

## **The Tale of *Yukos* and of the Russian Constitutional Court's Rebellion against the European Court of Human Rights\***

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**ABSTRACT:** The Article analyses the latest decision of Russia's Constitutional Court (CC) of 19 January 2017 in the case of the now-defunct oil company *Yukos*. The CC defied the authority of the ECtHR by ruling that Russia was not bound to enforce the ECtHR decision on the award of pecuniary compensation to the company's ex-shareholders, as it would violate the Constitution of the Russian Federation (CRF). The Article focuses on the CC's judicial reasoning underpinning its interpretation of the Vienna Convention on the Law of Treaties (VCLT), *jus cogens* and the principle of sovereignty, as well as constitutional law principles of equality and fairness in the area of taxation. The Article reflects on the future of Russia's relationship with the ECtHR by considering whether the latest decision would lead to selective enforcement, amendment of the Constitution, or Russia's exit from the Council of Europe.

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### **1. Introduction**

The saga in the case of the defunct *Yukos* oil company is far from over after the Russian Constitutional Court (CC) in its decision of 19 January 2017 ruled that Russia was not bound to

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\* Lavoro referato dalla Direzione della Rivista.

enforce the ECtHR decision on the award of pecuniary compensation to the company's ex-shareholders, as it would violate the Constitution of the Russian Federation (CRF).<sup>1</sup> The decision of the CC is yet another blow to the Yukos shareholders after the Hague District Court in April 2016 quashed the USD 50 billion award of the Permanent Court of Arbitration (PCA) due to its lack of jurisdiction to arbitrate cases concerning international investment disputes under the Energy Charter Treaty (ECT).<sup>2</sup>

By scrutinizing the recent decision of the CC in *Yukos*, this Article traces the evolving judicial reasoning of the CC that has over the last two years challenged the authority of the ECtHR by refusing to enforce its decisions on the grounds of non-compliance with the CRF. The first part of the Article will provide a brief overview of the ECtHR decision in the *Yukos* case, including its decision on just satisfaction, which had led to the CC's first decisions that openly challenged the authority of the ECtHR. The second part of the Article will examine the 2015 CC's decision on the enforcement of the ECtHR decisions<sup>3</sup> as well as the 2016 CC's decision in *Anchugov and Gladkov*.<sup>4</sup> Following this, the Article will focus on the CC's ruling in *Yukos*, in particular judicial reasoning underpinning its interpretation of the Vienna Convention on the Law of Treaties (VCLT), *jus cogens* and the principle of sovereignty, as well as constitutional law principles of equality and fairness in the area of taxation. The Article will pinpoint problematic aspects of the CC's judicial interpretation as well as reflect on broader implications of the case for Russia's future in the Council of Europe (CoE).

## 2. *Yukos Case before the ECtHR*

The protracted argument between the Yukos oil company's ex-shareholders and Russia has spanned over a decade before the ECtHR. In 2004, Yukos shareholders sought compensation from the Russian government before the ECtHR in the amount of nearly 38 billion EUR for the actions of Russian authorities, which eventually led to its bankruptcy. Following lengthy proceedings on the admissibility of a case that were only settled in 2009,<sup>5</sup> the ECtHR delivered its judgment on the merits on 20 September 2011.<sup>6</sup> The Court found that Russia acted in breach of Article 6 of the

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<sup>1</sup> Decision of the Constitutional Court of the Russian Federation on the possibility of enforcement in accordance with the Constitution of the Russian Federation of the decision of the European Court of Human Rights of 31 July 2014 in the case of *OAO Neftyanaya Kompaniya Yukos v. Russia* (CC Decision in *Yukos*), 1-П/2017, 19 January 2017.

<sup>2</sup> Rechtbank Den Haag, C/09/477160, HA ZA 15-1, 20 April 2016, available at [deeplink.rechtspraak.nl](http://deeplink.rechtspraak.nl).

<sup>3</sup> Decision of the Constitutional Court of the Russian Federation on the review of constitutionality of Article 1 of the Federal Law "On Ratification of the Convention for The Protection of Human Rights and Fundamental Freedoms and Additional Protocols Thereto" (CC decision on the enforcement of the ECtHR decisions), 12-П, 14 July 2015.

<sup>4</sup> Decision of the Constitutional Court of the Russian Federation on the possibility of enforcement in accordance with the Constitution of the Russian Federation of the decision of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* (CC decision in *Anchugov and Gladkov*), 12-П/2016, 19 April 2016.

<sup>5</sup> *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. 14902/04, 29 January 2009 (Admissibility).

<sup>6</sup> *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. 14902/04, 20 September 2011 (Merits).

ECHR by failing to accord sufficient time to Yukos for preparation of its case before national courts.<sup>7</sup> More specifically, the Court found that those procedural irregularities encountered by the applicant restricted the rights of the defense and resulted in the violation of the right to fair trial in Article 6 of the Convention.<sup>8</sup>

Further to this, the ECtHR found two breaches of Article 1 of Protocol No. 1 (protection of property), in particular with respect to the assessment of penalties by the Russian tax authorities in 2000-2001 and their failure to “strike a fair balance” in the enforcement proceedings against Yukos.<sup>9</sup> With regard to the assessment of penalties, the Court criticized Russian tax authorities’ retroactive application of Article 113 of the Tax Code that imposed a three-year statutory time-bar for the investigation of tax offences. The Court was also critical of the CC’s decision of 14 July 2005 that interpreted a three-year bar limit to the investigation of tax offences as not applicable to taxpayers who acted abusively.<sup>10</sup> In the majority’s opinion, the CC’s interpretation on retroactive applicability of Article 113 to dishonest taxpayers could not have been reasonably foreseen, as “it had changed the rules applicable at the relevant time by creating an exception from a rule which had had no previous exceptions”.<sup>11</sup> In light of this, the Court found the violation of Article 1 of Protocol No. 1 on account of the “change in interpretation of the rules on the statutory time-bar resulting from the CC’s decision of 14 July 2005”, as well as “the effect of this decision on the outcome of the Tax Assessment 2000 proceedings”.<sup>12</sup>

In addition to this, the Court found that doubling of tax penalties for the applicant was contrary to Article 1 of Protocol No. 1.<sup>13</sup> The Court also found that subjecting the applicant company to an additional 7% enforcement fee in connection with the entire amount of its tax-related liability (amounting to staggering EUR 1.16 billion) was “completely out of proportion to the amount of the enforcement expenses” and contributed, to a great extent, to the company’s demise.<sup>14</sup> Given the rigidity, inflexibility and speed with which enforcement proceedings had been conducted against the applicant, the Court found that domestic authorities acted in violation of Article 1 of Protocol No.1 by failing “to strike a fair balance between the legitimate aims sought and the measures employed”.<sup>15</sup>

The issue of just satisfaction was settled in the 2014 ECtHR judgment that awarded EUR 1,866,104,634 in pecuniary damages to be paid by Russia to the Yukos ex-shareholders.<sup>16</sup> It is an unprecedented amount of pecuniary compensation awarded in the context of human rights litigation, although just a fraction in respect to the value of the defunct oil giant estimated at

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<sup>7</sup> Ivi, dispositif, (2)-(7).

<sup>8</sup> Ivi, para. 551.

<sup>9</sup> *Ibidem*.

<sup>10</sup> Ivi, para. 572.

<sup>11</sup> Ivi, para. 573.

<sup>12</sup> Ivi, para. 574.

<sup>13</sup> Ivi, para. 575.

<sup>14</sup> Ivi, para. 655.

<sup>15</sup> Ivi, paras. 656-658.

<sup>16</sup> *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. 14902/04, 31 July 2014 (Just Satisfaction).

approximately 40 billion EUR.<sup>17</sup> Despite the fact that applicant sought 38 billion EUR in pecuniary damages, the Court did not find any grounds for an award of the entire amount sought by the applicant, as it did not establish a causal link “between the violation found and the pecuniary damage allegedly sustained by the company”.<sup>18</sup> The reasoning underpinning the decision is not entirely unpredictable, as the Court followed its previous case law, in which it refused to speculate, “as to what outcome might have been had violation of the Convention not occurred”.<sup>19</sup>

The compensation awarded by the Court in the amount of EUR 1,866,104,634 under Article 41 of the Convention was calculated on the basis of pecuniary losses sustained by the applicant company in breach of Article 1 of Protocol No. 1 on account of the retroactive imposition of the penalties and the payment of tax penalties for the years 2000-2001,<sup>20</sup> as well as on account of the manner in which the authorities conducted the enforcement proceedings.<sup>21</sup> This created a backlash in the Russian political circles against the authority of the ECtHR. Following Russia’s unsuccessful application for a referral of the Court’s ruling to the Grand Chamber,<sup>22</sup> the Russian Ministry of Justice raised the question on the enforcement of the ECtHR decision before the CC, arguing that its enforcement would be contrary to the CRF.

### **3. Uncertain Relationship between International and Russian Law**

The constitutional provisions on the relationship between international and Russian law are far from clear. As a general rule, the primacy of international treaties and agreements could be clearly inferred from Article 15(4) of the CRF:

“The universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be part of its legal system. If an international treaty or agreement of the Russian Federation provides for other rules than those envisaged by law, the rules of the international agreement shall apply”.

The latest decisions of the CC (2017: *Yukos*, 2016: *Anchugov and Gladkov*, 2015: decision on the enforcement of the decisions of the ECtHR) raise an important question on the relationship between international treaty law and Russian law, given its findings on the primacy of the Constitution if there exists a conflict between the rules of international and national law. Article 15(4) of the CRF does not specify whether international treaties and agreements have primacy over

<sup>17</sup> C. MCCARTHY, *The ECtHR’s Largest Ever Award for Just Satisfaction Rendered in the Yukos Case*, in *EJIL: Talk!*, www.ejiltalk.org, 15 August 2015.

<sup>18</sup> *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. 14902/04, 31 July 2014 (Just Satisfaction), para. 19.

<sup>19</sup> Ivi, para. 18, quoting in support *Jalloh v. Germany* [GC], case no. 54810/00, para. 128, ECHR 2006-IX, and *Martinie v. France* [GC], case no. 58675/00, para. 59, ECHR 2006-VI.

<sup>20</sup> Ivi, paras. 20-26. The compensation awarded amounts to EUR 1,299,324,198.

<sup>21</sup> Ivi, paras. 27-35. The compensation awarded amounts to EUR 566,780,436.

<sup>22</sup> *ECHR Upholds Yukos Ruling*, in www.khodorkovsky.com (Khodorkovsky’s blog), 16 December 2014.

Russian federal law *only*, or both over Russian federal law and the Constitution. However, the reading of this broadly formulated provision suggests that international law enjoys primacy over Russian law, including its federal law and the CRF. At least, this was a common understanding as to how the provision should be construed, before the CC rendered its 2015 decision on the enforcement of the ECtHR decisions.<sup>23</sup> The proceedings were initiated on the request from a group of 93 parliamentarians (members of *Duma*) who requested to declare unconstitutional the federal law that obliges Russia to execute the decisions of the ECtHR. While dismissing the parliamentarians' request, the CC judges ruled *in abstracto* on the possibility to refrain from executing the decisions of the ECtHR when they were contrary to the CRF.<sup>24</sup>

#### 4. CC's Decision of 2015

The 2015 decision was largely a response to the 2014 ECtHR judgment that obliged Russian authorities to make payments to the Yukos ex-shareholders and, in doing so, stirred strong resistance in the circles of the Russian political *élite*. While interpreting state obligations to comply with decisions of the ECtHR, the CC judges invoked Article 46 of the Convention that has been repeatedly construed in the ECtHR case law as giving the State the choice of the means to execute a judgment in its domestic legal system.<sup>25</sup> However, the choice of the means does not mean that the execution of the ECtHR could be delayed or denied and renders the CC's argument somehow displaced.<sup>26</sup>

Following this, the CC turns to sovereignty, the primacy of the CRF in Russian constitutional legal order, and the impossibility of the implementation of international agreements that entail the curtailment of the constitutional rights and freedoms or may be detrimental to Russian constitutional order.<sup>27</sup> In light of this, the CC found that neither the ECHR nor the ECtHR case law enjoy the primacy over the CRF.<sup>28</sup> Speaking of Russia's role as a fully-fledged member of the International Community, which manifests in its ability to conclude international treaties and membership in international organizations, the CC found that such role does not entail giving up of its sovereignty at the expense of fundamental constitutional principles.<sup>29</sup> Hence, the CC

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<sup>23</sup> Decision of the Constitutional Court of the Russian Federation rejecting the request of the judge N.V. Grigoryevoi of Moscow District Court, No. 87-O., 3 July 1997.

<sup>24</sup> CC Decision on the enforcement of the ECtHR decisions, *supra* note 3.

<sup>25</sup> Ivi, para. 2.1. See also: ECtHR, *Belilos v. Switzerland*, App. 10328/83, 29 April 1988, para. 78; ECtHR, *Scordino v. Italy* [GC], App. 36813/97, 29 March 2006, para. 233.

<sup>26</sup> *Ibidem*. See also: ECtHR, *Vermeire v. Belgium*, App. 12849/87, 29 November 1991, para. 26: "The freedom of choice allowed to a state as to the means of fulfilling its obligation under Article 53 cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed [...]".

<sup>27</sup> Ivi, para. 2.2.

<sup>28</sup> *Ibidem*.

<sup>29</sup> *Ibidem*.

reserved the right, as a matter of exception, not to implement decisions of the ECtHR “if this is the only possible way to avoid violations of fundamental principles and norms of the CRF”.<sup>30</sup>

By ratifying the ECHR and accepting the binding effect of decisions of the ECtHR, Russia consented to treaty obligations that come with it. Although those obligations may place certain limitations on sovereignty, they are only in place as long as treaty obligations are in force. This, however, does not take away from the sovereign right of the state to withdraw from the treaty and, in doing so, rescind its treaty obligations. Being part of the ECHR system, while at the same time reserving the right to cherry pick decisions of the ECtHR for enforcement, it seriously undermines the legitimacy and integrity of the human rights protection system and sets up a bad precedent for other CoE Member States. As put by Lord Mackay of Clashfern, “the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights”.<sup>31</sup>

The most controversial part of the CC decision is its analysis of the VCLT, which was invoked by the judges as a basis for addressing the conflict of norms that arise out of the interpretation of the ECHR.<sup>32</sup> As a starting point, the judges referred to the *pacta sunt servanda* principle: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.<sup>33</sup> Further, they turned to the rules of treaty interpretation in Article 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>34</sup> Following this, the CC affirmed the right not to enforce a decision of the ECtHR if a different meaning was assigned to any provision of the ECHR that was originally envisioned in the process of judicial interpretation that goes against the Convention’s object and purpose, and when it contravenes peremptory norms of international law (*jus cogens*). The principle of sovereignty and non-interference in internal affairs were viewed as norms belonging to *jus cogens* that, if breached, could justify the deviation from existing treaty obligations and non-compliance.<sup>35</sup> This is a distorted reading of *jus cogens*, as it does not grant unfettered sovereignty to States to do what they wish but in fact restrains States behavior, in particular in the field of the protection of human rights.<sup>36</sup>

The CC also invoked Article 46(1) that, as a matter of exception, allows retracting from its consent to an international treaty that has been expressed in violation of internal law if such “violation was manifest and concerned a rule of its internal law of fundamental importance”.<sup>37</sup> Article 46(2) further specifies that “a violation is manifest if it would be objectively evident to any

<sup>30</sup> *Ibidem*.

<sup>31</sup> House of Lords and House of Commons, Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Report with formal minutes, 18 December 2013, paras. 92, 111.

<sup>32</sup> CC decision on the enforcement of the ECtHR decisions, *supra* note 3, para. 3.

<sup>33</sup> VCLT, Article 26.

<sup>34</sup> VCLT, Article 31(1).

<sup>35</sup> CC decision on the enforcement of the ECtHR decisions, *supra* note 3, para. 3.

<sup>36</sup> M. AKSENOVA, Anchugov and Gladkov *is Not Enforceable: The Russian Constitutional Court Opines in Its First ECtHR Implementation Case*, in *Opinio Juris*, opiniojuris.org, 25 April 2016.

<sup>37</sup> CC decision on the enforcement of the ECtHR decisions, *supra* note 3, para. 3.

State conducting itself in the matter in accordance with normal practice and in good faith”. The CC considers legal provisions of Chapter I and II of the CRF as belonging to internal law of fundamental importance that would allow retracting Russia’s consent with respect to certain provisions of international treaties.<sup>38</sup> The CC elaborates that, although Russia ratifies treaties that comply with its CRF, there may occur situations when an international organization in its interpretation of treaty provisions assigns them a different meaning that was originally envisioned that may be contrary to the CRF. In this instance, the CC re-affirms the primacy of the CRF and, while not challenging the validity of that treaty as such, it speaks of Russia’s impossibility to comply with obligations that arise out of expansive interpretation in a specific case.<sup>39</sup> The CC specifies that non-compliance with the ECtHR decisions in violation of the CRF relates to both general and specific measures.<sup>40</sup>

In support of its argument, the CC also referred to a number of national decisions in Austria, Germany, Italy and United Kingdom, in which the ECtHR decisions were deemed contrary to national constitutional order.<sup>41</sup> However, in that regard, the CC only provides a cursory review of such practices. As an example, in Germany, international treaties do not enjoy primacy over the German Constitution, as they are given status of a federal statute. This is different to the CRF that unequivocally speaks of the primacy of international law over Russian law. In *Görgülü*, which was referred to by the CC, the German Federal Constitutional Court emphasized that German law, including the Constitution, must as far as possible be interpreted in harmony with Germany’s obligations under international law.<sup>42</sup> In the aftermath of *Hirst v. UK*, in which the ECtHR ruled that UK’s blanket ban on convicted prisoners voting rights breached Article 3 of Protocol No. 1,<sup>43</sup> the Joint Committee on the Draft Prisoner Voting (Eligibility) Bill produced the report that called for the law reform to ensure compliance with the Convention.<sup>44</sup> The UK Parliament has been criticized for procrastinating and failing to take any meaningful steps to implement the committee’s report.<sup>45</sup> However, the nature of disagreement between Russia and the ECtHR is totally different to the UK standoff with the ECtHR regarding prisoners voting rights, as the CC “denies the

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<sup>38</sup> *Ibidem*.

<sup>39</sup> *Ibidem*.

<sup>40</sup> *Ibidem*.

<sup>41</sup> *Ivi*, para. 4.

<sup>42</sup> For the analysis of the decision, see G. LÜBBE-WOLFF, *ECHR and National Jurisdiction – The Görgülü Case*, paper presented at the conference on *The Implementation of Decisions of the European Court of Human Rights in the Jurisprudence of Constitutional Courts in European Countries* at the Institute for Law and Public Policy of Moscow, under the aegis of the Constitutional Court of the Russian Federation, in December 2005, available at [www.vaeter-aktuell.de/](http://www.vaeter-aktuell.de/).

<sup>43</sup> *Hirst v. UK* [GC], App. 74025/01, 6 October 2005.

<sup>44</sup> House of Lords and House of Commons, Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Report with formal minutes, 18 December 2013, para. 234.

<sup>45</sup> E. BATES, *The Continued Failure to Implement Hirst v. UK*, in *EJIL: Talk!*, [www.ejiltalk.org](http://www.ejiltalk.org), 15 December 2015.

enforceability of the ECtHR judgments” in Russia by “purporting to extinguish the effect of Article 46 of the ECHR”.<sup>46</sup>

In the aftermath of the CC decision on the primacy of the CRF, the Law on the Constitutional Court was respectively amended by granting the powers to the Court to rule on the possibility of the enforcement of the decisions of international human rights bodies on the territory of Russia.<sup>47</sup> It is important to note that such powers extend beyond decisions of ECtHR, although this provision was most probably conceived with the ECtHR in mind, but also extend to any decision stemming from any international human rights body. Notwithstanding such amendments, Article 15(4) of the CRF on the primacy of international law still remains intact, thereby creating a veil uncertainty with respect to the hierarchy of sources of law.

### **5. CC’s Decision in Anchugov and Gladkov**

In another notable decision regarding Russian prisoners’ voting rights, *Anchugov and Gladkov*, the CC found it “impossible” to enforce the decision of the ECtHR on the basis of its non-compliance with the CRF.<sup>48</sup> The decision was adopted following the amendment of the Law on the Constitutional Court that allowed judges to rule on the enforcement of the ECtHR decision. Similar to its reasoning in *Hirst v. UK*, as mentioned above, the ECtHR found that automatic and indiscriminate ban on prisoners’ voting rights was disproportionate, thereby violating Article 3 of Protocol No. 1 of the ECHR.<sup>49</sup> What has been the stumbling block in the enforcement of the decision is that Article 32(3) of the CRF that does not accord voting rights to convicted prisoners serving their sentence. By analyzing the intention of legislators, the CC affirmed that the ban in Article 32(3) was meant to cover *all* convicted persons serving their sentence and no other interpretation was possible.<sup>50</sup>

The CC also addressed the ECtHR decision in part where it called upon the Russian government, in view of the complex process of amending the CRF, “to explore all possible ways to ensure compliance with the Convention, including through some form of political process or by interpreting the Constitution in harmony with the Convention”. However, the CC maintained that the ECtHR could not be enforced with respect to implementing general measures that involve repealing or amending Article 32(3) of CRF that enjoys primacy in Russian legal system.<sup>51</sup>

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<sup>46</sup> P. LEACH, A. DONALD, *Russia Defies Strasbourg: Is Contagion Spreading?*, in *EJIL: Talk!*, www.ejiltalk.org, 19 December 2015.

<sup>47</sup> Federal Constitutional Law Amending the Federal Constitutional Law on the Constitutional Court of the Russian Federation, approved by the *Duma* on 4 December 2015 and by the Federation Council on 9 December 2015. It entered in force on 14 December 2015.

<sup>48</sup> CC Decision in *Anchugov and Gladkov*, *supra* note 4, *dispositif*, 1-3.

<sup>49</sup> ECtHR, *Anchugov and Gladkov v. Russia*, App. 11157/04, 04 July 2013.

<sup>50</sup> *Ivi*, para. 4.1.

<sup>51</sup> CC Decision in *Anchugov and Gladkov*, *supra* note 4, *dispositif*.

Nevertheless, the CC found that the ECtHR decision could be enforced with respect to implementing general measures that ensure fairness, differentiation and proportionality of voting rights. In that respect, the CC brought up a distinction between custodial and non-custodial sentences emphasizing that the first-time offenders do not receive imprisonment as a form of punishment, which meant their voting rights were safeguarded. Therefore, the CC clarified that only the rights of prisoners convicted of serious offences who had received imprisonment terms were affected.<sup>52</sup> As to the implementation of individual measures benefitting individual applicants, the CC found that their conviction for serious offences and lengthy sentences automatically led to their disenfranchisement.<sup>53</sup> The significance of the CC's decision is that it is the first decision arising out of the controversial amended law on the possibility to deny the enforcement of the ECHR, signalling future non-compliance tendencies.<sup>54</sup>

## 6. CC's Decision in Yukos

The CC decision in *Yukos* replicates to a great extent the judicial reasoning of its previous ruling in *Anchugov and Gladkov* by re-asserting the primacy of the CRF over the ECHR.<sup>55</sup> While acknowledging the primacy of the CRF, the majority treaded carefully by calling to find an appropriate balance – when enforcing the judgments of the ECtHR – between “the spirit and letter of the ECHR” and the Russian constitutional protection of human rights.<sup>56</sup> In order to substantiate its position on the primacy of the CRF over the ECHR in parts where there exists a conflict between two legal instruments, the majority invoked the same obscure reading of Article 31(1) and 46(1) of the VCLT as in its 2015 decision on the enforcement of the ECtHR decisions (discussed above).<sup>57</sup> As rightly put by Deutsch, “if claims under treaties were subject to being met with contentions that the treaty is not binding on the country against which the claim is made because of some internal-law limitation, the stability of an international legal order would be jeopardized”.<sup>58</sup>

### 6.1. Decision Highlights: Retroactive Application of Tax Legislation, Non-Enforceability of the ECtHR Decision and Counting on Russia's Good Will

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<sup>52</sup> *Ibidem.*

<sup>53</sup> *Ibidem.*

<sup>54</sup> For more, see M. AKSENOVA, *Anchugov and Gladkov is Not Enforceable*, cit.

<sup>55</sup> CC decision in *Yukos*, *supra* note 1. See also: I. MARCHUK, *Flexing Muscles (Yet Again): The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case*, in *EJIL: Talk!*, www.ejiltalk.org, 13 February 2017; M. TIMOFEYEV, *Money Makes the Court Go Round: The Russian Constitutional Court's Yukos Judgment*, in *Verfassungsblog*, verfassungsblog.de, 26 January 2017.

<sup>56</sup> *Ivi*, para. 2.

<sup>57</sup> *Ibidem.*

<sup>58</sup> E. P. DEUTSCH, *Vienna Convention on the Law of Treaties*, in *Notre Dame Law Review*, 1971, 297 ff., 301.

The subsequent parts of the CC's judgment dealt with interpretation of Article 113 of the Russian Tax Code that provides for a statutory time-bar to hold a person accountable for tax offences. The CC upheld its earlier decision of 14 July 2005 that the statutory time-bar was not applicable to "dishonest taxpayers".<sup>59</sup> In its judgment, the CC also referred to the historical context of turbulent '90s, marred by economic instability, in which the tax legislation and regulations have been shaped.<sup>60</sup> In the opinion of the majority, the weaknesses of the transitional period marked by widespread tax evasion and poor accountability for tax offences were addressed through the reform of the Russian tax system in early 2000, which aimed to guarantee the compliance of the biggest taxpayers with its obligations.<sup>61</sup>

The CC found that, despite the ECtHR award of pecuniary damages to Yukos, such damages had been the result of the company's illegal activities that made the state interfere by imposing responsibility for the damage caused.<sup>62</sup> More specifically, it held that Yukos took advantage of "sophisticated unlawful schemes" to avoid paying taxes and left behind an unsettled debt, which had the "destructive effect" on the Russian legal system.<sup>63</sup> In light of this, the CC concluded that enforcement of the ECtHR decision – through the distribution of payment among the ex-shareholders and their successors – would contravene the constitutional principles of equality and fairness in the area of taxation.<sup>64</sup>

Finally, in a rather conciliatory tone, the CC held that it did not exclude the possibility of Russia demonstrating its good will and agreeing to pay *some* ex-shareholders, in particular those who had incurred financial loss as a result of the actions of the company's management.<sup>65</sup> However, such payment was recognized as being conditional upon Yukos' settling of its outstanding debts with the creditors.<sup>66</sup>

### 6.1. *Creative Legal Argument or Flawed Judicial Reasoning?*

The decision is problematic in many aspects and one can easily be lost in the jungle of intricate legal questions on the relationship between Russian tax legislation, the Constitution and the ECHR. The most problematic is the CC's interpretation of Russia's international treaty obligations that are superseded by the authority of the CRF. Technically, any international agreement or treaty that Russia has ratified or will choose to ratify in future could be challenged on the basis of its failure to comply with the CRF, given far reaching repercussions of the CC's 2017 *Yukos* and 2016 *Anchugov and Gladkov* decisions. This would lead to the lack of predictability at the international level as to whether Russia, as a party to any treaty, will honor its obligations under international law.

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<sup>59</sup> CC decision in *Yukos*, para. 4.2.

<sup>60</sup> *Ivi*, para. 4.3.

<sup>61</sup> *Ibidem*.

<sup>62</sup> *Ivi*, para. 4.5.

<sup>63</sup> *Ibidem*.

<sup>64</sup> *Ibidem*.

<sup>65</sup> *Ivi*, para. 7.

<sup>66</sup> *Ibidem*.

The interpretation of the principle of sovereignty and non-interference in internal matters as belonging to *jus cogens* that justifies Russia's non-compliance with its international treaty obligations is a misreading of fundamental principles and values, upon which international law is erected. Also, Article 113 of the Tax Code, which is a technical provision on the statute of limitations in tax proceedings, has been elevated to the constitutional law status and construed by means of invoking overly broad and abstract principles of equality and fairness in the matters of taxation. As it stands, the decision of the CC is an example of poor judicial reasoning obfuscated by references to overly stretched principles of international and constitutional law that, when applied in the context of the case, make little sense. At the heart of the case are the matters of tax law, in particular retroactive application of the legal provision in the Tax Code as well as the enforcement of tax penalties. However, acknowledging that would impede the CC to exercise its jurisdiction, as it can only intervene when constitutional law matters are at stake.

### ***7. Was the CC an Appropriate Venue?***

A rare glimpse of hope is the dissenting opinion of Judge Yaroslavtsev. He argues that the Ministry's of Justice request regarding the enforcement of the ECtHR judgment was inadmissible.<sup>67</sup> In support of this, as a starting point, he referred to his earlier dissent, in which he argued against the CC's broad interpretation of Article 113 of the Tax Code that allowed for its retroactive application after the statute of limitations had passed.<sup>68</sup>

Following this and turning to the substance of the ECtHR decision, he questions the appropriateness of bringing the matter before the CC. He points to the available referral mechanism provided for in Article 43 of the ECHR, which entitles any party to the case, "in exceptional circumstances, to request that the case be referred to the Grand Chamber".<sup>69</sup> He also criticized the Ministry for seeking "simplified" ways to resolve the impasse.<sup>70</sup> In his opinion, the CC cannot exercise its jurisdiction, as it would contravene the principle of *nemo iudex in propria causa* (no one should be a judge in his own case).<sup>71</sup> This is due to the fact that the ECtHR judgment in *Yukos* was to a great extent based on the 2005 CC's decision on retroactive application of tax legislation.<sup>72</sup> Therefore, he directed the Ministry – instead of seeking "easy ways" to get out of the deadlock – to continue the dialogue with the CoE Committee of Ministers, with the view of finding the solution.<sup>73</sup>

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<sup>67</sup> Separate Opinion of Judge Yaroslavtsev, para. 1.

<sup>68</sup> *Ibidem*.

<sup>69</sup> *Ivi*, para. 2.

<sup>70</sup> *Ibidem*.

<sup>71</sup> *Ibidem*.

<sup>72</sup> *Ibidem*.

<sup>73</sup> *Ivi*, para. 3.

### **8. *What's Next? Selective Enforcement, Amendment of the Constitution, or Exit from CoE?***

The CC decision was followed by a relatively mild reaction of the CoE, that expressed its concern over Russia's refusal to implement the judgment as threatening "the very integrity and legitimacy of the system of the ECHR" and urging the Russian government "to change the federal law to accommodate for the CC's powers to prevent the implementation of the judgments of the ECtHR".<sup>74</sup> In fact, the law has already been changed in 2015 granting such powers to the CC, so it is the CRF that has to be amended accordingly in the part on the CC's powers as well as the primacy of international law in Article 15(4). However, this is not an "elegant" solution to the problem, as such constitutional amendments would render the authority of the ECtHR partially meaningless, as it would allow the CC to cherry pick decisions to be enforced on the territory of Russia. This would also undermine the principle of finality of judgments of the ECtHR. Whereas Russia's compliance record with the decisions of the ECtHR is patchy, the CC's 2017 and 2016 decisions are the first of a kind adopted by the highest judicial authority of a CoE Member State openly dismissing the authority of the ECtHR and undermining Article 46 of the ECHR. The latest developments take place at the backdrop of mounting pressure on Russia in light of nearly 4000 individual applications related to the events eastern Ukraine and Crimea submitted to the ECtHR.<sup>75</sup>

This is definitely not last time the CC invoked its powers to deny the enforcement of the ECtHR decision and may exhibit early signs of departure from the CoE. However, the exit of Russia from the CoE would be unfortunate, as the decisions of the ECtHR have had a catalyzing effect on the development of the legislative and judicial practices in Russia. It would also wreck significant reputational damage, as leaving the CoE would be tantamount to breaking away from the rule of law and human rights.

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<sup>74</sup> CoE Statement, *Commissioner Concerned about Non-Implementation of a Judgment of the European Court of Human Rights in Russia*, 20 January 2017, available at [www.coe.int](http://www.coe.int).

<sup>75</sup> CoE Press Country Profile of Russia, March 2017, available at [www.echr.coe.int](http://www.echr.coe.int).