

ACQUIESCENCE AFFIRMED, ITS LIMITS LEFT UNDEFINED: THE *MARKIN* JUDGMENT AND THE PRAGMATISM OF THE RUSSIAN CONSTITUTIONAL COURT *VIS-À-VIS* THE EUROPEAN COURT OF HUMAN RIGHTS¹

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In its Markin Judgment of Dec. 6, 2013, the Constitutional Court of Russia was expected to determine whose opinions were legally superior – those of the European Court of Human Rights or those of the Constitutional Court itself. The fact that the Court purposely left this question open marks yet another milestone in the expansion of the pragmatic approach to the national / international dichotomy across Europe.

Keywords: Konstantin Markin v. Russia; Constitutional Court of Russia; European Court of Human Rights; normative conflict; pragmatism.

1. Introduction

In the *Markin* Judgment² passed on 6 December 2013 the Constitutional Court of Russia [hereinafter Court] for the first time has expressed its view on how decisions

¹ This article is a revised and expanded version of my blog post published in the Cambridge Journal of International and Comparative Law Blog, available at <<http://cjl.org.uk/2013/12/26/acquiescence-affirmed>> (accessed Aug. 6, 2014).

² Постановление Конституционного Суда Российской Федерации от 6 декабря 2013 г. № 27-П по делу о проверке конституционности положений статьи 11 и пунктов 3 и 4 части четвертой статьи 392 Гражданского процессуального кодекса Российской Федерации в связи с запросом президиума Ленинградского окружного военного суда [*Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 6 dekabrya 2013 g. No. 27-P po delu o provere konstitutsionnosti polozhenii stat'i 11 i punktov 3 i 4 chasti chetvertoi stat'i 392 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii v svyazi s zaprosom prezidiuma Leningradskogo okruzhnogo voennogo suda*] [Judgment of the Constitutional Court of the Russian Federation of the 6 December 2013 No. 27-P in the Case Concerning Review of Constitutionality of Provisions of Article 11 and of Article 392, section 4, paragraphs 3 and 4, of the Code of Civil Procedure of the Russian Federation as Instituted by Application of the Presidium of the Leningrad District Military Court], available at <<http://pravo.gov.ru:8080/page.aspx?77827>> (accessed Aug. 6, 2014) [hereinafter *Markin* Judgment].

of the European Court of Human Rights [hereinafter Eur. Ct. H.R.] are to be enforced in Russia if they appear to be in conflict with the Court's own case law. By doing so, the Court has joined a number of other top European national courts – most notably those of Germany, the United Kingdom, and Italy – which have recently been trying to define the extent of permissible impact of the Eur. Ct. H.R. jurisprudence on their domestic legal orders. Despite the earlier call by the President of the Court to set the 'limits to [Russia's] acquiescence'³ (to the Eur. Ct. H.R.'s adverse rulings), the Court has refrained from laying down any general principles or proclaiming its own superiority *vis-à-vis* the Eur. Ct. H.R. and has instead opted for an *ad hoc* resolution of conflicts on a case-by-case basis. Albeit with some important Eur. Ct. H.R.-friendly caveats, the Court's reasoning is purposely open-ended and leaves the Court free to embrace the law of the European Convention of Human Rights [hereinafter ECHR] just as much as to deviate from it, depending on the circumstances of future cases. In this sense, the *Markin* Judgment is emblematic of the increasingly prominent pragmatic approach to the relationship between international and municipal law.

2. The *Markin* Case: A Procedural History

The Court's judgment is yet another chapter in the case of Konstantin Markin, a Russian military serviceman who was denied three-year parental leave to take care of his three children because under Russian law such leave could only be granted to female military personnel. In January 2009 the Court summarily rejected Markin's complaint, finding no constitutional issue. The Court considered that the relevant provisions of the Law on the Status of Military Personnel and related laws did not constitute gender discrimination in violation of the equal protection clause of Art. 19 of the Russian Constitution because servicewomen's exceptional entitlement to parental leave was based on the 'limited participation of women in military service' and the 'special social role of women associated with motherhood.'⁴

³ Зорькин В. Предел уступчивости [Zor'kin V. *Predel ustupchivosti* [Valery Zor'kin, *Limits to Acquiescence*]], *Rossiiskaya Gazeta* (Oct. 29, 2010), <<http://www.rg.ru/2010/10/29/zorkin.html>> (accessed Aug. 6, 2014).

⁴ Определение Конституционного Суда Российской Федерации от 15 января 2009 г. №187-О-О об отказе в принятии к рассмотрению жалоб гражданина Маркина Константина Александровича на нарушение его конституционных прав положениями статей 13 и 15 Федерального закона «О государственных пособиях гражданам, имеющим детей», статей 10 и 11 Федерального закона «О статусе военнослужащих», статьи 32 Положения о порядке прохождения военной службы и пунктов 35 и 44 Положения о назначении и выплате государственных пособий гражданам, имеющим детей» [*Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 15 yanvarya 2009 g. No. 187-O-O ob otkaze v prinyatii k rassmotreniyu zhalob grazhdanina Markina Konstantina Alexandrovicha na narushenie ego konstitutsionnykh prav polozheniyami statei 13 i 15 Federal'nogo zakona "O gosudarstvennykh posobiyakh grazhdanam, imeyushchim detei," statei 10 i 11 Federal'nogo zakona "O statuse voennosluzhashchikh," stat'i 32 Polozheniya o poryadke prokhozhdeniya voennoi sluzhby i punktov 35 i 44 Polozheniya o naznachenii i vyplate gosudarstvennykh posobii grazhdanam, imeyushchim detei'*] [Decision of the Constitutional Court of the Russian Federation of 15 January 2009

By contrast, in *Konstantin Markin v. Russia* decided a year and a half later, in October 2010, the Chamber of the Eur. Ct. H.R. found a violation of Art. 14 (prohibition of discrimination) in conjunction with Art. 8 (right to respect for private and family life) of the ECHR.⁵ Not only did the Chamber sharply criticize the reasoning of the Court as ‘unconvincing’⁶ and founded upon ‘gender prejudices.’⁷ but it also suggested, under the broad reading of Art. 46 of the ECHR, that the Russian government amend the provisions of domestic law which were found incompatible with the ECHR.⁸ After furious response by Russian officials, including Valery Zor’kin, the President of the Court, who argued to ‘protect [Russia’s] sovereignty . . . national institutions and . . . national interests,’⁹ in March 2012 the Grand Chamber of the Eur. Ct. H.R. softened its rhetoric but nonetheless affirmed the Chamber judgment.¹⁰

Mr. Markin petitioned a local court in Saint Petersburg to reopen the proceedings in his case, relying on Art. 392 of the Code of Civil Procedure [hereinafter Code] which lists a decision of the Eur. Ct. H.R. in favor of the applicant as a ground for judicial review. However, the Code was silent on whether that option was still open where a decision of the Eur. Ct. H.R. contradicted a prior ruling of the Court in the same case. Faced with two opposite opinions of the lower courts on this issue, the district court requested the Court to assess the constitutionality of Art. 392 in conjunction with Art. 11 of the Code (the latter lists sources of law to be applied by courts, including the Constitution, international treaties, and federal laws). The district court argued that within the domestic legal framework decisions of the Court and of the Eur. Ct. H.R. appeared to be ‘equal,’ thus creating a situation of *non liquet* if those decisions were at odds with each other.¹¹

No. 187-O-O Rejecting Complaints by Konstantin Aleksandrovich Markin Concerning Violation of His Constitutional Rights by Provisions of Articles 13 and 15 of the Federal Law ‘On Government Benefits for Citizens with Children,’ Articles 10 and 11 of the Federal Law ‘On Status of Military Personnel,’ Article 32 of Regulations on Military Service and Paragraphs 35 and 44 of Regulations on Grant and Processing of Government Benefits to Citizens with Children]] <available at <http://www.ksrf.ru/ru/Decision/Pages/default.aspx>> (accessed Aug. 6, 2014).

⁵ *Konstantin Markin v. Russia*, no. 30078/06 (Eur. Ct. H.R., Oct. 7, 2010).

⁶ *Id.* at ¶ 57.

⁷ *Id.* at ¶ 58.

⁸ *Id.* at ¶ 67.

⁹ Zor’kin, *supra* n. 3.

¹⁰ *Konstantin Markin v. Russia* [GC], no. 30078/06 (Eur. Ct. H.R., Mar. 22, 2012).

¹¹ Определение президиума Ленинградского окружного военного суда от 30 января 2013 г. о направлении запроса в Конституционный Суд Российской Федерации о проверке конституционности положений статьи 11 и пунктов 3 и 4 части четвертой статьи 392 Гражданского процессуального кодекса Российской Федерации [Opređenje prezidiuma Leningradskogo okružnogo voennogo suda ot 30 yanvarya 2013 g. o napravlenii zaprosa v Konstitutsionnyi Sud Rossiiskoi Federatsii o provere konstitutsionnosti polozhenii stat'i 11 i punktov 3 i 4 chasti chetvertoi stat'i 392 Grazhdanskogo protsessual'nogo kodeksa Rossiiskoi Federatsii [Order of the Presidium of the Leningrad

3. The *Markin* Judgment: Pragmatic Ambiguity

The *Markin* Judgment of the Court has two dimensions: a procedural one and a substantive one. The procedural issue is *who* in the domestic judicial system should decide (upon) conflicts between the ECHR, as interpreted by the Eur. Ct. H.R., and domestic law, as interpreted, *inter alia*, by the Court. The substantive issue is *what rules* should govern the resolution of conflicts. Although both parties to the proceedings laid much emphasis on the latter issue during the oral hearings, the Court apparently was extremely hesitant to elaborate on the substance of the matter and confined it to one sentence in the entire 18-page judgment.

Rather, the Court concentrated on the procedure. It ruled that Artis. 11 and 392 of the Code are in conformity with the Constitution because they do not, contrary to the view of the district court, create a deadlock: a local court must in any event reopen proceedings and, if it cannot enforce a decision of the Eur. Ct. H.R. without at the same time disregarding provisions of domestic law, it must request the Court to assess the constitutionality of such provisions. The Court said: ‘...Given that the rights and freedoms provided for in the Constitution of the Russian Federation are, basically, the same as the rights and freedoms recognized by the European Convention of Human Rights, the court [reviewing the case] faces the question of constitutionality of relevant domestic law provisions...’¹² – the question which under the established case law may be decided solely by the Court. In this aspect, the *Markin* Judgment mirrors the approach taken by the Constitutional Court of Italy, which in its decisions Nos. 348/2007¹³ and 311/2009¹⁴ declared itself exclusively competent to strike down municipal laws as being inconsistent with the ECHR (and thus with the Constitution). For good or for ill, this approach expands the monopoly of the Constitutional Court to assess not only the constitutionality of domestic legislation but also its ‘conventionality.’ Leaving aside the question of whether it is legally correct to conflate these two terms (as the Court did), suffice it to say that as a matter of judicial policy this approach will definitely narrow the scope for direct application of the ECHR by the lower courts.

District Military Court of 30 January 2013 to Request the Constitutional Court of the Russian Federation to Review Constitutionality of the Provisions of Article 11 and of Article 392, section 4, paragraphs 3 and 4, of the Code of Civil Procedure of the Russian Federation]] (unpublished, text on file with the author).

¹² *Markin* Judgment, *supra* n. 2, at ¶ 3.

¹³ Corte Costituzionale della Repubblica Italiana [Constitutional Court of Italy], sentenza No. 348/2007, ¶ 4.3, available at <<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2007&numero=348>> (accessed Aug. 6, 2014).

¹⁴ Corte Costituzionale della Repubblica Italiana [Constitutional Court of Italy], sentenza No. 349/2007, ¶ 6.2, available at <<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2007&numero=349>> (accessed Aug. 6, 2014).

Much more intriguing, however, is the substantive aspect of the whole problem: even if we know *who* is in charge of dealing with normative conflicts between the Eur. Ct. H.R.'s and the Court's interpretations of human rights, it still remains to be determined *how* or based on *what criteria* those conflicts should be resolved. Here, the Court entirely avoided the purely dogmatic question of supremacy – a question that had plagued the reasoning of the lower courts in the *Markin* case as well as commentators.¹⁵ Whose opinions are legally superior – those of the national court or those of the international one? Instead of trying (in vain) to come up with a logically impeccable answer to this question, the Court left it open. It simply noted in one sentence: 'if . . . challenged legal provisions are found to be consistent with the Constitution, the Constitutional Court . . . within the limits of its competence will determine possible constitutional means of implementation of the judgment of the [ECtHR]'. No guiding standard emerges from this kind of reasoning: the approach envisaged by the Court is completely *ad hoc*.

Still, there are two important caveats which signal the Court's desire to avoid isolation from international law and from decisions of international institutions. First, the Court emphasized that a blanket refusal to implement an Eur. Ct. H.R. decision is anyway 'not an option' for a court reviewing the case.¹⁶ In his comments to the press after the delivery of the judgment Sergey Mavrin, Vice-President of the Court and Judge Rapporteur in the case, remarked: 'Our judgment in this respect is aimed less at confrontation with the Eur. Ct. H.R. than at finding solutions to the problem of implementation of Eur. Ct. H.R. decisions in cases of conflict.'¹⁷ Second, the Court has considered it possible to depart from its own previous decisions in order to accommodate opinions of the Eur. Ct. H.R. This conclusion is in stark contrast with the earlier statement by Valery Zor'kin, the President of the Court, that 'the interpretation given to the Constitution by the state's highest judicial organ cannot be overridden by the interpretation of the Convention.'¹⁸ According to the Court in the *Markin*

¹⁵ See, e.g., Ланаева В. Дело «Константин Маркин против России» в контексте проблемы национального суверенитета // Сравнительное конституционное обозрение. 2012. № 2 [Lapaeva V. Delo 'Konstantin Markin protiv Rossii' v kontexte problemy natsional'nogo subereniteta // Sravnitel'noe konstitutsionnoe obozrenie. 2012. No. 2 [Valentina Lapaeva, Case of Konstantin Markin v. Russia in the Context of National Sovereignty, 2012(2) Comparative Constitutional Review]]; Будылин С. Конвенция или Конституция? Международное право и пределы государственного суверенитета // Закон. 2013. № 12 [Budylin S. Konventsiya ili Konstitutsiya? Mezhdunarodnoe pravo i predely gosudarstvennogo suvereniteta // Zakon. 2013. No. 12 [Sergey Budylin, Convention or Constitution? International Law and Limits of State Sovereignty, 2013(12) Law]].

¹⁶ *Markin* Judgment, *supra* n. 2, at ¶ 3.2.

¹⁷ КС поможет в реализации решений ЕСПЧ в России – зампред суда [KS pomozhet v realizatsii reshenii ESPCh v Rossii – zampred suda [Constitutional Court Will Help Implementing ECHR Decisions in Russia – Vice-President of Court]], RAPSИ, <http://www.rapsinews.ru/judicial_news/20131206/270014556.html> (accessed Aug. 6, 2014).

¹⁸ Zorkin, *supra* n. 3.

Judgment, a finding of a violation of the ECHR by the Eur. Ct. H.R. might mean that a constitutional issue has re-emerged, 'which, in turn, might constitute the ground for . . . the initiation of constitutional review.'¹⁹

4. The *Markin* Judgment in Context: Pragmatism Across Europe

The pragmatic and strategic attitude of the Court towards its Strasbourg challenger is consonant with the approach increasingly being adopted by domestic courts in Europe as well as by scholars. It is now becoming accepted that the question of supremacy is moot; that 'the relationship between international and local law – and even less so between international and domestic courts – cannot be described by a simplistic monist or dualist framework';²⁰ and that 'we should leave it at the existing divergences of national and transnational answers to the question of who has the last word.'²¹ In the era of pragmatism, working out mutually acceptable solutions for specific situations of disagreement is more important than setting up formal hierarchies.

In this vein, top European national courts which at various points found themselves on a collision course with the Eur. Ct. H.R. developed some sort of balancing tests to deal with conflicting decisions of the Strasbourg court and of their own. In Germany, the Federal Constitutional Court [hereinafter FCC] declared in the *Görgülü* case that German courts, on the one hand, 'must give precedence to interpretation [of domestic law] in accordance with the Convention'²² but, on the other hand, must not enforce Eur. Ct. H.R. decisions 'in a schematic way'²³ and 'must include the effects [of Eur. Ct. H.R. decisions] on the national legal system in their application of the law.'²⁴ The FCC considered that lower courts may refuse to give domestic effect to the decision of the Eur. Ct. H.R. 'provided this is the only way in which a violation of fundamental principles of the constitution can be averted.'²⁵ Given, however, the

¹⁹ *Markin* Judgment, *supra* n. 2, at ¶ 3.2.

²⁰ Andreas Paulus, *A Comparative Look at Domestic Enforcement of International Tribunal Judgments*, 103 Proceedings of the Annual Meeting (American Society of International Law) 47 (2009). See also Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56(2) Int'l & Comp. L.Q. 219 (2007).

²¹ Gertrude Luebbe-Wolff, *Who Has the Last Word? National and Transnational Courts – Conflict and Cooperation*, 30(1) Yearbook of European Law 99 (2011).

²² Das Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court of Germany], 2 BvR 1481/04 vom 14.10.2004, ¶ 62, available at <http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html> (accessed Aug. 6, 2014).

²³ *Id.* at ¶ 47.

²⁴ *Id.* at ¶ 57.

²⁵ *Id.* at ¶ 35.

emphasis by the FCC on 'the Basic Law's commitment to international law,'²⁶ the invocation of 'fundamental principles of the constitution' may itself turn into a value-balancing exercise.

Similarly, the Supreme Court of the United Kingdom [hereinafter UK] opined in the *Pinnock* case that British courts should implement 'a clear and constant line of [Eur. Ct. H.R.] decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of [British] law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle.'²⁷ Accordingly, domestic courts may on 'rare occasions'²⁸ decline to follow the opinion of the Eur. Ct. H.R. if doing so would foster 'valuable dialogue'²⁹ with the Strasbourg court on points of disagreement. And even though the practice of the UK Supreme Court manifests the existence of a 'strong presumption'³⁰ in favor of compliance with Eur. Ct. H.R. rulings, on two occasions (in *Boyd*³¹ and *Horncastle*³² cases) the Supreme Court was successful in convincing the Grand Chamber of the Eur. Ct. H.R. to reverse respective Chamber judgments regarding compatibility with the Convention of certain important aspects of UK law.

Finally, the Constitutional Court of Italy also laid down its balancing test in its decisions Nos. 348/2007 and 311/2009 where it reserved for itself the right to determine, when deciding upon the effect of Eur. Ct. H.R. rulings in the domestic legal system, 'the reasonable balance between the constraint arising from international obligations, as imposed by Art. 117, para. 1, of the Constitution, and the protection of constitutionally protected interests contained in other articles of the Constitution.'³³ This balancing exercise may, according to the Constitutional Court of Italy, justify non-implementation of Eur. Ct. H.R. rulings in 'exceptional'³⁴ cases.

²⁶ *Id.* at ¶ 33.

²⁷ *Manchester City Council v. Pinnock*, [2011] UKSC 6, ¶ 48.

²⁸ *R v. Horncastle and others*, [2009] UKSC 14, ¶ 11.

²⁹ *Id.*

³⁰ Sir Philip Sales, *Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine*, (2012)2 Public Law 256, available at <<http://www.statutelawsociety.co.uk/wp-content/uploads/2014/01/PubL022012PSCompleteOffprint.pdf>> (accessed Aug. 6, 2014).

³¹ *R v. Boyd, Hastie and Spear Saunby and Others*, [2002] UKHL 31. This judgment led to a shift in Eur. Ct. H.R.'s approach to the UK Courts Martial system. See *Cooper v. the United Kingdom* [GC], no. 48843/99 (Eur. Ct. H.R., Dec. 16, 2003); *Grievs v. the United Kingdom* [GC], no. 57067/00 (Eur. Ct. H.R., Dec. 16, 2003).

³² *R v. Horncastle and others*, *supra* n. 28. This judgment prompted the Eur. Ct. H.R. Grand Chamber to reconsider the permissibility of hearsay evidence under UK criminal law. See *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05, 22228/06 (Eur. Ct. H.R., Dec. 15, 2011).

³³ Corte Costituzionale, sentenza No. 348/2007, *supra* n. 13, at ¶ 4.7.

³⁴ Corte Costituzionale della Repubblica Italiana [Constitutional Court of Italy], sentenza No. 311/2009, ¶ 6, available at <<http://www.giurcost.org/decisioni/2009/0311s-09.html>> (accessed Aug. 6, 2014).

The strength of the described legal tests lies in their flexibility: they both reaffirm international obligations of states members to the ECHR and leave national courts enough space for maneuver in their relations with the Eur. Ct. H.R. On the one hand, in practice compliance with Eur. Ct. H.R.'s decisions is overwhelming, and top national courts implement those decisions into domestic law even at the cost of reversal of their own prior case law (such as the shift in the standard of privacy protection by the FCC³⁵ after *Von Hannover v. Germany*;³⁶ the reversal by the UK House of Lords of its own precedent concerning disclosure obligations in detention review proceedings³⁷ after *A. and Others v. the United Kingdom*;³⁸ and the change in the case law on expropriation and retroactivity of laws by the Italian Constitutional Court in decisions Nos. 348/2007 and 349/2007 after *Scordino v. Italy (No. 1)*³⁹ and *Scordino v. Italy (No. 2)*⁴⁰). On the other hand, by voicing their objections domestic courts may sometimes affect the outcomes at Strasbourg, usually in an indirect way (for instance, the warning issued by the Italian Constitutional Court in its decisions Nos. 348/2007, 349/2007 and 311/2009 was one of the factors that led to the reversal by the Eur. Ct. H.R. of its initial attitude towards crucifixes in Italian schools in *Lautsi v. Italy*).⁴¹ The inter-judicial European conversation continues, with its actors being aware of the benefits and costs of pragmatic decision-making. In the words of Gertrude Luebbe-Wolff, a judge at the FCC: 'If we find one or another individual judgment of the Eur. Ct. H.R. hard to swallow, we should let "Strasbourg" know, but we should also remember the importance of the system of which the judgment is a part, and be ready to make sacrifices, to a certain extent, to keep it working.'⁴²

5. Conclusion

The Court has joined the European trend insofar as normative conflicts between the ECHR and domestic laws are concerned. But where does the *Markin* Judgment leave us? New points of disagreement, such as restrictions of LGBT rights⁴³ or

³⁵ Das Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court of Germany], 1 BvR 1602/07, 1606/07, 1626/07 vom 26.02.2008, ¶ 55.

³⁶ *Von Hannover v. Germany*, no. 59320/00 (Eur. Ct. H.R., Jun. 24, 2004).

³⁷ *Secretary of State for the Home Department v. AF (No. 3)*, [2009] UKHL 28.

³⁸ *A. and Others v. the United Kingdom* [GC], no. 3455/05 (Eur. Ct. H.R., Feb. 19, 2009).

³⁹ *Scordino v. Italy (No. 1)* [GC], no. 36813/97 (Eur. Ct. H.R., Mar. 29, 2006).

⁴⁰ *Scordino v. Italy (No. 2)*, no. 36815/97 (Eur. Ct. H.R., Jul. 15, 2004).

⁴¹ *Lautsi v. Italy* [GC], no. 30814/06 (Eur. Ct. H.R., Mar. 18, 2011).

⁴² Luebbe-Wolff, *supra* n. 21, at 98.

⁴³ See, e.g., Определение Конституционного Суда Российской Федерации от 24 октября 2013 г. № 1718-О об отказе в принятии к рассмотрению жалобы гражданина Алексева Николая

curtailment of NGO activities,⁴⁴ might well lead to new clashes between Strasbourg and Russia in the future. The approach adopted by the Court in the discussed judgment acknowledges this inherent uncertainty of life and the ensuing difficulty with any clear-cut rules of conflict resolution: no national judge can exclude the possibility of a case being brought before him by a successful Eur. Ct. H.R. applicant, where appeals to formal legal hierarchies between the international and the national courts would appear blind to the realities of conflict of values as they play out in the unique circumstances of actual disputes. Hence, the contemporary turn to pragmatism with its promise of practical and workable solutions for individual cases and – of course – the corresponding risks of arbitrariness and abuse of discretion. This ambivalence of *ad hoc* scenarios is now being realized by the Russian legal community, especially those favoring integration with Europe: on the one hand, there is a sense of relief that the Court has refrained from asserting ‘national sovereignty’ and its own ‘monopoly of interpretation’ *vis-à-vis* Eur. Ct. H.R.; on the other hand, there is no guarantee that the same things cannot be done through the backdoor, case by case. Yet, this is the reality of contemporary legal thinking – the era in which mutual contestation between parties to the legal process moves from

Александровича на нарушение его конституционных прав статьей 71 Закона Санкт-Петербурга «Об административных правонарушениях в Санкт-Петербурге» [*Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 24 oktyabrya 2013 g. No. 1718-O ob otkaze v prinyatii k rassmotreniyu zhaloby grazhdanina Alexeeva Nikolaya Alexandrovicha na narushenie ego konstitutsionnykh prav stat'ei 71 Zakona Sankt-Peterburga 'Ob administrativnykh pravonarusheniyaх v Sankt-Peterburge'*] [Decision of the Constitutional Court of the Russian Federation of 24 October 2013 No. 1718-O Rejecting Complaint by Nikolai Alexandrovich Alexeev Concerning Violation of His Constitutional Rights by Article 71 of the Law of Saint-Petersburg 'On Administrative Violations in Saint-Petersburg']], available at <<http://www.ksrf.ru/ru/Decision/Pages/default.aspx>> (accessed Aug. 6, 2014).

⁴⁴ See, e.g., Постановление Конституционного Суда Российской Федерации от 8 апреля 2014 г. № 10-П по делу о проверке конституционности положений пункта 6 статьи 2 и пункта 7 статьи 32 Федерального закона «О некоммерческих организациях», части шестой статьи 29 Федерального закона «Об общественных объединениях» и части 1 статьи 19.34 Кодекса Российской Федерации об административных правонарушениях в связи с жалобами Уполномоченного по правам человека в Российской Федерации, фонда «Костромской центр поддержки общественных инициатив», граждан Л.Г. Кузьминой, С.М. Смирenskogo и В.П. Юкечева [*Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 8 aprel'ya 2014 g. No. 10-P po delu o proverke konstitutsionnosti polozhenii punkta 6 stat'i 2 i punkta 7 stat'i 32 Federal'nogo zakona 'O nekommercheskikh organizatsiyakh', chasti shestoi stat'i 29 Federal'nogo zakona 'Ob obshchestvennykh ob'edineniyakh' i chasti 1 stat'i 19.34 Kodeksa Rossiiskoi Federatsii ob administrativnykh pravonarusheniyaх v svyazi s zhalobami Upolnomochennogo po pravam cheloveka v Rossiiskoi Federatsii, fonda 'Kostromskoi tsentr podderzhki obshchestvennykh initsiativ', grazhdan L.G. Kuz'minoi, S.M. Smirenskogo i V.P. Yukecheva*] [Judgment of the Constitutional Court of the Russian Federation of 8 April 2014 No. 10-P in the Case Concerning Review of Constitutionality of Provisions of Article 2, paragraph 6, and Article 32, paragraph 7, of Federal Law 'On Non-Profit Organizations', Article 29, section 6, of Federal Law 'On Civic Associations' and Article 19.34, section 1, of the Code of Administrative Offences of the Russian Federation as Instituted by the Ombudsman of the Russian Federation, Kostroma Support Center for Civic Initiatives Foundation, L.G. Kuz'mina, S.M. Smirensky and V.P. Yukechev]], available at <<http://www.ksrf.ru/ru/Decision/Pages/default.aspx>> (accessed Aug. 6, 2014).

the general to the particular. To borrow the words of the prominent United States Justice Oliver W. Holmes, only a 'molecular motion'⁴⁵ has been made today, and the rest is left for tomorrow, offering opportunities for further debate. Instead of a full stop, in the *Markin* case, there is a comma.

References

Luebbe-Wolff, Gertrude. *Who Has the Last Word? National and Transnational Courts – Conflict and Cooperation*, 30(1) Yearbook of European Law 98–99 (2011).

Paulus, Andreas. *A Comparative Look at Domestic Enforcement of International Tribunal Judgments*, 103 Proceedings of the Annual Meeting (American Society of International Law) 47 (2009).

Sales, Philip, Sir. *Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine*, (2012)2 Public Law 256, available at <<http://www.statutelawsociety.co.uk/wp-content/uploads/2014/01/PubL022012PSCompleteOffprint.pdf>> (accessed Aug. 6, 2014).

Wildhaber, Luzius. *The European Convention on Human Rights and International Law*, 56(2) Int'l & Comp. L.Q. 219 (2007).

Будылин С. Конвенция или Конституция? Международное право и пределы государственного суверенитета // Закон. 2013. № 12 [Budylin S. *Konventsiya ili Konstitutsiya? Mezhdunarodnoe pravo i predely gosudarstvennogo suvereniteta // Zakon*. 2013. No. 12 [Sergey Budylin, *Convention or Constitution? International Law and Limits of State Sovereignty*, 2013(12) Law]].

Зорькин В. Предел уступчивости [Zor'kin V. *Predel ustupchivosti* [Valery Zor'kin, *Limits to Acquiescence*]], *Rossiiskaya Gazeta* (Oct. 29, 2010), <<http://www.rg.ru/2010/10/29/zorkin.html>> (accessed Aug. 6, 2014).

КС поможет в реализации решений ЕСПЧ в России – зампред суда [KS pomozhet v realizatsii reshenii ESPCh v Rossii – zampred suda [Constitutional Court Will Help Implementing ECHR Decisions in Russia – Vice-President of Court]], *RAPSI*, <http://www.rapsinews.ru/judicial_news/20131206/270014556.html> (accessed Aug. 6, 2014).

Лапаева В. Дело «Константин Маркин против России» в контексте проблемы национального суверенитета // Сравнительное конституционное обозрение. 2012. № 2 [Lapaeva V. *Delo 'Konstantin Markin protiv Rossii' v kontexte problemy natsional'nogo subereniteta // Sravnitel'noe konstitutsionnoe obozrenie*. 2012. No. 2 [Valentina Lapaeva, *Case of Konstantin Markin v. Russia in the Context of National Sovereignty*, 2012(2) Comparative Constitutional Review]].

⁴⁵ *Southern Pacific v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

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