In Search for a Theory of Constitutional Interpretation in Congruence with European Human Rights Law

Anna Jonsson Cornell
Abstract

This article seeks to illustrate the challenges facing the Russian Federal Constitutional Court (RFCC) when it comes to combining constitutional pragmatism and the implementation of European human rights law. It will focus on the role of the RFCC for implementing and developing the Russian Federal Constitution (RFC). In so doing, most of the attention will be had to the methods of interpretation used by the RFCC in two cases; the Markin case and the Gladkov case. These cases have been chosen for the very reason that they have been dealt with by the European Court of Human Rights. These two cases also illustrate the dialogue between the RFCC and the ECtHR, or rather the lack thereof. I will argue that this dialogue can, and needs, to be improved, and that such a dialogue is crucial for the implementation and development of the RFC. I will suggest how this can be achieved and when doing that I will draw some parallels to the Swedish experience. The main conclusion is that the method of constitutional interpretation applied by the RFCC restricts the impact of European human rights law on Russian constitutional law.

Working paper 2014:2
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Jur. dr. Anna Jonsson Cornell
Associate professor and senior lecturer in comparative constitutional law
Faculty of Law
Box 512
SE 751 20 Uppsala
anna.jonsson_cornell@jur.uu.se

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Introduction*

First let me congratulate the conveners for putting together a symposium on this important topic and thereby allowing us to join the celebration of the 20th anniversary of the Russian Federal Constitution (RFC). It is to my mind important that we continue to do research on Russia’s constitutional developments, and that we put the analysis in a historical and comparative perspective. It is crucial in times of globalization and legal pluralism that Russian constitutional law is not only studied in a national context taking only Russian legal sources and tradition into account. The Russian legal system is as little an isolated island as is the Russian economic system. Processes of global interaction and interdependence cannot be disregarded.

In this article I seek to illustrate the challenges facing the Russian Federal Constitutional Court (RFCC) when it comes to combining constitutional pragmatism and the implementation of European human rights law. I will focus on the role of the RFCC for implementing and developing the Russian Federal Constitution (RFC). In so doing, I will devote most of my attention to the methods of interpretation used by the RFCC in two cases; the Markin case, and the Gladkov case. I have chosen these two cases for the very reason that they have been dealt with by the European Court of Human Rights (ECtHR). By doing so, I seek to illustrate the dialogue between the RFCC and the ECtHR, or rather the lack thereof. I will argue that this dialogue can, and needs, to be improved, and that such a dialogue is crucial for the implementation and development of the RFC. I will suggest how this can be achieved and when doing that I will draw some parallels to the Swedish experience. It should be noted that in both the Markin and the Gladkov case the RFCC declared the constitutional complaint inadmissible and that these cases were not decided on its merits in full. Certainly, this will limit the general application of the conclusion drawn in this article. Rather, this article should be seen as a

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* This article is based on a presentation made by the author at the Roundtable "Direct Effect of the Constitution: 20 Years of Russian Experience", arranged by St. Petersburg State University, Law Faculty, North-West Branch of the Association of Lawyers of Russia, with support of the Constitutional Court of the Russian Federation and the Ministry of Justice of the Russian Federation, in St Petersburg, Sept 20-21, 2013. The author would like to thank Justice Thomas Bull for valuable comments on the text.
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case study that contributes to our knowledge of the methods for constitutional interpretation applied by the RFCC.

I would like to put my comments in the context on an ongoing debate on Russia and European human rights law and therefore take my starting point in a special issue of the Review of Central and East European Law from 2012 in which Russia and European human rights law is dealt with. One of the authors, and the guest editor, professor Lauri Mälksoo, argues that; Russia does accept human rights law in principle, both at the level of international law and national constitutional law, the 1993 RFC has a natural law approach to human rights, and that becoming a member of the Council of Europe (CoE) and adhering to the European Convention on Human Rights (ECHR) was revolutionary and that the latter has the potential to penetrate state sovereignty in Russia, in its endeavor to protect human rights.

I agree in principle to these three points. However, in this article I will make some additional observations from which I will draw conclusions that further our understanding of the points made and thereby add to the current discussion on Russia and European human rights law. Mälksoo’s first point, i.e. that Russia accepts human rights law in general both nationally and internationally constitutes my starting point and hence my focus will be on Mälksoo’s second and third points. Let us start with the second point, i.e. that the RFC has a natural law approach to human rights. This is true if one focuses on the surface level of the law. I would argue that the RFCC is hampering the development of the RFC beyond the letter of the law by applying an interpretative method based primarily on formalism and legal positivism. Such an approach hinders the development of the constitution in a manner that would be consistent with European human rights law. I will illustrate and further develop this argument by referring to two cases dealt with the by the ECtHR and the RFCC; the Markin case and the Gladkov case. Mälksoo’s third point related to state sovereignty has proven to be a difficult question for Russia when implementing European human rights law, as will be further illustrated in this article. Russia is certainly not alone in having objections to the interpretations of the ECtHR and its interpretation of the scope of the margin of appreciation in specific cases. Nevertheless, Russia did sign and ratify the ECHR as a sovereign state and of free choice. Moreover, this was the result of an outspoken ambition of Russia “returning to Eu-
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roped”. In all international and regional legal cooperation national identity and state sovereignty will be an important and delicate issue and there are various ways to handle this question.7

As will be further argued in this article, Russia has still to employ the measures that are available within the ECHR and the limits set by the ECtHR to protect interests and values that are considered vital to state sovereignty. However, in order to be able to do that, Russian courts in general and the RFCC in particular need to engage in a dialogue with the ECtHR which is based on developed methods of constitutional interpretation rather than political and nationalistic arguments, as was the case in the Markin and Gladkov case. From these cases it seems like the clash between Russia’s traditions and democratic vision on the one hand, and the individual rights granted by the ECHR and its protocols, on the other, is on the rise. The ECtHR argues in these two important cases that the margin of appreciation is much smaller than what the Russian government claims. In both cases, the RFCC have declared the case inadmissible, which raises the question if it should not have been more in line with the principle of subsidiarity if the RFCC had, in a preemptive fashion, dealt with these cases on its merits? This question of course provokes yet another question; was the RFCC hindered by the RFC and the federal constitutional law on the RFCC to hear these cases? I will return to these question below. I would also argue that when a constitutional doctrine and methods of interpretation that allows for European human rights law to be dealt with in substance by Russian courts is at place, then the RFCC can move beyond constitutional political pragmatism and in a serious manner proceed with developing the constitution so that it preserves its legitimacy amongst the Russian people and, at the same time, implements the European human rights law that Russia is bound by. However, the legitimacy aspect begs yet another question which is related to how we view the constitution; is it mainly expressing the letter of the law, is it primarily an instrument without inherent values, or is to be seen as an expression of culture? Irrespective of what answer we provide to these questions it will have implications for how the role the constitutional court and its role in developing the constitution is viewed. Where in rests, and where should, the primary allegiance of a constitutional court rest? I will now proceed with the analysis of the the Markin and the
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The RFCC on Markin

Markin, a father of three, was denied parental leave as an employee of the Russian military service. The RFCC’s decision was delivered in January 15, 2009. In his constitutional complaint Markin argued that his rights as established in articles 19.2, 38.2 and 55.3 RFC had been violated. Article 19 stipulates the right to equality and not to be discriminated against, including on the basis of sex. Article 38.1, 2 establishes first that motherhood is protected by the state and secondly that parents are equally responsible for the upbringing and caring for their children. Hence, article 38 itself contains an interesting contradiction which might lead to difficulties in its implementation. Article 55.3 stipulates on what grounds a constitutional right can be restricted.

The RFCC declared the case inadmissible, stating that there had been no violation of the complainant’s constitutional rights. In reaching this decision the RFCC relied on article 37 which states that labor is free, article 59 stipulating the duty and obligation to defend the fatherland, article 71 m) referring to the jurisdiction of the federal state, article 72.1 b) referring to the joint jurisdiction between the federal center and the federal subjects, article 114 d), e) referring to the powers of the federal government, and article 55.3 according to which rights and freedoms can be restricted by federal law when necessary to achieve certain goals such as the defense and security of the state. Articles 71, 72, 114 are referred to in order to establish the state’s legislative powers within this particular area. Subsequent to concluding that the federal legislature is empowered to restrict the rights in article 19 and 38, the court moves on to assess the constitutionality of the federal laws restricting the constitutional rights of the applicant. The RFCC concludes that the federal law prohibits men serving in the military from combining their service with parental leave and that this is constitutional due to the special legal status of the military, and the constitutional aims that justify restrictions on rights and freedoms. Thus, the RFCC first states that there has been no violation of a constitutional right (since the rights can be constitutionally restricted the
complainant has no rights) and secondly that this limitation is justified due to the voluntary character of the service.

The argument of the RFCC was basically that the federal legislature is entitled to legislate within this area in order to secure the defense and security of the Russian state and that this includes restricting, by law, constitutional rights and freedoms of military personnel. Since Markin had freely chosen to work in the military he was free to leave the military if the conditions did not suit him. Hence he had no rights under the constitution that were violated by the federal laws regulating military services and parental leave, since these rights, i.e. the right not to be discriminated against on the basis of sex and the right and obligation to raise ones children, had lawfully been removed from him by federal law.

Since people join the military voluntarily and since the legislature has the right to restrict rights in this area referring to articles 71,72, 114, and 55.3, in the RFCC’s interpretation, anyone joining the military is basically giving up all constitutional rights, including the right not to be discriminated against on the grounds of sex. When reaching this decision the RFCC relied on its own case law relating to the rights of employees within state security services broadly defined. According to this case law it is extremely hard to hear a case on its merits if it involves the status of employees within the police, security services or the military. The essence of this jurisprudence is that the state is free to regulate all conditions for employees within this sector and those employees basically have waived their constitutional rights.

It is clear that the RFCC by employing a formalistic and state oriented method of constitutional interpretation without paying any regard to the ECHR reaches a decision which is not in congruence with European human rights law, as we now know. There are alternative methodological approaches to a case like this. First, the RFCC could have concluded that the current legislation restricts men’s right to parental leave in the military. Thereafter the court could proceed to assessing whether this restriction is constitutional or not. When doing so the court has to assess whether the constitutional right in question 1. can be restricted, i.e. that it is not absolute, and 2. if it can be restricted under what circumstances. After concluding that the right can be restricted the court would have to assess whether this has been done in a manner consistent with the constitution. In this particular case that would mean to ensure that
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the restriction was done by federal law (legality) and that it was necessary to achieve the aim in question (proportionality).

The RFCC concludes that the federal legislature can restrict the rights in question. The issue of legality is decided by reference to articles 71, 72, 114, and 55.3 RFC. According to article 55.3, articles 19 and 38 can be restricted by federal law, if the requirements in article 55.3 are fulfilled, including a proportionality test. In this particular case, a legal restriction of men’s rights has been done in the interest of the defense and security of the state. The federal law regulating parental leave for military personnel provides a right to parental leave for service women only. The RFCC argues that the discrimination against men by this law is justified due to the low number of women serving in the military, with reference to article 38.1 RFC stating that the state shall protect motherhood, and finally due to the fact that parental leave en masse potentially could be harmful to the defense and security of the state. This is interesting since the RFCC seems to combine a method that allows it to rely on empirical facts, in this case the low number of women in the military and the potential dangers of men taking parental leave en masse, with a contextual interpretation of articles 19, 38 and 57 RFC. Taken together this allows for a narrow definition of the right to non-discrimination on the basis of sex and more importantly an, I would argue misguided, assessment of the proportionality of the measure.

As I understand it the RFCC interprets article 38.1 as limiting the right not to be discriminated against on the grounds of sex according to article 19.2 and 3, and the right for men to take part in their children’s upbringing according to article 38.2. Hence the RFCC can conclude that there has been no unconstitutional discrimination on the basis of sex and no violation of article 19 RFC. Moreover, in conducting its assessment of the constitutionality of the federal law in question the RFCC decides it to be proportional and justified by relying on article 57 RFC stating that labor is free. Taken together this brings with it a decision that clearly puts the interest of the state first, the protection of motherhood second and only thereafter the principle of non-discrimination on the basis of sex.

This method of interpretation, I would argue, hinders the RFCC from developing the RFC in a manner consistent with the ECHR. The ECHR is according to article 15.4 RFC part of the Russian
legal order and could hence be considered by the RFCC when engaging in constitutional review. Should the RFCC have applied a method of constitutional interpretation that allowed for it to assess the scope of the constitutional rights in conformity with the ECHR the scope of article 19 RFC would be assessed differently and more importantly, the assessment of the proportionality of the restriction could have been assessed differently. In this context it is interesting to note that the RFCC refers to an ILO convention, but it does not in any way, at least not as stated in the decision, refer to the ECHR. Secondly, the RFCC does not elaborate on article 55.3 or employ the principle of proportionality in an explicit way. It just concludes that the legislature can regulate this matter according to the constitution, and that Markin is free to leave the military and hence that no right has been violated. As an alternative, the RFCC could have chosen to decide whether the federal laws were proportional in relation to its aim, i.e. trying to answer the question if discrimination on the basis of sex was necessary in order to protect the defense and security of the state? The RFCC chose not to do so.

The ECtHR on Markin
The ECtHR grand chamber delivered its judgment in the Markin case on March 22, 2012. The ECtHR found Russia to be in violation of article 14 in conjunction with article 8 of the ECHR and that Markin had been discriminated against on the grounds of sex when he was denied full parental leave. The Russian government objected, stating that that Markin had no victim status, that the issue had been effectively resolved, and that Markin was abusing the right to individual petition. The ECtHR dismissed all three preliminary objections and moved on to decide on the merits of the case, inter alia because it considered the subject matter - the difference in treatment under Russian law between servicemen and servicewomen as regards entitlement to parental leave – to be an important question of general interest not only for Russia but also for other States Parties to the Convention. In finding Russia to be in violation of article 14 in conjunction with article 8 the ECtHR concluded that there is an evolution of society, on the European level, towards equal treatment concerning parental leave, also in the military. The ECtHR reached this conclusion from a comparative analysis. This is an illustrative and concrete
example of how comparative law is used to determine what is a common European standard and hence the content of the ECHR. Secondly, the ECtHR stated that references to national traditions are not valid and that it is not in accordance with the ECHR to invoke gender stereotypes in order to justify a difference in treatment on the basis of sex. The ECtHR refers to its case law on this issue and underlines that the advancement of gender equality is a major goal in the member states of the CoE, implying that it is a common European standard not to discriminate on the basis of sex. However, certain restrictions on parental leave are justified although they can never be discriminatory or of a too broad or sweeping nature, meaning that they should focus on certain areas of expertise or positions. And lastly, that one cannot waive its right to be discriminated against on the grounds of sex since this is too much of an important public interest. Taken together this means that the contracting states’ margin of appreciation is very limited in this area and that any restrictions of the rights protected in this regard must be of a well-defined and limited character, and most importantly, they shall not be discriminatory on the grounds of sex.

What does this mean for the Russian case? If the conditions established by the ECtHR are fulfilled the very aim argued by the Russian government, i.e. the security of the state, can still be fulfilled. However, there are high demands concerning the quality of the law. Having this knowledge and of course with the benefit of hindsight it is interesting to keep in mind the argument of the RFCC when deciding the Markin case. Let us now turn to the Gladkov case.

The RFCC on the Gladkov Case
Before we proceed with the assessment made by the ECtHR in the Anchugov and Gladkov case, the RFCC decision in the Gladkov case will be discussed. The applicant challenged article 32.3 RFC before the RFCC stating that it violated his right to vote and right not to be discriminated against as stipulated in articles 3.3, 6.2, 17.1,2 and 19 RDC. According to article 32.3 imprisoned persons do not have a right to vote in elections.

On May 27, 2004 the RFCC issued a decision (No. 177-O) stating that it did not have the jurisdiction to review the complaint,
based on the argument that the RFCC cannot review one article of the RFC against another article of the RFC. In reaching this conclusion the court also referred to articles 40.2 and 43.1, p. 1 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation. This decision is final according to article 79.1 of the same law. Thus, the RFCC declared Gladkov’s constitutional complaint inadmissible since it did not fall under the jurisdiction of the court.

According to article 125.4 RFC the RFCC has jurisdiction to review the constitutionality of federal laws in concrete cases when a complaint has been filed by a citizen or upon a request from a court. Thus, from a strict formalistic point of view the RFCC would be correct in declaring Gladkov’s complaint inadmissible. However, the restriction of voting rights for prisoners is further regulated in federal laws, inter alia the Federal Law on Fundamental Guarantees of Electoral Rights and Eligibility to Participate in a Referendum of the Citizens of the Russian Federation. Thus, the applicant could have been more elaborate in its complaint by for example referring to the relevant federal laws and asking the RFCC to assess their compatibility with the RFC. And, the RFCC could have adopted a more generous approach when deciding on admissibility, taking the federal laws into account ex officio.

The ECtHR on the Anchugov and Gladkov Case

The ECtHR delivered its decision in the Anchugov and Gladkov case on July 4, 2013. The two applicants, both sentenced to prison, again argued that their right to vote had been violated by article 32.3 of the RFC. The ECtHR found Russia to be in violation of Protocol no. 1 article 3, i.e. the right to vote.

What is interesting with this case is, among other things, that the Russian government argued that the RFC is the highest-ranking legal norm in Russia and that it takes precedent over all international law obligations, including the ECHR. This argument should be understood in the context of article 15.4 RFC and its contested application. The Russian government therefore argued that the ECtHR did not have jurisdiction to review the compatibility of article 32.3 with the ECHR. The ECtHR answered that the contracting parties have a responsibility to comply with the ECHR “with respect to their jurisdiction as a whole, including the consti-
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tution”, and that Russia has undertaken to secure to everyone within its jurisdiction the right to vote since no reservation was made. Hence the court is competent to review whether Russia complies. The ECtHR underscored that this is not a review in abstracto but rather a concrete review aiming to establish whether article 32 RFC in this particular case had led to the applicants’ right to vote (as defined by the protocol and ECtHR case law) being infringed.16

Let us proceed with the ECtHR’s assessment on the merits. The court concluded that the right to vote is not absolute and that the contracting states must be awarded a wide margin of appreciation, thereby confirming its earlier case law. However, the court stated that it will review national measure in order to ensure that they do not “impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate”.17 According to the court’s case law all blanket restrictions on the right to vote are considered to be outside of the margin of appreciation. When disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it is not compatible with Article 3 of Protocol No. 1.18

Notably, in this specific case the court accepted the aims of the Russian law, i.e. enhancing civic responsibility and respect for the rule of law and ensuring the proper functioning and preservation of civil society and the democratic regime, and recognized that those aims could not, as such, be excluded as untenable or incompatible with the provisions of Article 3 of Protocol No. 1.19 But more importantly, the court did not accept the argument of proportionality by the Russian government, nor did the court accept the argument of historical traditions and that article 32 of the RFC corresponds to the Russian vision of democracy. The ECtHR concluded that article 32.3 RFC poses a blanket restriction on all prisoners serving a prison sentence.20 The court underlined that it does not matter that the relevant law is the constitution; “a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations”.21 In conclu-
sion, the Court found that Russia have overstepped the margin of appreciation afforded to it in this field and that Russia has failed to secure the applicants’ right to vote guaranteed by Article 3 of Protocol No. 1.\textsuperscript{22}

For the purpose of my arguments in this article, the final paragraph in the Court’s decision is of particular interest. The ECtHR stated that “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 No. 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.”\textsuperscript{23} Hence, the ball was passed back to the RFCC.

The difficulties facing the Russian constitutional order as a result of this decision might seem severe. The wording of the RFC says one thing and in changing it an amendment of the constitution would be needed. However, the question remains whether this article allows for further regulation in federal law, which should be the case. If so, by ensuring that the requirements of the ECtHR on restrictions of voting rights are fulfilled in the federal law, the federal legislature can avoid a constitutional amendment. Thus, in this particular case the future constitutional conundrum facing Russia is not only related to methods of constitutional interpretation but also the quality of laws restricting constitutional rights. Nevertheless, by choosing a more generous approach to issues of admissibility in combination with a convention conform method of constitutional interpretation the RFCC could have avoided this ECtHR decision. Such a decision would probably have stirred a heated domestic debate on the separation of powers between the legislature on the one hand, and the RFCC on the other.

In all fairness, one has to recognize that the case law of the ECtHR has developed quickly, that the decision of the court in the Scoppola case is important, and that this decision was not available to the Russian courts deciding in the Gladkov case. In the Scoppola case the court after a comparative analysis §§ 45-60, concludes that there is an international trend towards fewer restrictions on convicted prisoners’ voting rights.\textsuperscript{24} This is interesting for many reasons and the implications for interpreting national constitutional
law are many. First, it confirms that the ECHR is a living document, constantly being developed by the ECtHR in its case law. Secondly, the ECtHR is increasingly using comparative and international law to assess what is a common standard concerning a certain right. Countries that find themselves being outliers in these contexts will of course be hit harder by the case law of the ECtHR. This poses challenges to all contracting states and it puts high demands on national legislation and national courts. How this is dealt with nationally is partly a result of national legal culture and national methods of constitutional interpretation. A country like Russia with a positivistic and state oriented method of constitutional interpretation will experience severe challenges as the Gladkov and Markin cases illustrate. It is now up to the Russian legal community broadly defined to determine how to handle this challenge and the choices made will determine how the RFC will develop.

The Scoppola case is of relevance to Russia’s laws on voting rights especially from the perspective that it assesses the quality of the Italian law reaching the conclusion that the law is within the margin of appreciation of the state due to it being detailed and specific. There are no blanket sanctions and the regulation is detailed, loosing one’s voting rights is related to the type and seriousness of the crime etc., i.e. there are legitimate reasons for restricting voting rights and they are deemed proportional. The ECtHR’s test in this case will of course be crucial to the RFCC when they hear similar cases in the future.25

Lessons learned

What can we learn from the cases just referred to concerning the ECtHR’s view of Russia’s implementation of European Human rights law in general, and the RFCC’s role in this process in particular? It is clear that the decisions by the ECtHR in the Markin and Gladkov cases are difficult for Russia to digest. They do pose challenges to Russian constitutional law in general, and the role of the RFCC in developing the RFC and implementing the ECHR, in particular. First, as regards the RFCC’s method of constitutional interpretation, the two cases referred to above confirm that in Russian constitutional law the state and its interest come first. In that sense, the natural law and individual rights aspects of the RFC on the surface level of law have not yet had a decisive impact on the
theory and method of constitutional interpretation in Russia. Secondly, the method applied by the RFCC in interpreting the RFC, and when deciding on matters of standing before the court in these two cases, is formal and positivistic, besides from being state centered. There seems to be a lack of theological methods of interpretation that allows for the natural law aspect to be taken into consideration. This is especially interesting since in Russian legal doctrine natural law is often mentioned as a legal source within the Russian legal order. Moreover, this lacunae presents a serious challenge to the RFCC when dealing with European Human Rights law. Thirdly, by not making explicit and elaborate arguments as to the principle of proportionality as laid down in article 55.3 RFC, the RFCC misses an excellent opportunity to connect the interpretation of the RFC with the ECHR and the case law of the ECtHR. A more elaborate argumentation on the application of the principle of the proportionality would improve the quality of Russian legislation while at the same time develop the RFC.

Fourthly, and concerning Russian constitutional law in general, it can be concluded from the cases above that the Russian government is applying a to wide a use of the margin of appreciation when legislating. The ECtHR does not accept reference to national traditions and the Russian vision of democracy in combination with blanket restrictions. However, state interests such as security and order are legitimate grounds for restrictions of rights according to ECtHR, but the demands put on the quality of the legislation used to restrict rights are high and requires a thorough understanding of the ECHR and the case law of the ECtHR. The Scoppola case referred to above should prove useful to the Russian legislature. Fifthly, the RFCC is not doing enough to enforce European Human rights law and to ensure that the RFC is in congruence with the ECHR. The ECtHR states that the RFCC should be able to coordinate the ECHR and the RFC and interpret the latter so that it is not in violation with the ECHR. This is a technique frequently used by other contracting parties, Sweden for example. This modus operandi is certainly in line with the principle of subsidiarity and if applied correctly puts the RFCC in the driving seat. Hence allowing the federal legislature and the RFCC to carve out the specifics of Russian constitutional law within its domestic context, without being subjected to what has been perceived as excessive interference by the ECtHR. And it is clear from the case law
of the ECHR that the rights protection afforded by the ECHR should primarily be enforced by the national legal system.\textsuperscript{26}

Finally, taken together this means that the RFCC needs to develop a theory and method of constitutional interpretation that at a minimum allows for making a prognosis of how the ECtHR would decide on the actual case, i.e. a method of constitutional interpretation ensuring that the interpretation of a right and its restriction is in conformity with the ECHR. This is not the same as giving up sovereignty, rather the opposite. It provides a tool for developing the national constitution so that in future difficult cases concerning constitutional rights, interpreting the national constitution can assess them.

**The Swedish Experience**

This is exactly what has happened in Sweden. The European Convention on Human Rights is Swedish law since 1995.\textsuperscript{27} The legislature is obliged not to adopt any new laws that would violate the ECHR\textsuperscript{28} and the courts have developed a method of interpretation allowing for Swedish law, including the constitution, to be interpreted in conformity with the ECHR. In the hierarchy of legal norms the ECHR comes after the constitution but before ordinary law, as is the case in Russia. According to the method of constitutional interpretation developed by the Swedish courts the ECHR has legal effect in the Swedish legal system in two different ways. First, the ECHR poses an international law obligation on the Swedish state and could result in the Swedish state being declared to be in violation of the convention. In order to avoid such an international law responsibility the Swedish Supreme Court has developed a method of interpretation based on the principle of convention conform interpretation of Swedish law. This means that when Swedish courts decide a case on for example freedom of expression, they would make an assessment of the Swedish law in relation to the ECHR, and as far as possible interpret Swedish law in conformity with the ECHR in order to avoid a violation of the ECHR. In one particular case, the Supreme Court decided not to apply the Swedish law on hate speech since it was estimated that such an application would be in violation of the freedom of expression as protected by the ECHR.\textsuperscript{29}
The second aspect of the binding nature of the ECHR in the Swedish legal system was clarified by the Swedish Supreme Court in 2012. In this landmark decision the court stated that courts first and foremost should apply the ECHR as national law. This is an important development of the method of interpretation stating that ECHR is Swedish law, it is internal to the legal system, and it should be dealt with like any other national legal source. This means that all courts and authorities are obliged to apply and interpret the articles of the ECHR in each individual case. The rights protection provided by the ECHR is seen as a minimum rights protection that courts should always strive to provide. This means that the rights protection provided by Swedish law can go further than what the ECHR and the case law of the ECtHR demand. This development has been described as a “nationalization of the ECHR”. According to the Swedish Supreme Court, this will in the long run contribute to the impact of the case law of the ECtHR diminishing in relation to the application of the ECHR as Swedish law, and at the same time the national constitutional rights protection, will develop. The relevance of the ECHR and the case law of the ECtHR will primarily be to set the limits to what is an acceptable development of constitutional rights protection in Swedish law. It is the task of the highest courts in Sweden to secure that Swedish jurisprudence is kept within the limits of the ECHR since Sweden does not have a constitutional court.

It has taken Swedish courts 18 years to develop this method of interpretation and it goes to say that it is not only the Russian legal order being challenged by the ECHR. Many contracting states have been forced to implement reforms, and adjust their methods of constitutional interpretation. Still, this is not necessarily seen as violation of sovereignty, rather as a means to implement and develop the constitution.

**Dialogue between Courts**

There was really no need for the Markin or Gladkov case to go to the ECtHR. However, the RFCC tried neither of these cases on the merits and the reasons for declaring them inadmissible are themselves interesting from an outside and comparative perspective. The transnational dialogue between courts has played a crucial role for the developing on human rights law and constitutional law
globally. This dialogue takes place in many different ways. Courts refer to foreign and international law in their decisions. Members of the high courts meet and have joint seminars. They learn from each other and share their experience with for example the implementation of international human rights law. Justices read and write, they contribute to the international academic debate on constitutional law and methods of constitutional law interpretation. And finally, there is the dialogue between courts taking place within the formal setting of interpreting and deciding individual cases, of which the dialogue between the ECtHR and the courts of the contracting parties are one example. Such a dialogue should not take place in media or other non-legal channels. This dialogue should firstly and mostly take place within the framework of the judiciary. For it to be possible it is necessary that national courts refer to, and take the case law of the ECtHR into consideration. This is not the same as surrendering sovereignty; it is a question of influence based on dynamic interaction. However, for national courts to be able to engage in this dialogue, a method of constitutional interpretation that goes beyond the written word is needed.

**Conclusion**

In order to conclude, let us return to the three points made by Mälksoo. His first point, i.e. that Russia accepts human rights law in general both nationally and internationally constituted my starting point. I would argue that yes, on the surface level, i.e. on the level of laws as stipulated in books this is correct. My presentation has however mostly focused on Mälksoo’s second and third points.

As to the second point, that the RFC has a natural law approach to human rights, one could argue that this is true if one focuses solely on the surface level of law. My conclusion is that the RFCC is hampering this development in that it applies an interpretative method based mainly on legal positivism and state centrism, and not on a theological method of interpretation that would allow for natural law and the ECHR to be taken into consideration. The method of constitutional interpretation used by the RFCC hinders the development of the constitution in a manner that would be consistent with European human rights law, as illustrated by the cases referred to above.
As to Mäksoo’s third point that Russia’s becoming a member of the CoE and adhering to the ECHR was revolutionary and that the latter has the potential to penetrate state sovereignty. I do agree that it was revolutionary and important. I would also argue that it has been essential to the development of individual legal activism in Russia, which in itself is necessary in order to ensure that the constitution is implemented and developed. However, the cases I have referred to above clearly illustrate the difficulties that the question, and understanding, of sovereignty still brings to the implementation and development of the RFC and the implementation of European Human Rights Law. In both cases the state sovereignty and state security issues has been, from the Russian side, the overriding issue. And in both cases the ECtHR has struck down this argument referring to the poor quality of the laws restricting the rights in question. The conclusion to be drawn from this is not necessarily that the decisions of the ECtHR are threatening Russian state sovereignty, rather that when referring to the margin of appreciation it is required that the restrictive legislation fulfills the requirements of the case law of the ECtHR. Thus, the responsibility is both on the legislature and the courts.

This leads me to my main conclusion, by developing a theory of constitutional interpretation in dialogue with the ECtHR the RFCC could contribute to the implementation and development of the RFC and ensure that it is in congruence with European human rights law at the same time as legitimate interests such as the defense and state security is upheld. I would also argue that the ball is in the ballpark of the RFCC and that the RFCC could be inspired by other countries experience in this matter. If the RFCC took a more active role in this regard, the RFCC will be the arbiter that ensures that the RFC is implemented and developed in a manner that is both in congruence with Russian traditions and European human rights law standards. This would of course require a different theory and method of constitutional interpretation than the current one.

Surely, Russia’s legal sovereignty has been affected by joining the ECHR. This is the whole idea of international and regional legal regimes. However, it is rather far fetched to argue that this actually put state sovereignty in jeopardy. Should that argument prevail it means that we have a very limited view of the role to be played by constitutions, i.e. that they are primarily denominators
and carriers of culture and traditions of states, and that their over-riding purpose is to safe guard these. Such a point of view could also lead to the conclusion that the primary allegiance of the RFCC lays with what is perceived to be Russian traditions and culture. This is not the dominating view of the role to be played by constitutions in liberal democracies, and certainly not the anticipated role for constitutional courts to play. Importantly, I think that the very fact that Russia is not the only contracting state suffering a difficult relationship to the ECtHR is important to highlight. All contracting states and their legal orders have been challenged and forced into difficult legal reforms, including my own country Sweden. We do not however, view that as an affront on the Swedish sovereignty, we work with it and adjust in a manner that harmonizes with the Swedish political, legal and judicial tradition. And by doing so the constitutional rights protection is improved, and the legitimacy of the state strengthened. As a result, the constitution on the one hand, and the role of the courts, on the other, are perceived as carriers and protectors of human rights. Russia is not alone in experiencing difficulties in this regard and the RFCC could, by being inspired by other countries, contribute to the diminishing of this tension by deepening its dialogue with the ECtHR and other contracting states’ high court in search for a new method of constitutional interpretation.

1 Decision on admissability, January 15, 2009, No. 187-O-O.
2 Decision on admissability of the RFCC, No. 177-O.
6 On the different levels of law see, K. Tuori, "The Law and its Traditions", in Perspectives on jurisprudence. Stockholm: Stockholm University Law Faculty, 490.
7 The ECtHR’s principle of margin of appreciation being one example. For an example within the European Union see, the Lisbon Treaty article 4 (2).
8 As we shall see below, the RFCC decided in the Gladkov case that it does not have the competence to review one article of the RFC against another article in the constitution.
9 Konstantin Markin V Russia, no. 30078/06
10 Ibid., § 90.
11 Ibid., § 140.
12 Ibid., §§ 142, 127.
13 Ibid., § 147.
14 Ibid., § 150.
15 Anchugov and Gladkov v. Russia (nos. 11157/04 and 15162/05)
16 Anchugov and Gladkov v. Russia (nos. 11157/04 and 15162/05), §§ 50-52.
17 Ibid., § 96.
18 Ibid., § 100.
19 Ibid., § 102.
20 Ibid., § 105.
21 Ibid., § 108.
22 Ibid., § 110.
23 Ibid., § 111.
24 Scoppola v. Italy (No. 3) (no. 126/05), § 95.
25 Ibid., §§ 103-109.
26 Zullo v. Italy, no. 64897/01.
27 SFS 1994:1219
29 NJA 2005 s. 805.
30 Högsta domstolen, B 1982-11, dom 2012-12-21, available in Swedish at
32 Högsta domstolen, B 1982-11, dom 2012-12-21.
33 A Jonsson, Judicial Review and Individual Legal Activism: the Case of Russia in Theoretical Perspective, Uppsala, 2005.