in policy making and “norm construction” rather than confining itself to the examination of the specific issues raised by the case before it.¹⁹⁸

While the Russian Constitutional Court has refused to “cure” the violation of prisoner voting rights in a way suggested by the ECtHR in the *Anchugov and Gladkov* case, the Court has attempted, through this decision, to suggest ways for the Russian legislator to reduce the scope of such violation through reform of the criminal law sentencing provisions. The Russian Constitutional Court has not disregarded the relevance of international law within the Russian legal system; rather, the Court was seeking to redefine the rules of engagement with international legal norms, while at the same time trying to provide input into these norms and perhaps disrupting the current consensus around them.¹⁹⁹ It is also clear that when

¹⁹³ Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 13, § 4.4.

¹⁹⁴ *Id.* at 19, § 5.5.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 20, § 6.

¹⁹⁷ Kleimenov, *supra* note 177, at 37.

¹⁹⁸ Ruling of the Russian Federation Constitutional Court of Apr. 19, 2016, at 20, § 6; *see also* D.I. Dedov, Judge of the Eur. Ct. of Hum. Rts., *Konstitutsionnyi Sud Rossii: Zhit Nastoyashim, Pomnya Proshloe I Ustremivshis' v Budushee* [The Constitutional Court of Russia: to live in the present, remembering the past and rushing to the future] 6 (May 17–18, 2016); S.D. Knyazev, *Obyazatelnost Postanovlenii ECPCCH v Pravovoi Sisteme Rossii (na Osnove Praktiki Konstitutsionnogo Suda Rossiiskoi Federatsii)*, 12 ZHURNAL POSSIISKOGO PRAVA 5, 12 (2016).

¹⁹⁹ *See* V.D. Zorkin, Chairman, Russ. Fed’n Const. Ct., *Konstitutsionnaya Ustitsiya na Perehodnom Etape Istoricheskogo Razvitiya Rossii* [Modern Constitutional Justice: Challenges and Perspectives Constitutional Justice at the Transitional Stage of Russia’s Historical Development] (May 17–18, 2016) (Noting that “Russia has no desire to disengage

it comes to international human rights principles, the Russian Constitutional Court—aiming to chip away at the universalism of these principles—is set on viewing them through the prism of national sovereignty. The principle of sovereignty was utilized by the Russian Constitutional Court to reassert the “domestic ownership”²⁰⁰ of human rights and to demonstrate that Russian domestic courts would not be “passive recipients of an externally-imposed jurisprudence.”²⁰¹

V. HAS RUSSIA TRULY “DISENGAGED” FROM THE EUROPEAN COURT OF HUMAN RIGHTS?

From examination of the above decisions, it becomes clear that the Russian Constitutional Court is fearful of “compelled constitutionalism” and the increasing dominance of the Strasbourg Court in setting the domestic parameters of the debate relating to human rights.²⁰² The debates about the limits of “moral sovereignty” and the content of human rights have most recently played out in decisions of the Russian Constitutional Court and the ECtHR pertaining to so-called homosexual propaganda laws.²⁰³ Russian constitutional scholars advance the argument that since the ECtHR takes its authority from the principle of “European consensus,” this “consensus” has to be more inclusive; therefore, international obligations cannot be enforced upon a state without consent—specifically expressed through domestic constitutional norms—from the people of that state.²⁰⁴ Hence, international norms that demand changes to a domestic constitution may not be implemented,²⁰⁵ as international norms do not have priority over domestic

from the European political and legal sphere, rather the aim is to make the Russian voice count in the formation of European legal standards” and that the ECtHR should not rule by reliance on European consensus that was formed “behind Russia’s back.”)

²⁰⁰ ROGER MASTERMAN, SUPREME, SUBMISSIVE OR SYMBIOTIC? UNITED KINGDOM COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS 3 (2015), <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/166.pdf>.

²⁰¹ *Id.* at 13.

²⁰² A.M. Barnashov, *Konstitutsii Gosudarstv I Mezhdunarodnoe Pravo*, 2 VESTNIK TOMSKOGO GOSUDARSTVENNOGO UNIVERSITETA 24, 26 (2013).

²⁰³ Ruling of the Russian Federation Constitutional Court of Sept. 14, 2014; *see also Bayev and Others*, 2017 EUR. CT. H.R. 572.

²⁰⁴ Russian constitutional scholars question the validity of “European consensus” doctrine. They argue that the doctrine of “European consensus” is based on questionable methodological practices by the Strasbourg Court, so the Court’s reliance on this doctrine is problematic in the first place. *See* V.V. Lapteva, Chief Researcher, Inst. of Gen. Physics, Russ. Acad. of Sci., *RoI Rossiiskoi Teorii Prava v Sovershenstvovanii Konstitutsionnoi Ustitsii* [Role of the Russian theory of law in improving constitutional justice] 6 (May 17–18, 2016).

²⁰⁵ *See* Barnashov, *supra* note 202.

constitutions.²⁰⁶ Decisions of the Russian Constitutional Court and the ECtHR pertaining to prisoner voting rights are illustrative of the divergent perspectives in regard to the role of international law and international judicial bodies tasked with interpreting it *vis-à-vis* domestic constitutional law and national courts. Some Russian scholars even view Article 15(4) of the Russian Constitution (making international law part of the domestic legal landscape) as having the potential to “undermine Russian national security interests.”²⁰⁷ The chairman of the Russian Constitutional Court, V. Zorkin, has stated that no decision of the Strasbourg Court can be viewed as a purely legal pronouncement.²⁰⁸ Each decision issued by the ECtHR is also a “political act.”²⁰⁹ Thus, if decisions of the ECtHR interpreting ECHR principles tread upon Russian national sovereignty and key constitutional principles, Russia needs to actively protect itself from such decisions.²¹⁰ While the evolutive approach to rights by the Strasbourg Court allowed the Court to make the ECHR relevant to contemporary European society, Russian constitutional scholars have argued that this approach allowed the Strasbourg Court to “invent” new rights and steadily encroach “upon areas of law and policy for which constitutional responsibility could previously be said to lie exclusively within the domestic domain.”²¹¹ It is argued that the ECtHR’s lack of respect for Russian local constitutional identity and sovereignty brings with it the risk of delegitimizing the Strasbourg Court and could, as a result, worsen the human rights situation of Russian citizens.²¹²

²⁰⁶ *Id.* at 28. Some Russian constitutional scholars argue that when it comes to human rights norms, they have a special status, due to Article 17 of the Russian Constitution, which states that “[i]n 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.” Thus, Article 17 specifically proclaims that human rights are guaranteed in accordance with international law. Hence, an argument could be made that this specific constitutional reference accords priority to international legal principles when it comes to human rights norms rather than giving priority to the Russian Constitution over international norms. See Eduard V. Suhov, *Problema Protivorechii Reshenii Evropeiskogo Suda po Pravam Cheloveka I Konstitutsionnogo Suda Rossiiskoi Federatsii*, 1 SOTSIALNO-POLITICHESKIE NAUKI 66, 68 (2011).

²⁰⁷ See V.D. Bastrykin as cited in A.B. Lazarev, *Vzaimosvyaz’ Natsionalnogo I Mezhdunarodnogo Prava na Primere ECPCH i Konstitutsionnogo Suda RF. Rol’ ESPCH I KS RF v Konstitutsionnom Prave Rossii*, 10 INTERAKTIVNAYA NAUKA 198, 200 (2016).

²⁰⁸ *Id.* (discussing V.D. Zorkin)

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ MASTERMAN, *supra* note 200, at 23.

²¹² See V.D. Zorkin, Chairman, Const. Ct. Russ., *Dialog Konstitutsionnogo Suda Rossiiskoi Federatsii I Evropeiskogo Suda po Pravam Cheloveka v Kontekste Konstitutsionnogo Pravoporyadka* [Dialogue of the Constitutional Court of the Russian Federation and the European Court of Human Rights in the context of the constitutional order] 16 (Nov. 18–20, 2010) (who argues that ECtHR loses legitimacy every time it ignores “complexities of local contexts”); see also Knyazev, *supra* note 198, at 16.

While references to the politicized nature of the ECtHR are made within and outside of Russia,²¹³ it is clear that the decisions of the Russian Constitutional Court are also not devoid of political undertones, so both national and international judicial realms become key loci for the settling of political scores. Hence, when it comes to the Russian Constitutional Court and the ECtHR, while the abstract nature of human rights principles is agreeable to both, the way that these principles are interpreted through judicial reasoning becomes a highly political enterprise. The 2015 constitutional reference by the Russian Constitutional Court is therefore careful to draw a distinction between the priority of the Russian Constitution over the ECHR (the Russian Constitutional Court has pointed out the organic connection between the two documents) versus the priority of the Russian Constitution over the Strasbourg Court's interpretation of ECHR principles.²¹⁴

In the context of Russia, human rights restrictions, especially minority rights, are increasingly framed by references to the urgent need to protect Russian sovereignty from the “*diktat* of the West.”²¹⁵ Thus, the Russian Constitutional Court becomes the guarantor of sovereignty and interprets all human rights claims through the lens of Russian sovereignty.²¹⁶ The claim of the priority of the Russian Constitution inevitably leads to the diminishing scope of rights, which is framed as resistance to Western judicial activism. On the other hand, domestic “judicial activism” is explained by the superior awareness of the local constitutional court to be aware of the various historical, economic, cultural, and religious norms that all inform the domestic constitutional court in its reasoning process.²¹⁷ Hence, while principles of formal equality and international legal norms are frequently referenced by the Russian Constitutional Court, when it comes to balancing competing constitutional rights, the way that rights are concretized becomes a highly political exercise.²¹⁸ In many instances, highly politicized decisions by Russian courts are justified by authorities who point to the fact that the courts have meticulously followed “the letter of the law.”²¹⁹ Hence, obedience to the “letter of the law”—and by extension to the authority that represents it—is portrayed as “the major characteristic of stability of the political system.”²²⁰ The political undertones of the Russian Constitutional Court's rulings are further reinforced by references to

²¹³ See, e.g., MASTERMAN, *supra* note 200, at 23.

²¹⁴ Kleimenov, *supra* note 177, at 23.

²¹⁵ Lazarev, *supra* note 207, at 210.

²¹⁶ A.A. Klishas, Chairman, Federation Council Committee on Constitutional Legislation and State Building, *Doklad na konferentsii “Sovremennaya Konstitutsionnaya Ustitsiya: Vyzovy I Perspektivy”* [Report at the Conference: “Modern Constitutional Justice: Challenges and Prospects”] 8 (May 17–18, 2016).

²¹⁷ Lapteva, *supra* note 204, at 8.

²¹⁸ A.S. Tarasov, *K Voprosu o Zloupotreblenii Konstitutsionnym Pravom Na Sovremennom Etape Razvitiya Rossiiskogo Gosudarstva*, 1 VESTNIK VOLZHSKOGO UNIVERSITETA UMENI V.N. TATISCHEVA 1, 2 (2017).

²¹⁹ Mikhail Zherebtsov, *President Putin's Conception of the Rule of Law*, 8 J. PARLIAMENTARY & POL. L. 757, 760 (2014).

²²⁰ *Id.* at 759.

“traditional values” and “local norms,” which are supposedly derived from the Court being in constant dialogue with the legislative body that represents the true will of the people, while the Strasbourg Court is presented as lacking these “checks and balances.”²²¹ For example, V. Zorkin, chairman of the Russian Constitutional Court, has stated that “no court can replicate a complex legislative decision-making process.”²²² Furthermore, the ECtHR cannot substitute the mechanism of “European consensus” for the domestic constitutional court’s engagement with the legislature. In other words, “People’s democracy cannot be substituted for court’s rule.”²²³ Thus, while the advancement of the “sovereign democracy”²²⁴ by the Russian Constitutional Court is viewed as entirely appropriate, the “aristocratic democracy”²²⁵ of the ECtHR is presented as lacking legitimate basis and not stemming from the will of the people.²²⁶ However, from the perspective of many minority groups within Russia, the ECtHR often represents their last avenue of redress against abuses perpetrated by their own government. Hence, “Successful and expeditious implementation of the judgments of the ECtHR on the national level is vital for the ECtHR, as both the credibility and legitimacy of the system depend on it.”²²⁷

The refusal of the Russian Constitutional Court to genuinely consider dissenting voices, especially when it comes to minority rights, in a way mirrors the Russian Constitutional Court’s complaint about the Strasbourg Court’s refusal to consider the dissenting Russian position when it comes to its conclusions regarding “European consensus.” Russian constitutional scholars are quick to point out that “European consensus” cannot be established by relying on the principle of simple majority or the similarities in judicial approaches in the majority of member states.²²⁸ Such an oversimplified majoritarian approach lacks methodological soundness.²²⁹ However, both courts do rely on a “majoritarian logic”²³⁰—presented

²²¹ Zorkin, *supra* note 199.

²²² See Zorkin *supra* note 212.

²²³ Zorkin, *supra* note 199.

²²⁴ In essence, the concept of “sovereign democracy,” coined by Vladislav Surkov (personal advisor to President Putin), means “democratic values are neither contested nor rejected [,] but subordinated to national interests. This logic is based on the refusal to undergo foreign supervision and meddling. Yet the decisions of the CoE [Council of Europe] are seen as such in Russia, and are thus a source of irritation and misunderstanding.” See Kerttu Mager, *Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court*, 24 JURIDICA INT’L 14, 21 (2016).

²²⁵ Zorkin, *supra* note 199 (noting that aristocratic democracy is defined as a democracy based on consensus between various bureaucratic structures).

²²⁶ See Mager, *supra* note 224, at 21; see also Zorkin, *supra* note 199.

²²⁷ Mager, *supra* note 224, at 15.

²²⁸ S.M. Shakhrai, Pro-rector, Moscow St. U., *Sudebnaya Pervosnova Rossiskogo Konstitutsionalizma* [The Judicial Principle of Russian Constitutionalism] 7 (May 17–18, 2016) (Russ.).

²²⁹ *Id.*

²³⁰ Orlova, *supra* note 47, at 131.

either as “traditional values” or “European consensus”—to lend legitimacy to their reasoning. Hence, in both cases, the outcome of failing to give due weight to dissent is an increase in legal nihilism and a growing disconnection from the law at both national and international levels.²³¹ While the hope to “constitutionalize” both national and international relations is a noble aim, the real question is how such “constitutionalizing” can be accomplished, how respect for and trust in both the Russian Constitutional Court and the Strasbourg Court can be increased,²³² and how to make both courts better able to engage in dialogue with one another.²³³ In a sense, both courts are pursuing an “all or nothing solution.”²³⁴ The Russian Constitutional Court wants to have the final say on how human rights should be conceptualized within Russia, and the ECtHR is aiming to do the same by referencing Article 46(1) of the ECHR to insist on mandatory implementation of its decisions and by stating that it does not leave room for “cherry-picking” in judgment enforcement.²³⁵ This constitutional standoff leads to the deterioration and fragmentation of human rights norms and to the further disempowerment of individuals at both national and international levels.²³⁶

VI. CONCLUSION

A move towards a global legal system without taking account of national concerns regarding the limits of their sovereignty is “less likely to exercise state power and more apt to (re)invent a politico-juridical regime which makes power more practicable because it can be constructed as ‘legal.’”²³⁷ Hence, a serious accounting for dissent in the current functioning of international legal regime must take place. Striving for objectivity and universality in the human rights norms in international law is a worthwhile undertaking. The problem is not objectivity as a concept but rather how this concept can be manipulated to disregard dissenting views. Greater engagement through consensus building can be achieved, but only through a process of contestation. A process of contestation can morph into a process of mutual construction, easing rather than aggravating social divisions.²³⁸ Compelled constitutionalism will only lead to further fragmentation.²³⁹

²³¹ Tarasov, *supra* note 218, at 4.

²³² See Klishas, *supra* note 216.

²³³ See *id.*

²³⁴ Mager, *supra* note 224, at 19.

²³⁵ Mager, *supra* note 224, at 22.

²³⁶ Elena A. Lukanina, *Rol' Konstitutsionnogo Suda Rossiiskoi Federatsii v Implementatsii Reshenii Evropeiskogo Suda po Pravam Cheloveka v Otechestvennoe Pravo v Prizme Sohraneniya Natsional'nogo Suvereniteta*, 14 VESTNIK VOLGOGRADSKOGO GOSUDARSTVENNOGO UNIVERSITETA 89, 91 (2016).

²³⁷ Rajkovic, *supra* note 8, at 44.

²³⁸ al Attar, *supra* note 5, at 135.

²³⁹ Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265, 289 (2009).

Law cannot just be conceptualized as simply a system of legal rules that are interpreted by judges. Law is also very much a system of legal relations: “[a] legal relation (right, duty, power, freedom, liability, immunity, disability) is a pattern of potentiality into which actual persons and situations may be fitted.”²⁴⁰ Hence, it is vital to uncover those meanings and emotions in international relations that frequently have an impact on national interpretations of constitutional values. Constitutional courts seek justification for their decisions in their own internal logic as contrasted with the external stereotypes of others.²⁴¹ Hence, as suspicions escalate, the actions and reasoning of the other (such as the ECtHR) become patently negative and questionable. Domestic constitutional courts, in dismissing the reasoning of the other, feel that they are acting righteously.²⁴² In doing so, “they are patently denying the other a right to claim its own legitimate interests.”²⁴³ A way to de-escalate the current conflict lies in the willingness of both the Russian Constitutional Court as well as the ECtHR “to tone down exclusive claims and seek instead mutually inclusive arrangements” as well as perhaps a mutually respectful tone of dialogue.²⁴⁴ What is needed the most at this point is a cross-fertilization of knowledge,²⁴⁵ ideas, and solutions, not necessarily in order to reach concrete agreements, but at least to reduce the scope of disagreement when it comes to human rights norms and the relationship between domestic constitutional courts and international courts that deal with human rights principles.²⁴⁶ Ultimately, certain undemocratic tendencies of international law—where many dissenting voices are ignored—need to be addressed in order to achieve better international judicial governance.²⁴⁷ The meaningful incorporation of dissent into international legal dialogue may eventually contribute to nations viewing their sovereignty more as a social contract than an “essentialist condition.” In other words, if domestic and

²⁴⁰ al Attar, *supra* note 5, at 126.

²⁴¹ Andrei P. Tsygankov & Matthew Tarver-Wahlquist, *Duelling Honors: Power, Identity and the Russia-Georgia Divide*, 5 FOREIGN POL’Y ANALYSIS 307, 309 (2009).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Tsygankov & Tarver-Wahlquist, *supra* note 241, at 324.

²⁴⁵ Cross-fertilization of knowledge should occur not only between national courts and international judicial bodies, but also between various national courts. These various levels of knowledge exchange would aid in legitimizing the “living tree” approach of the Strasbourg Court to the principles contained in the ECHR. *See* Singh, *supra* note 24, at 384.

²⁴⁶ *See* H. Hajivev, *Vzaimodeistvie Evropeiskogo Suda po Pravam Cheloveka I Konstitutsionnyh Sudov (evolutsionnaya interpretatsiya Konventsii)* [Interaction of the European Court of Human Rights and Constitutional Courts (evolutionary interpretation of convention)] 2 (May 17–18, 2016). Networking between national and international judicial bodies will contribute to greater human rights protections at both national and international levels. *See also* Han-Chul Park, Chairman, Const. Ct. Republic of Korea, *Mezhdunarodnoye sotrudnichestvo v oblasti konstitutsionnogo pravosudiya vo imya zaschchity vseobshchikh prav cheloveka* [International Cooperation in the field of Constitutional Justice for the Protection of Universal Human Rights] 3 (May 17–18, 2016).

²⁴⁷ Singh, *supra* note 24, at 400.

international courts adopt an integrative approach to their reasoning and actively seek to minimize conflict through mutual meaning making, this may in turn increase the power of domestic courts *vis-à-vis* their executive branches of government, resulting in a better process of “checks and balances”²⁴⁸ and greater connection between domestic and international forms of judicial control. This view of sovereignty, then, does not necessarily create tension between the development of human rights and sovereignty.²⁴⁹ Ultimately, any attempt to design a workable international legal order and international judicial bodies must take into account the complexities of various political communities, multiple individual identities, hybrid cultures, and dissenting voices.²⁵⁰ This is certainly not an easy undertaking, and there is no guarantee of a favorable outcome. However, in the process of mutual dialogue, both the national and the international orders will have to cede some of their powers in the process of collective “meaning making.” Collective “meaning making” could offer the possibility of breaking the cycle in which national sovereignty and international law are viewed as “enemy regimes” and would increase the ability of both to advance rather than fragment the scope of human rights protection.²⁵¹ Such collective “meaning making” has the potential to increase the autonomous capacity of international law to serve as a facilitator of cooperation that would not occur otherwise.



²⁴⁸ U.V. Malysheva, *Teoretiko-Pravovye Osnovy Realizatsii Reshenii Evropeiskogo Suda po Pravam Cheloveka v Ugolovnom Protsesse Rossiiskoi Federatsii*, 1 TRUDY AKADEMII UPRAVLENIIYA MVD ROSSII 28, 29 (2017).

²⁴⁹ Nyst, *supra* note 35, at 59.

²⁵⁰ Twining, *supra* note 2, at 364.

²⁵¹ S.N. Shevchenko, *K Voprosu o Razreshenii 'Konstitutsionnyh 'Kollizii I Kvazikollizii*, 6 EURASIAN ADVOC. 44, 47 (2015).