

# The Soft Power of Dissent: The Impact of Dissenting Opinions from the Russian Constitutional Court

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## ABSTRACT

*This Article poses a question regarding the importance of judicial dissents emanating from constitutional courts. It examines the power of dissents emanating from the Russian Constitutional Court, given the fact that the Russian government has invested a significant effort in suppressing dissenting voices. The very presence of dissents in the Russian Constitutional Court poses an interesting question regarding their impact on democracy, consensus building, and civil society. This Article argues that while dissents coming from the Russian Constitutional Court may not be binding, they carry a great deal of “soft power.” Judicial dissents aid in challenging commonly espoused consensus both inside and outside the courtroom and provide a legitimizing voice to marginalized groups that have frequently been excluded from the dialogue. Due to the possibility of judicial dissents spilling over from the confines of the courts, they aid the democratic process, not necessarily by convincing the majority to change their minds, but by forming a polity where people’s rights are the subject of an ongoing political debate. The Article concludes that while judicial dissents are not binding, the true “soft power” of judicial dissents comes from their ability to challenge the permanence of both law and consensus. Judicial dissents show that disagreement matters and is fundamental to democracy.*

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## I. INTRODUCTION

Do dissenting judicial opinions matter in a state that actively suppresses dissent within the public sphere and views failure to conform as an existential threat? The Russian government has deliberately suppressed dissent on a number of fronts. The state has repeatedly used the 2014 civil war in Ukraine and Russia's annexation of Crimea to discredit any sort of opposition to the regime, with critics painted as unpatriotic and foreign, and as threatening Russia's very existence.<sup>1</sup> While the government has invested significant effort in suppressing dissenting voices, the presence of dissents in the Russian Constitutional Court (the Court) presents an interesting question regarding their impact on democracy, consensus building, and civil society. Due to the nonbinding nature of dissents emanating from the Court, their possible impact on legal and nonlegal communities is an area lacking in scholarship.<sup>2</sup> This Article argues that while dissents emanating from the Court may not be binding, they carry a great deal of "soft power." Judicial dissents aid in challenging commonly espoused consensus both inside and outside the courtroom and provide a legitimizing voice to marginalized groups that have frequently been excluded from dialogue. The possibility of judicial dissents spilling over from the confines of the courts aids the democratic process, not necessarily by convincing the majority of the population to change their minds, but by "forming a polity where people's rights are the subjects of an ongoing political debate."<sup>3</sup> Judicial dissents provide hope by challenging the permanence of both law and consensus.<sup>4</sup>

Part I of this Article deals with arguments of both Russian and Western scholars regarding the benefits and detriments of judicial dissents. It analyzes the January 17, 2012 decision of the Court dealing with the role of dissent. Part II examines how judicial dissents can play a transformative role in challenging the common

1. Cameron Ross, *Introduction, in* SYSTEMIC AND NON-SYSTEMIC OPPOSITION IN THE RUSSIAN FEDERATION: CIVIL SOCIETY AWAKENS? 1, 5 (2015).

2. P.U. Ulturgashev, *Osobyie Mneniya Sudei v Sravnitelno-Pravovom Kontekste [Dissenting Opinions of Judges in a Comparative Legal Context]*, OTRASLI PRAVA: ANALITICHESKII PORTAL (May 27, 2015), <http://xn----7sbaj7auwnffhk.xn--p1ai/article/6688> [https://perma.cc/5G9J-LQKD] (archived Feb. 17, 2019) (Russ.).

3. Dan Priel, *Are Jurisprudential Debates Conceptual? Some Lessons from Democratic Theory*, 50 OSGOODE HALL L.J. 359, 393 (2012).

4. See Mari-Claire Belleau & Rebecca Johnson, *Ten Theses on Dissent*, 67 U. TORONTO L.J. 156, 165 (2017).

consensus, thus opening the door for alternative visions and narratives, making the law more inclusive and more just in serving its citizens. It examines judicial dissents in two recent cases—*Anchugov and Gladkov* (2016) and *Yukos* (2017)—where the Court attempted to redefine its relationship with transnational institutions, such as the European Court of Human Rights (ECtHR), and to deal with issues of sovereignty and constitutional identity. Part III looks at the impact of judicial dissents on civil society and democracy. The Article argues that in addition to challenging consensus and providing a legitimizing voice to disempowered groups, judicial dissents have the capacity to transcend and exceed the institutions from which they arise, hence impacting public debate and potentially public action. It examines the October 2018 debate regarding the future of the Russian Constitution, Russia’s vision of globalization, universality, and local identity, which was initiated by the chairman of the Court and transcended the confines of the courtroom. Finally, the Article concludes that while judicial dissents are not binding, the true “soft power” of judicial dissents comes from their ability to challenge the permanence of both law and consensus.<sup>5</sup> Judicial dissents show that disagreement matters<sup>6</sup> and is fundamental to democracy.

## II. THE MANY SIDES OF DISSENT

Russian legal scholars, not unlike their Western counterparts, are divided over the value of dissenting opinions.<sup>7</sup> On the one hand, some of the arguments against dissenting opinions relate to them endangering the unity of the court by impacting collegiality between the judges, as well as impacting the strength of judicial opinions by not making the court speak with one voice in the form of a unanimous opinion.<sup>8</sup> Some authors go so far as to state that dissents may impact the public’s confidence in the majority’s opinion.<sup>9</sup> A single unanimous

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5. *Id.*

6. *Id.* at 172.

7. I.M. Deneka, *O Nekotoryh Osobennostyah Instituta Osobogo Mneniya [On Some Features of the Institute of Dissenting Opinion]*, 2 GUMANITARNYE I URIDICHESKIE ISSLEDOVANIYA 87 (2014) (Russ.).

8. Olga A. Krapivkina, *Judicial Dissents: Legal and Linguistic Aspects*, 10 J. SIBERIAN FED. UNIV. HUMAN. & SOC. SCI. 2449, 2455 (2016); *see also* D.A. Basangov, *Uridicheskaya Priroda Osobogo Mneniya Sudi Konstitutsionnogo Suda Rossiiskoi Federatsii [Legal Nature of the Dissenting Opinion of the Judge of the Constitutional Court of the Russian Federation]*, 2 ZH. R.P. 24, 25 (2006) (Russ.).

9. I.S. Frolov, *Osoboe Mnenie Sudi Kak Odnazh iz Garantii Nezavisimosti Sudei I Ih Ravenstva Pri Postanovlenii Prigovora: Problemy I Perspektivy [The Dissenting Opinion of the Judge as One of the Guarantees of Judicial Independence and Equality; Problems and Perspectives]*, 2 SIBIRSKIE UGOLOVNO-PROTSESSUALNYE I KRIMINALISTICHESKIE CHTENIYA 147, 148 (2017) (Russ.).

judgment and the absence of dissent are “thought to foster the public’s perception of the law as dependably stable and secure,”<sup>10</sup> making it easier to implement the Court’s ruling.<sup>11</sup> Random dissents (forms of “intellectual exhibitionism”)<sup>12</sup> risk weakening “the institutional impact of the Court” by making the Court appear “indecisive and quarrelsome,”<sup>13</sup> thus ultimately impacting the Court’s legitimacy.<sup>14</sup> Dissents may be particularly harmful when the Court is trying to rule in regard to a divisive social issue and provide some clarity with respect to legal norms and principles.<sup>15</sup> Dissents are thought to create a greater amount of work, not only for the judges writing the dissent, but also for the majority, who have to respond to dissenting arguments.<sup>16</sup> Despite creating an increased workload, in most cases dissents—due to their nonbinding nature—do not impact the rights of the litigants.<sup>17</sup> Furthermore, the presence of a dissenting opinion itself or modifications to the opinion of the majority made to accommodate dissent risk “creating uncertainty or indeterminacy in the law.”<sup>18</sup>

When it comes to contentious social and political issues that produce a sharp division of opinions, dissenting judgments may make it appear that the courts’ opinions are divided along political rather than legal lines. This is especially so in constitutional cases, where the rights of the individual are pitted against the state,<sup>19</sup> and dissents may be viewed as a platform for airing political views.<sup>20</sup> In addition to the “institutional costs” of dissents, the “personal costs” of dissenting for the judge may range from a lack of promotion or reappointment to an outright dismissal.<sup>21</sup> Not surprisingly, dissents are presented as “individualistic” and as going against the secrecy of judicial deliberations.<sup>22</sup> Moreover, instead of increasing dialogue,

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10. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

11. Basangov, *supra* note 8, at 27.

12. A.S. Ispolinov, *Osoby Mneniya v Mezhdunarodnyh Sudah: Doktrina I Praktika [Dissenting Opinions in International Courts: Doctrine and Practice]*, 1 PRAVO. ZHURNAL VYSSHEI SHKOLY EKONOMIKI 218, 224 (2018) (Russ.).

13. Ginsburg, *supra* note 10, at 7.

14. Ispolinov, *supra* note 12, at 221.

15. Deneka, *supra* note 7, at 90.

16. Christine M. Joseph, *All But One: Solo Dissents on the Modern Supreme Court of Canada*, 44 OSGOODE HALL L.J. 501, 508 (2006).

17. Frolov, *supra* note 9, at 150; *see also* Freda M. Steel, *The Role of Dissents in Appellate Judging*, 67 UNIV. TORONTO L.J. 142, 144 (2017).

18. Peter W. Hogg & Ravi Amarnath, *Why Judges Should Dissent*, 67 UNIV. TORONTO L.J. 126, 135 (2017).

19. *Id.* at 134.

20. Ispolinov, *supra* note 12, at 231.

21. Julia Laffranque, *Dissenting Opinion and Judicial Independence*, 8 JURIDICA INT’L 162, 168 (2003).

22. Krapivkina, *supra* note 8, at 2456; *see also* Laffranque, *supra* note 21, at 168.

constant dissenting by some judges can shut down a dialogue, as their views could be regarded as entrenched by the rest of their colleagues.<sup>23</sup>

On the other hand, those arguing in favor of judicial dissents see the value of dissent in the maintenance of judicial independence, by allowing jurists to express disagreements with the majority,<sup>24</sup> letting the “marketplace of ideas” lead to the truth, and making judicial reasoning more transparent in nature.<sup>25</sup> In a sense, dissenting opinions are reflective of different views of the “requirements of democratic society” and place a value on pluralism as the cornerstone of democracy.<sup>26</sup> Furthermore, ability to dissent may reduce pressures surrounding a contentious arbitration by channeling disagreements “into more productive forms” when judges are not able to reconcile their views.<sup>27</sup> Dissents force the majority to refine its opinions to deal with the criticisms outlined in dissenting opinions. In other words, “[b]y pointing the finger at flaws allegedly affecting the majority’s decision, a well-reasoned dissent encourages the majority to address the criticized issues thoroughly, thereby raising the level of the majority’s reasoning.”<sup>28</sup> Dissents not only have the capacity to strengthen and refine the reasoning of the majority, but they also serve to strengthen the very legitimacy of the judicial deliberative process<sup>29</sup> by showing the losing party that their arguments were given thorough consideration, even if ultimately rejected.<sup>30</sup> Dissent has the capacity to increase the transparency of the judicial process by outlining the various debates that have taken place among the judges involved in a particular case.<sup>31</sup> Dissenting opinions demonstrate to the public that some areas of the law involve difficult choices where unanimity is not always possible to achieve.<sup>32</sup>

More broadly, dissents challenge “the authoritarian character of the law”<sup>33</sup> by revealing the multiple reasoning processes behind the conclusions in any given case and thus challenging the finality of each one.<sup>34</sup> Dissents challenge the “rhetoric of inevitability”<sup>35</sup> when it

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23. Ispolinov, *supra* note 12, at 225.

24. Hogg & Amarnath, *supra* note 18, at 130.

25. Krapivkina, *supra* note 8, at 2456.

26. Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUMAN RIGHTS L. REV. 37, 59 (2009).

27. Peter J. Rees & Patrick Rohn, *Dissenting Opinions: Can They Fulfil a Beneficial Role?*, 25 ARB. INT’L 329, 330 (2009).

28. *Id.* at 335.

29. I.V. Smolkova, *Taina Soveschaniya Sudei I Osoboe Mennie Sudi [The Secrecy of Judicial Deliberations and Judicial Dissent]*, 3 VESTNIK OGU 172, 175 (2006) (Russ.).

30. Rees & Rohn, *supra* note 27, at 335.

31. Hogg & Amarnath, *supra* note 18, at 131.

32. Steel, *supra* note 17, at 145.

33. Krapivkina, *supra* note 8, at 2456.

34. Hogg & Amarnath, *supra* note 18, at 132.

comes to the majority's conclusions, thus potentially extending the space for dissent outside the confines of the courtroom and opening the door to future legal challenges.<sup>36</sup> In a way, dissents can shine a light on issues and arguments that remained invisible in the past, allowing for the gradual transformation of legal and social consciousness.<sup>37</sup>

Dissents also enable various levels of public debates among judges, legal scholars, legislators, and the general public.<sup>38</sup> Hence, despite the nonbinding nature of dissents, they can still be influential in a number of ways, especially in their capacity to reveal a new trend or an outmoded practice and pave the way for future reform.<sup>39</sup> In other words, "[t]he dissenting opinion causes restlessness and such restlessness provides a necessary stimulus for the future, and it helps to avoid routine and critique-free decision-making."<sup>40</sup> Ultimately, in the words of Charles Hughes, former associate justice of the U.S. Supreme Court, "a dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."<sup>41</sup> Moreover, with the increasing prominence of comparative law, dissents may play a role in shaping judicial opinions beyond their own jurisdictions, especially in novel or rapidly changing areas of the law.<sup>42</sup>

Given the lack of agreement regarding the role of dissent when it comes to judicial reasoning both in Russia and in the West, an interesting starting point of analysis regarding the role of dissent in constitutional litigation is the January 17, 2012 decision by the Court.<sup>43</sup> The case revolved around the refusal of the Court to reveal the content of a dissenting opinion to the accused. The accused argued that his constitutional right to make full answer and defense was violated by the refusal of the Court to reveal the content of the dissenting opinion to him.<sup>44</sup> The majority of the Court concluded that no constitutional violation occurred, but nevertheless stated that the federal legislator is not precluded from amending the provisions of

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35. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 204 (1990).

36. Basangov, *supra* note 8, at 26.

37. *Id.* at 27–28.

38. Krapivkina, *supra* note 8, at 2456.

39. Ulturgashev, *supra* note 2.

40. Laffranque, *supra* note 21, at 169.

41. Hogg & Amarnath, *supra* note 18, at 138.

42. *Id.* at 140.

43. Opređenje iz Konstitucionnog Suda Rossijskoy Federatsii Stat'yami 301 i 312 Ugolovno-protsessual'nogo kodeksa Rossijskoy Federatsii ot 17 yanvary 2012, [Decision of the Constitutional Court of the Russian Federation Concerning Articles 301 and 212 of the Criminal Procedure Code of the Russian Federation of January 17, 2012], SOBRANIE ZAKONODATEL'STVA ROSSIJSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 174-O-O.

44. *Id.* ¶ 1.

the Russian Criminal Procedure Code to allow the accused to access the contents of dissenting opinions in criminal cases.<sup>45</sup> In addition to finding no constitutional violation, the majority of the Court also expressed a rather restrained view regarding the role of dissent in the context of criminal law.<sup>46</sup> The majority of the Court pointed out that the right to dissent (in both oral and written form) is a form of procedural guarantee of judicial independence that is outlined in the Russian Constitution in Article 120(1).<sup>47</sup> However, judicial dissent does not constitute an independent act and does not impact the rights and responsibilities of litigants, nor does it entail any procedural consequences for the parties to the case.<sup>48</sup> While this view of the majority described the role and the impact of dissent in rather minimalistic terms, the judgment also contained four dissenting opinions that dealt with the issue of the role of dissent in a more substantive fashion.

Justice Gadjiev, in his dissenting opinion, stated that dissents do not violate the secrecy of deliberations, since the content of deliberations is not revealed in the dissent.<sup>49</sup> A judge engaged in the writing of a dissent needs to respect the authority of the Court and the principle of collegiality.<sup>50</sup> The role of dissent extends beyond simply ensuring the independence of judges; it also plays a role in the development of the law.<sup>51</sup> Dissent aids in maintaining the “mental independence” of judges and increases the overall trust in the system of justice.<sup>52</sup> The social utility of dissent is that it increases the individual responsibility of each judge sitting on a panel. Dissents show that judicial positions are not simply acts of “self-expression,” but are based on concrete legal arguments and reasoning.<sup>53</sup> Justice Gadjiev summarized the role of dissent as follows:

A dissenting opinion does not weaken, but, on the contrary, strengthens the authority of the Court. It eliminates a certain hypocrisy by demonstrating what everyone already knows: two lawyers always three opinions. A good dissenting opinion is aimed at resolving particularly complex legal problems; it can suggest how to avoid judicial errors in the future. In this sense, there is an

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45. *Id.* ¶ 2.

46. *Id.*

47. *Id.* ¶ 1. Article 120(1) reads “judges shall be independent and submit only to the Constitution and the federal law.” KONSTITUTSIIA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 120(1) (Russ.).

48. Opređenje iz Konstitucionnogo Suda Rossiyskoy Federatsii Stat'yami 301 i 312 Ugolovno-protsessual'nogo kodeksa Rossiyskoy Federatsii ot 17 yanvarya 2012, [Decision of the Russian Federation Constitutional Court], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 174-O-O, ¶ 1.

49. *Id.* ¶ 4.

50. *Id.*

51. *Id.* ¶ 5.

52. *Id.* ¶ 6.

53. *Id.*

undoubted correlation between the right to a dissent, liberalization of judicial practice, development of law in judicial acts, and the constitutional principle of democracy.

A dissenting opinion contributes to raising the level of legal consciousness of society; it guarantees a fair and open trial of the case; contributes to public debate about the law, as well as to the dialogue between different levels of courts (which is the main point of judicial democracy); and attracts the attention of scholars and legislators to pressing legal issues.

The judge's dissenting opinion is not a complaint of a loser, but an argument of a possible winner in a difficult dispute about the development of the law. Legal certainty, as an element of the normative content of the principle of a lawful state, means that it is necessary to eliminate ambiguous, ambivalent norms from the sphere of legal regulation.<sup>54</sup>

In contrast to the very limited view of the majority, Justice Gadjeiev saw the role of dissent as significant for developing public legal consciousness, thus being a primary building block of democracy. Justice Zhilin, writing in dissent, agreed with Justice Gadjeiev that dissents do not violate the secrecy of deliberations<sup>55</sup> and can be influential on appeal.<sup>56</sup>

Justice Knyazev, in his dissenting opinion, also emphasized that dissents do not violate the secrecy of judicial deliberations<sup>57</sup> and that the practice of writing dissents is widely supported by many jurisdictions, as well as being present in many international tribunals, such as the ECtHR and the International Criminal Court.<sup>58</sup> In concluding his dissenting opinion, Justice Knyazev stated that refusing to disclose a dissenting opinion to the litigant in any case

[d]oes not contribute to identifying and correcting the defects of an unjust sentence and thus leaves open the question of whether the Russian Federation can truly be characterized by its own Constitution as a lawful state, where the highest value is placed on an individual person and his/her freedoms, including fair application of laws.<sup>59</sup>

It is clear that for Justice Knyazev, the role of dissent is connected with individual rights and the concept of fairness, as well as with the whole idea of a lawful state. The final dissenting opinion, authored by Justice Kleandrov, also stated that dissenting opinions do not undermine the secrecy of judicial deliberations. He furthermore challenged the majority's conclusions that not allowing the accused in the criminal case to access the dissenting opinion does not violate the

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54. *Id.* ¶ 7.

55. *Id.* ¶ 2.

56. *Id.* ¶ 3.

57. *Id.* ¶ 1.

58. *Id.* ¶ 15.

59. *Id.* ¶ 26.



accused's constitutional rights; he stated that the majority should have found the current practice of not making the dissenting opinion available to the accused to be unconstitutional due to vagueness, and hence taken the chance to direct the federal legislator to clarify this legal lacuna.<sup>60</sup>

The judgment of the Court dealing with dissent is revealing in terms of the various positions taken in regard to the very practice and importance of dissents by different judges on the Court. There was certainly no consensus when it came to judicial perceptions of dissenting opinions, with some judges viewing dissent as having limited impact and others regarding dissent as fundamental for democracy, important for future legal developments, and empowering for civil society. Thus, despite the rather narrow official position of the Court regarding dissent, the very topic of judicial dissents has clearly challenged the judicial consensus of the Court.

### III. THE ROLE OF DISSENT IN CHALLENGING CONSENSUS

Perhaps one of the greatest values of judicial dissent relates precisely to its role in challenging consensus. In other words, unanimity that is merely formal ceases to be a virtue if it is achieved despite the existence of strong conflicting views.<sup>61</sup> Judicial opinions are frequently described in terms of their neutrality, abstraction, and universality.<sup>62</sup> The presentation of judicial opinions as neutral deflects criticism and fails to expose "the fluid relationship between politics and the law."<sup>63</sup> Thus, "the monologism of judicial rhetoric results in opinions that are most often decontextualized, authoritarian, finalized, and dismissive of alternative perspectives."<sup>64</sup> The law, in many ways, can serve as a tool of oppression rather than liberation, especially when it comes to the marginalized and the weak.<sup>65</sup> Decisions emanating from the courts, in particular in constitutional matters, can perpetuate the status quo through reliance on judicial methodologies of seeking legitimacy in consensus and relying on precedent.<sup>66</sup> Thus, judicial reasoning often serves to institutionalize the "unquestionable power of the judiciary" and

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60. *Id.* ¶ 3.

61. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 434 (1986) (transcript of a lecture given at UC Hastings College of the Law).

62. Katie L. Gibson, *In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent*, 35 WOMEN'S STUD. COMM. 123, 125 (2012).

63. *Id.* at 128.

64. *Id.* at 125.

65. Alexandra V. Orlova, "Public Interest," *Judicial Reasoning and Violence of the Law: Constructing Boundaries of the "Morally Acceptable,"* 9 CONTEMP. READINGS L. & SOC. JUST. 51, 71 (2017).

66. *Id.* at 72.

perpetuate the belief that neutral and objective decisions by the court secure fair outcomes and justice for all.<sup>67</sup>

Judicial opinions are also instrumental in shaping the very boundaries of debates, thus leaving many groups out of a conversation due to their inability or unwillingness to accept the very parameters of debate set by the common consensus and reinforced by the court.<sup>68</sup> Failure to conform to the common consensus—a consensus further legitimized by judicial reasoning—provides a justification for blaming those experiencing exclusion.<sup>69</sup> However, the seeming impartiality and neutrality of consensus is often achieved by subjugating “the interests and values of participants to some other system of interests and values.”<sup>70</sup> In other words, the very emphasis on a common framework can have a marginalizing effect on those representing a truly alternative perspective.<sup>71</sup> Dissent, on the other hand, has the capacity to “shift the language of the law to legitimate voices, experiences, and rights of groups traditionally excluded by the rhetoric of the law.”<sup>72</sup>

Thus, it is important to not view dissent as a nuisance or a kind of temporary disruption on the way to progress toward some sort of universal consensus.<sup>73</sup> Even if dissent is not disregarded, it is frequently regarded as secondary, as the ultimate goal remains the creation of consensus.<sup>74</sup> It is difficult to make a shift to viewing dissent and diversity as “valuable ends of discussion” in and by themselves, rather than always striving for consensus no matter the cost.<sup>75</sup> Judicial dissents can be helpful in challenging and disrupting the very rhetoric of consensus by making visible multiple truths, especially when it comes to contentious social issues.<sup>76</sup> So, while judicial dissents may be viewed as a kind of “institutional disobedience,”<sup>77</sup> in a way they are “protests within the system” that argue for change by still working within the confines of the system.<sup>78</sup> Dissents challenge the finality of decisions, while keeping the conversation open through publicly acknowledging the remaining

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67. Gibson, *supra* note 62, at 125, 129.

68. *Id.* at 131; *see also* Orlova, *supra* note 65 at 72.

69. Kendall R. Phillips, *The Spaces of Public Dissension: Reconsidering the Public Sphere*, 63 COMM. MONOGRAPHS 231, 238 (1996).

70. *Id.* at 241.

71. *Id.*

72. Gibson, *supra* note 62, at 126.

73. Phillips, *supra* note 69, at 243.

74. *Id.*

75. *Id.* at 244.

76. Marshall Rothstein, *The Role of Dissenting and Concurring Reasons in the Supreme Court of Canada's Charter of Jurisprudence*, 27 NAT'L J. CONST. L. 1, 5 (2010).

77. Erin J. Rand, *Fear the Frill: Ruth Bader Ginsburg and the Uncertain Futurity of Feminist Judicial Dissent*, 101 Q.J. SPEECH 72, 73 (2015).

78. *Id.* at 79.

points of contention, thus creating a possible opening for future change and more meaningful participation by previously excluded groups.<sup>79</sup> In fact, “dissent written from a position of institutional power can provide recognition to a group that feels otherwise unheard and disenfranchised.”<sup>80</sup>

Dissent can play a transformative role in challenging the common consensus, thus opening the door for alternative visions and narratives, making the law more inclusive and more just in serving its citizens.<sup>81</sup> It is important to remember that “the rhetorical genre of the law exists not simply in the texts of judicial opinions but rather in the psychology of the audience.”<sup>82</sup> Hence, by challenging the law’s consensus built around universality, neutrality, and fairness, judicial dissents can contribute to transforming the law to better represent our lived experiences.<sup>83</sup> However, judicial dissents, despite their disruptive nature, still constitute “a protest within the system, [which] argues for change in a way that respects—even constitutes—that system.”<sup>84</sup> Having said that, under certain circumstances judicial dissents can transcend and exceed the institutions from which they arise and proliferate in other ways, such as through social protest, grassroots movements, and even legislative reforms. In the words of Justice Marshall Rothstein:

Dissent offers up the law for reinvention and transformation; it provides an opening for grassroots forms of advocacy that draws on popular culture and technology to spin the judicial dissent out of its institutional setting and into wider and more diverse contexts.<sup>85</sup>

In a lot of ways, dissents are about appealing to future decision makers and advocates and can serve as “jumping-off points” from which to advocate for new ideas and directions when opportunity presents itself.<sup>86</sup> It is important that dissent does not simply become a tool “in the service of . . . consensus,” especially where widespread consensus to maintain the status quo exists among public institutions as well as the general public.<sup>87</sup> In such situations, acts of dissent may be perceived as threats to state sovereignty.<sup>88</sup> The cases of *Anchugov*

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79. *Id.* at 78.

80. *Id.*

81. Gibson, *supra* note 62, at 135.

82. *Id.* at 136.

83. *Id.*

84. Rand, *supra* note 77, at 79.

85. *Id.* at 81–82.

86. Rothstein, *supra* note 76, at 11.

87. Takeshi Suzuki & Noriko Sekido, *Noam Chomsky's Response to President Bush After 9/11: An Analysis of Public Dissension*, in ENGAGING ARGUMENT (2006).

88. *Id.* at 39.

and *Gladkov* (2016)<sup>89</sup> and *Yukos* (2017)<sup>90</sup> provide a revealing illustration of the role of judicial dissent in challenging the status quo in regard to the role of international institutions and so-called Western ideas and their impact on Russian sovereignty.

#### A. Anchugov and Gladkov, No. 12-P (2016)

The Court issued a judgment on April 19, 2016, in the

case concerning the resolution of the question of possibility to execute the Judgment of the European Court of Human rights of 4 July 2013 in the case of Anchugov and Gladkov v. Russia in accordance with the Constitution of the Russian Federation in respect to the request of the Ministry of Justice of the Russian Federation.<sup>91</sup>

This trial was the Court's first consideration of the implementation of a decision of the ECtHR in relation to the Russian Constitution.<sup>92</sup> It involved two applications against the Russian Federation at the ECtHR, brought forward by Mr. Anchugov and Mr. Gladkov. The complaint concerned their ban from voting in elections by Article 32(3) of the Russian Constitution, as both were convicted prisoners serving their sentences in detention. Article 32(3), a part of Chapter II of the Russian Constitution and thus amendable only by the adoption of a new constitution,<sup>93</sup> reads: "citizens detained in a

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89. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 april 2016 g. [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016.

90. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o Razreshenii Voprosa o Vozmozhnosti Ispolneniya v Sootvetstvi s Konstitutsiyey Rossiyskoy Federatsii ot 31 Iyulya 2014 [Resolution of the Constitutional Court of the Russian Federation in the Case of the Resolution of the Possibility of Execution in Accordance with the Constitution of the Russian Federation of July 31, 2014], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2017, No. 1-P/2017.

91. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 april 2016 g. [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016.

92. Peter Roudik, *Russian Federation: Constitutional Court Allows Country to Ignore ECtHR Rulings*, GLOB. LEGAL MONITOR (May 18, 2016), <http://www.loc.gov/law/foreign-news/article/russian-federation-constitutional-court-allows-country-to-ignore-echr-rulings/> [<https://perma.cc/RG7K-RWS6>] (archived Feb. 13, 2019).

93. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 135(1)–(3) (Russ.). Article 135(1) provides that any provisions located in Chapter II of the Russian Constitution "may not be revised by the Federal Assembly." *Id.* art. 135(1). In turn, Articles 135(2) and (3) describe a process of convening the Constitutional Assembly, should a proposal to amend provisions located in Chapter II of the constitution be put forward and the role of the Constitutional Assembly to either "confirm the invariability" of the entire constitution or "draft a new [c]onstitution" which must be adopted by the two thirds of the Constitutional Assembly and submitted to a public referendum. *Id.* art. 135(2)–(3).

detention facility pursuant to a sentence imposed by a court shall not have the right to vote or to stand for election.”<sup>94</sup>

Anchugov and Gladkov had both been convicted of serious crimes, including murder, aggravated robbery, and participation in an organized criminal group.<sup>95</sup> They claimed that being barred from voting violated their rights under Article 10 of the European Convention on Human Rights (ECHR or the Convention), concerning freedom of expression, as well as Article 3 of the Convention’s Protocol No. 1, concerning the right to vote. The latter was argued both on its own terms and together with the nondiscrimination provision found in Article 14 of the ECHR.<sup>96</sup> Anchugov and Gladkov both had already tried to bring a case against Article 32(3) of the Russian Constitution before the Court,<sup>97</sup> which rejected the case on the grounds that it was not within the Court’s competence<sup>98</sup> and that the Court had “no jurisdiction to check whether certain constitutional provisions were compatible with others.”<sup>99</sup> The Russian government’s argument at the ECtHR was that the Russian Constitution held supreme legal authority within the Russian Federation, and so took precedence over all other domestic and international law;<sup>100</sup> thus, the ECtHR was not competent to judge Article 32 of the Russian Constitution’s compatibility with the ECHR.<sup>101</sup>

The ECtHR responded to the question of the admissibility of the case by declaring that state parties were required under Article 1 of the ECHR to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention,”<sup>102</sup> and that this requirement did not distinguish between types of legal instruments or allow for any part of a state’s jurisdiction to be excluded from review.<sup>103</sup> On these grounds, the ECtHR asserted that international law held priority over the Russian Constitution, declaring that it is “with respect to their ‘jurisdiction’ as a whole—which is often exercised in the first place through the constitution—that the State Parties are called upon to show compliance with the Convention.”<sup>104</sup>

The ECtHR held that under certain circumstances, such as serious abuse of a public position, individuals’ electoral rights could be restricted,<sup>105</sup> but that such restrictions should be made only after

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94. *Id.* art. 32(3).

95. Anchugov & Gladkov v. Russia, App. Nos.11157/04 & 15162/05, Eur. Ct. H.R. ¶¶ 7, 12 (2013).

96. *Id.* ¶ 3.

97. *See id.* ¶ 23.

98. *Id.* ¶ 19.

99. *Id.* ¶ 21.

100. *Id.* ¶ 48.

101. *Id.*

102. *Id.* ¶ 50.

103. *Id.*

104. *Id.*

105. *Id.* ¶ 97.

proper consideration and in respect of the requirement of “a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.”<sup>106</sup> Drawing on its previous decisions in *Hirst v. United Kingdom*<sup>107</sup> and *Scoppola v. Italy*,<sup>108</sup> the ECtHR declared that the removal of voting rights from a group “generally, automatically and indiscriminately” on the grounds of their serving prison sentences, without consideration of the nature of the offense, the length of the sentence, or the relevant circumstances, was in violation of Article 3 of Protocol No. 1.<sup>109</sup> Failing to find evidence that Russian courts had considered the proportionality of disenfranchisement in relation to the individual circumstances of each case,<sup>110</sup> the ECtHR found that the Russian government had “overstepped its margin of appreciation” and had “failed to secure the applicants’ right to vote.” The Russian Constitution’s indiscriminate disenfranchisement of convicted prisoners was thus in violation of Article 3 of Protocol No. 1.<sup>111</sup>

Summing up its ruling, the ECtHR explained that Article 46 of the ECHR, requiring states party to the ECHR to abide by the ECtHR’s judgments, allows states to choose the means by which to ensure compliance.<sup>112</sup> With many possible approaches available to addressing the voting rights of prisoners, the ECtHR stated:

In the present case, it is open to the respondent Government to explore all possible ways in that respect and to decide whether their compliance with Article 3 of Protocol 1 can be achieved through some form of political process or by interpreting the Russian Constitution by the competent authorities—the Russian Constitutional Court in the first place—in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them.<sup>113</sup>

The Court’s 2016 judgment was one of a number of domestic measures taken in response to the ECtHR’s pronouncement. In its judgment, the Court again emphasized the priority of the Russian Constitution, declaring that “judgments of the European Court of Human Rights . . . including those containing proposals on the need to make amendments to the national legal provisions, do not abrogate the priority of the Constitution of the Russian Federation for Russia’s

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106. *Id.*

107. *Hirst v. United Kingdom* (No. 2), 42 Eur. Ct. H.R. 41 (2006).

108. *Scoppola v. Italy* (No. 3), App. No. 126/05, 2012 Eur. Ct. H.R. 868 (2012).

109. *Anchugov & Gladkov v. Russia*, App. Nos. 11157/04 & 15162/05, Eur. Ct. H.R. ¶ 100 (2013).

110. *Id.*

111. *Id.* ¶ 110.

112. *Id.* ¶ 107.

113. *Id.*

legal system.”<sup>114</sup> The Court repeated its earlier conclusion in a 2015 constitutional case,<sup>115</sup> which found that interaction between European Convention law and Russian constitutional law was impossible under “conditions of subordination.”<sup>116</sup> The only way to find balance and ensure the effectiveness of ECHR norms within Russia was through dialogue between the two systems. In short, the Court once again argued that the ECtHR’s decisions must respect each nation’s constitutional identity.<sup>117</sup> The Court saw its own obligation as finding a “reasonable balance” between the “letter and spirit” of ECtHR judgments, the fundamental constitutional principles of the Russian Federation, and the “legal regulation of human and civil rights and freedoms established by the Constitution of the Russian Federation.”<sup>118</sup> It then declared that the restriction of certain electoral rights was allowable on the grounds of a need for stability, as “in order to be stable[,] legal democracy needs effective legal mechanisms able to guard it, apart from other things, against abuses and criminalization of public authority.”<sup>119</sup>

The majority of the Court’s decision was taken up by the argument that the ECtHR did not understand the Russian situation, and that the Russian approach to sentencing practices and to Article 32 of the Russian Constitution had long taken individual and specific differences into account in restricting voting rights.<sup>120</sup> A large part of the judgment was taken up by a description of two earlier ECtHR cases involving the disenfranchisement of prisoners.<sup>121</sup> In the Court’s opinion, the Russian Federation’s approach to the voting rights of prisoners resembled the approach taken by Italy as evaluated in the *Scoppola* case,<sup>122</sup> rather than the British approach examined in *Hirst*.<sup>123</sup> Its argument for consistency with the *Scoppola* approach

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114. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 april 2016 g. [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, ¶ 4.2.

115. See Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iyul 2015 g. [Ruling of the Russian Federation Constitutional Court of July 14, 2015], ROSSIISKAIA GAZETA [ROS. GAZ.] July 27, 2015, ¶ 6 (referencing the discussion in *Anchugov & Gladkov*).

116. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 april 2016 g. [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, ¶ 1.2.

117. *Id.*

118. *Id.*

119. *Id.* ¶ 2.

120. *Id.* ¶ 5.1.

121. See *id.* ¶¶ 1.1, 3.

122. See *id.* ¶ 3 (commenting that the approach to prisoner voting rights in the *Scoppola* case was upheld by the ECtHR due to it being differentiated and individualized); see also *Scoppola v. Italy* (No. 3) App. No.126/05, 2012 Eur. Ct. H.R. 868 (2012).

123. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 april 2016 g. [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, ¶ 3; see *Hirst v. United Kingdom*

was based on a review of a century of Russian legal history on the issue, including the Russian Constitution of 1993, where Article 32 is found.<sup>124</sup> While the 1993 constitution was being drafted, the Court argued, there had been an opportunity to “turn down an absolute ban to participate in elections, established for citizens kept in places of deprivation of liberty under a court sentence,” and a deliberate decision had been made not to pursue this option.<sup>125</sup> In the Court’s words, “It is necessary to admit that the constitutional legislator in this case expressed his will quite clearly and definitely, having extended the restriction established by him to all convicted persons belonging to this category.”<sup>126</sup>

According to the Court, evidence of consideration of individual and specific differences in the restriction of prisoners’ voting rights could be found in the process of drafting the 1993 Russian Constitution. A reference to being “detained in a detention facility” following a court sentence was substituted for an earlier wording describing citizens subject to “restriction of liberty.” This amounted to a narrowing in scope of the provision, to include only life or fixed-term imprisonment;<sup>127</sup> as a result, no person can be deprived of voting rights without first receiving a court sentence.<sup>128</sup> The wording in Article 56(1) of the Russian Criminal Code—“citizens who are kept in places of deprivation of liberty under a court sentence”—means that persons in detention prior to sentencing are not restricted by Article 32 of the constitution.<sup>129</sup> Article 56(1) of the Russian Criminal Code also ensures that a first-time offender convicted of a minor crime can only be given a sentence involving the deprivation of liberty in exceptional circumstances, as outlined in Section 63 of the Russian Criminal Code, and only after the nature and circumstances of the offense have been comprehensively reviewed.<sup>130</sup> The Court concluded that the provisions of criminal law in Russia “practically fully exclude[d] the possibility of application of deprivation of liberty to persons having committed crimes of small gravity for the first time in

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(No. 2), App. No.74025/01, 42 Eur. Ct. H.R. 41 (2006) (discussing that the ECtHR found that the case was problematic due to the presence of an automatic deprivation of voting rights for all prisoners without any differentiation).

124. See *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 april 2016 g.* [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, ¶¶ 4–4.2.

125. *Id.* ¶ 4.1.

126. *Id.*

127. Ivan Kleimenov, *Judgment of the Constitutional Court of the Russian Federation no 12-P/2016: Refusal to Execute Judgments of ECHR or the Search for Compromise between Russian and International Law?*, 1 QUESTIONS INT’L L. 19, 29 (2016).

128. *Id.* at 30.

129. *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 april 2016 g.* [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, ¶ 5.1.

130. *Id.* ¶ 5.2.



the absence of aggravating circumstances.”<sup>131</sup> As well, the Court used statistics to show that very few people convicted of crimes of lesser gravity had received sentences involving imprisonment, which would lead to the removal of their voting rights.<sup>132</sup> The Court’s conclusion, based on statistics and on legal principles in criminal law, found that the Russian judicial and legal systems provided adequate individualization and differentiation in the limitation of prisoners’ voting rights.<sup>133</sup>

According to the Court, Russia was already following the *Scoppola* approach in its handling of prisoners’ voting rights.<sup>134</sup> Its objections to the ECtHR’s argumentation in *Anchugov and Gladkov* drew on a “multiannual experience of a constructive cooperation and mutually respectful dialogue” between the Court and the ECtHR; the Court’s objection to the ECtHR’s ruling was thus intended as “a contribution to the crystallization of the developing practice of the European Court of Human Rights in the field of suffrage protection, whose decisions are called upon to reflect the consensus having formed among States Parties to the Convention.”<sup>135</sup> Despite its disagreement with the ECtHR’s description of how Russia handled prisoners’ voting rights, the Court saw further room for cooperation with the Convention system and the ECtHR, perhaps including further reform of sentencing under criminal law to “optimize the system of criminal penalties,” or a decrease in incarceration via the use of “alternate kinds of penalties.”<sup>136</sup> Such changes, however, were the responsibility of the legislator.<sup>137</sup> Lastly, the Court found that the ECtHR’s judgment in *Achugov and Gladkov* was merely the “*in abstracto* review of a norm,”<sup>138</sup> an “act of abstract normative control” by the Strasbourg court.<sup>139</sup> The ECtHR, therefore, was involved in “norm construction” and policy making, rather than keeping to its role of examining the specific issues involved in the case it was considering.<sup>140</sup>

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131. *Id.*

132. *Id.* ¶ 5.3.

133. *Id.*

134. *Id.* ¶ 5.2.

135. *Id.* ¶ 4.4.

136. *Id.* ¶ 5.5.

137. *Id.*

138. *Id.* ¶ 6.

139. Kleimenov, *supra* note 127, at 37.

140. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 aprel 2016 g. [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, ¶ 6; *see also* D.I. Dedov, Judge of the Eur. Ct. of Hum. Rts., Konstitutsionnyi Sud Rossii: Zhit Nastoyashim, Pomnya Proshloe I Ustremivshis’ v Budushee [The Constitutional Court of Russia: To Live in the Present, Remembering the Past and Rushing to the Future] 6 (May 17–18, 2016) (Russ.); S.D. Knyazev, *Obyazatel’nost Postanovlenii ECPCH v Pravovoi Sisteme Rossii (na Osnove Praktiki Konstitutsionnogo Suda Rossiiskoi Federatsii)*, Zhurnal Rossiiskogo Prava (2016) X, at 12 (Russ.).

The judgment of the majority is certainly reflective of the current Russian governmental consensus in terms of viewing “Western influences” and those who support them as associated with “undermin[ing] the country from within”<sup>141</sup> and posing a threat to Russian sovereignty.<sup>142</sup> Thus, in a way, the majority opinion of the Court becomes a further guarantor of that sovereignty by interpreting human rights claims through the sovereignty lens and framing its reasoning as an act of resistance to Western judicial activism.<sup>143</sup> However, the truths of this consensus were challenged by two dissents from Justices Yaroslavtsev and Kazantsev.

Justice Yaroslavtsev disagreed with the majority of the Court regarding inability to comply with the measures of general character (i.e., differentiation and individualization when it comes to prisoner voting rights) suggested by the ECtHR.<sup>144</sup> While the Russian Constitution does contain a total ban on prisoner voting rights in Article 32(3), the constitution does not stand in “proud isolation” within Russian law; rather, it has to be viewed in tandem with other branches of Russian law.<sup>145</sup> The ECtHR rightly pointed out that Article 1 of the ECHR does not exempt any sort of norms and measures from being reviewed against the provisions of the Convention. In other words, no part of the “jurisdiction” of member states is immune from being reviewed against the provisions of the ECHR.<sup>146</sup> Hence, member states need to demonstrate compliance with the provisions of the ECHR when it comes to their entire “jurisdiction,” including their constitutions.<sup>147</sup> While the Russian Constitution contains a ban on prisoner voting rights, the constitution does not prescribe the implementation of this restrictive measure. Therefore, it is crucial to consider criminal law, criminal

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141. Pavel Romanov & Elena Iarskaia-Smirnova, “*Foreign Agents’ in the Field of Social Policy Research: The Demise of Civil Liberties and Academic Freedom in Contemporary Russia*,” 25 J. EUR. SOC. POL’Y 359, 362 (2015).

142. A.B. Lazarev, *Vzaimosvyaz’ Natsionalnogo I Mezhdunarodnogo Prava na Primere ECPCCH i Konstitutsionnogo Suda RF. Rol’ ESPCH I KS RF v Konstitutsionnom Prave Rossii [Interrelation of the National and International Law in the Example of the ECtHR and the Constitutional Court of the Russian Federation: The Role of the ECtHR and the Constitutional Court of the Russian Federation in the Constitutional Law of Russia]*, 10 INTERAKTIVNAYA NAUKA 10, 210 (2016) (Russ.).

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

144. See *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 aprel 2016 g. [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016]*, ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, pmb. at 57–58 (Yaroslavtsev, J., dissenting).

145. *Id.* ¶ 2, at 59.

146. *Id.*

147. *Id.*

procedure law, and other relevant branches of law in order to understand the basis, conditions, and consequences of this prohibition.<sup>148</sup> Thus, while the Russian Constitution fixes the categories of citizens that are deprived of voting rights, the federal legislature determines the actual composition of these categories. In other words, it is the federal legislature that concretizes the constitutional prohibitions in regard to voting.<sup>149</sup> Thus, the federal legislature has the ability to achieve partial differentiation of prisoner voting rights by developing and concretizing the meanings of terms such as “deprivation of liberty,” “places of deprivation of liberty,” “detention,” and “in accordance with the judgment of the court.” In conclusion, Justice Yaroslavtsev stated:

As follows from the above, an adequate constitutional-legal interpretation of Article 32 of the Constitution of the Russian Federation in conjunction with the provisions of criminal law, including Articles 15, 56, and 57 of the Criminal Code of the Russian Federation, permits avoiding conflicts related to restrictions on electoral law, thus making it possible to comply with measures of a general character [related to differentiation and individualization of prisoner voting rights] as indicated by the European Court of Human Rights . . . in accordance with the Constitution of the Russian Federation, and to achieve compatibility of these [ECtHR] measures with the provisions of the Constitution.<sup>150</sup>

It is clear that Justice Yaroslavtsev’s dissent suggested that the constitutional provisions containing a total ban on prisoner voting rights can be interpreted in a way to achieve individualization and differentiation as required by the ECtHR if the constitution is considered together with other branches of Russian law. In other words, individualization and differentiation can be achieved through constitutional interpretation and federal legislative amendments to various provisions of criminal and criminal procedure laws. Instead of interpreting the Russian constitutional ban on prisoner voting rights in a rigid fashion and viewing it through the lens of state sovereignty, Justice Yaroslavtsev indicated that, in fact, compliance with the ECtHR judgment could be achieved through constitutional interpretation. Even more importantly, Justice Yaroslavtsev challenged the dominant view of state sovereignty espoused by the majority and instead called for greater engagement with (rather than disengagement from) Western institutions such as the ECtHR, by stating that Russian constitutional provisions are not “immune” from being reviewed for their compliance with the provisions of the ECHR. This dissent certainly poses a challenge to the current Russian

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148. *Id.* ¶ 3, at 60.

149. *Id.* ¶ 3, at 62.

150. *Id.* ¶ 4, at 63.

consensus centered on protecting domestic sovereignty, including legal sovereignty, from “Western meddling.”<sup>151</sup>

While Justice Yaroslavtsev’s dissent primarily focused on issues of constitutional interpretation, the dissenting opinion of Justice Kazantsev went even further in challenging Russia’s current standoff with the West. Justice Kazantsev pointed out that the right to elect and be elected is not absolute.<sup>152</sup> Thus, federal legislators can restrict it under certain circumstances.<sup>153</sup> Hence, if the federal legislator can restrict voting rights, it also follows that the legislator can expand voting rights. Thus, the prohibition on the right to vote contained in Article 32(3) of the constitution is not an absolute prohibition and can be modified.<sup>154</sup> The ban on prisoner voting rights contained in Article 32(3) of the constitution constitutes the maximum, rather than the minimum, restriction on prisoner voting rights that the federal legislature is entitled to set. However, Article 32(3) does not require an automatic ban on all prisoner voting rights. This constitutional provision, read alongside other constitutional provisions, allows the federal legislature to give voting rights to some of the individuals contained in this category.<sup>155</sup> If the need to limit the scope of the ban on prisoner voting rights flows from Russia’s international legal obligations, the federal legislature is not only able to, but must use its right to lower the total ban on prisoner voting rights contained in Article 32(3), in order to comply with the norms of the ECHR as they were interpreted by the ECtHR in the *Anchugov and Gladkov v. Russia* case.<sup>156</sup>

In accordance with Article 15(4) of the constitution of the Russian Federation, the ECHR constitutes part of Russia’s legal system; thus, Russia (as a member state) must comply with the decisions of the ECtHR interpreting norms contained in the ECHR.<sup>157</sup> Given the fact that the Constitution of the Russian Federation and the ECHR are based on the same normative values, in the case of conflict the Russian Federation can only preference the provisions of the Russian Constitution (including the way these provisions are interpreted by the Court) over the provisions of the ECHR (including the way these provisions are interpreted by the ECtHR) if the Russian constitutional provisions contain a more comprehensive protection of

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151. Alexandra V. Orlova, *Privatizing Homosexuality: Russia’s Reassertion of “Moral Sovereignty” over Gay Rights*, 11 HUM. RTS. & INT’L LEGAL DISCOURSE 122, 139 (2017).

152. See *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 aprel 2016 g.* [Resolution of the Constitutional Court of the Russian Federation of April 19, 2016], ROSSIISKAIA GAZETA [ROS. GAZ.] May 5, 2016, ¶ 2, at 49 (Kazantsev, J., dissenting).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* ¶ 2, at 52.

157. *Id.* ¶ 3, at 52.

human rights, including when it comes to balance with other constitutional rights.<sup>158</sup> Thus, if the Russian Constitution (including the way it is interpreted by the Court) contains a less comprehensive protection of rights in comparison with the ECHR norms (including the way these norms are interpreted by the ECtHR), it follows that the Russian Federation must preference the provisions of the ECHR and follow the decisions of the ECtHR.<sup>159</sup>

In this particular case, there is little doubt that the ECHR, as it has been interpreted by the ECtHR, provides a more comprehensive protection of prisoner voting rights.<sup>160</sup> By ratifying the ECHR, the Russian Federation has made it part of its legal system and thus, by virtue of Article 46 of the ECHR, must recognize the mandatory jurisdiction of the ECtHR as the body tasked with interpreting the provisions of the ECHR.<sup>161</sup> Moreover, the Russian Federation must comply with the decisions of the ECtHR as it interprets the norms of the ECHR, even when, in the opinion of the Russian Federation, the interpretation of the ECHR by the ECtHR differs from the original intent of the Russian Federation at the time of signing and ratification of the ECHR.<sup>162</sup> It is notable that a current trend away from a total ban on prisoner voting rights is observable in various international instruments.<sup>163</sup> Thus, it is possible and necessary for the Russian Federation to implement the decision of the ECtHR in the *Anchugov and Gladkov v. Russia* case, due to the ability of the federal legislature to regulate the categories of prisoners and thus avoid a total ban on prisoner voting rights.<sup>164</sup> The individualization and differentiation of prisoner voting rights does not require amendments to the Constitution of the Russian Federation. It can be achieved either through amendment of relevant election legislation or by amending criminal and criminal procedure law to optimize the system of penalties requiring imprisonment.<sup>165</sup>

It is clear that Justice Kazantsev, by virtue of his dissent, has challenged the restrictive view of sovereignty as isolationist and immutable and demonstrated by virtue of his judgment that a greater connection between domestic and international forms of judicial control is certainly possible.<sup>166</sup> Justice Kazantsev's view of sovereignty, then, does not necessarily create tension between the

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158. *Id.* ¶ 3, at 53.

159. *Id.*

160. *Id.*

161. *Id.* ¶ 3, at 54.

162. *Id.*

163. *Id.* ¶ 3, at 55.

164. *Id.* ¶ 3, at 56.

165. *Id.*

166. See Alexandra V. Orlova, *Sovereignty, Dissent, and the Shaping of International Consensus around Human Rights: An Examination of Russian "Disengagement" from the European Court of Human Rights*, 35 ARIZ. J. INT'L & COMP. L. 435, 466–67 (2018) [hereinafter Orlova *Disengagement*].

development of human rights and sovereignty.<sup>167</sup> He prioritizes the concerns of individuals over sovereignty concerns by stating that, in cases of conflict, the system that provides a more comprehensive protection of rights should be given preference, hence allowing rights to be reclaimed by their individual holders.<sup>168</sup>

### B. Yukos, *No.1-P* (2017)

Another notable dissent that pushed the boundaries of existing and governmentally reinforced consensus regarding the role of Russia's constitutional identity *vis-à-vis* international law and the judicial institutions interpreting its norms is in the 2017 case of *Yukos*. This 2017 judgment of the Court stemmed from a September 20, 2011 judgment by the ECtHR.<sup>169</sup> The ECtHR found that the Russian Federation breached Article 1 of Protocol No. 1 of the ECHR (protection of property) in regard to the assessment of penalties by the Russian tax authorities against the now defunct oil company Yukos in 2000–2001 as well as failed to “strike a fair balance” between legitimate aims sought and the measures employed in the enforcement proceedings against the company.<sup>170</sup> In particular, the ECtHR was critical of the retroactive application of Article 113 of the Tax Code by Russian authorities, as well as the 2005 decision of the Court that stated that the three-year statutory limitation period contained in Article 113 of the Tax Code, on the investigation of tax offenses, was not applicable in cases of dishonest taxpayers.<sup>171</sup> The ECtHR stated that the Court's interpretation regarding the retroactive applicability of Article 113 to dishonest taxpayers was not reasonably foreseeable and created an unpredictable exception to the rule where previously there were none.<sup>172</sup> The ECtHR was also critical of the doubling of tax penalties against Yukos.<sup>173</sup> The ECtHR ordered compensation in the amount of €1,866,104,634 to be paid by the Russian government to Yukos ex-shareholders.<sup>174</sup>

Not surprisingly, the ECtHR's decision on the merits as well as the award of compensation created a vocal outcry in Russian political

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167. See Carly Nyst, *Solidarity in a Disaggregated World: Universal Jurisdiction and the Evolution of Sovereignty*, 8 J. INT'L L. & INT'L REL. 36, 59 (2012).

168. Orlova *Disengagement*, *supra* note 166.

169. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04 Eur. Ct. H.R. (2011).

170. *Id.* ¶¶ 657–58.

171. *Id.* ¶ 572.

172. *Id.* ¶ 573.

173. *Id.* ¶ 575.

174. OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04 Eur. Ct. H.R. ¶ 36 (2014).

circles against the authority of the ECtHR.<sup>175</sup> As a result, the Russian Ministry of Justice raised the question regarding the possibility of implementation of the ECtHR decision before the Court in 2017. The majority opinion of the Court for the most part replicates the Court's judicial reasoning in the *Anchugov and Gladkov* case.

The Court reiterated the earlier conclusions that it had reached in a 2015 constitutional reference case<sup>176</sup> as well as in the 2016 *Anchugov and Gladkov* judgment regarding the impossibility of interaction between the European conventional and the Russian constitutional legal orders "in the conditions of subordination."<sup>177</sup> The Court stated that only dialogue between different legal systems can ensure a proper balance between them.<sup>178</sup> The Court stated that the effectiveness of the ECHR's norms within the Russian constitutional order is dependent upon respect by the ECtHR of national constitutional identity.<sup>179</sup> However, despite these strong statements, the Court also noted that in its practice it is bound to follow the decisions of the ECtHR even if they are based on the application of "evolutive reasoning," "substance over form," and so on, which can lead the ECtHR to depart from its earlier positions.<sup>180</sup> The Court also noted that it is ready to search for a lawful compromise for the sake of supporting the fundamental significance of the European system of protection of human rights and freedoms.<sup>181</sup>

Despite its statement about searching for a compromise, the Court went on to state that, in cases where the substance of a decision of an international body for the protection of human rights and freedoms impinges unlawfully upon the basic principles and rules of the Constitution of the Russian Federation, "Russia may deviate, by way of exception, from performing the obligations placed upon it by such decision, provided that this deviation is the only possible way to avoid the violation of the Constitution of the Russian Federation."<sup>182</sup> Interestingly, the majority of the Court seems to have engaged with the argument made in Justice Kazantsev's dissenting opinion in the *Anchugov and Gladkov* case regarding comprehensive protection of rights and balancing of rights. The majority stated that the Court cannot support the interpretation of the ECHR provided by the ECtHR if Russian constitutional norms (including the way these

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175. Iryna Marchuk, *The Tale of Yukos and of the Russian Constitutional Court's Rebellion against the European Court of Human Rights*, 1/2017 ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI 413, 416 (2017) (It.).

176. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iyul 2015 g [Resolution of the Russian Federation Constitutional Court of July 14, 2015], ROSSIISKAIA GAZETA [ROS. GAZ.] July 27, 2015, ¶ 6.

177. *Id.* ¶ 2.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

norms are interpreted by the Court) contain a more comprehensive protection of human rights and freedoms, taking into account the balancing of rights.<sup>183</sup> Hence, the majority of the Court engaged in relativizing the issue of what constitutes a more comprehensive protection of human rights and freedoms by assessing the rights of Yukos shareholders against other Russian taxpayers.

The rest of the majority's decision dealt with the interpretation of Article 113 of the Russian Tax Code, which contained a statutory limitation period to hold an individual accountable for tax offenses. The majority held that what needed to be remembered and was of principal importance in this case was the fact that material losses sustained by Yukos as a result of the actions of Russian tax authorities were the consequences of illegal activities by the company itself.<sup>184</sup> Yukos was a persistent tax defaulter, and when it ceased to exist it left unpaid outstanding tax obligations. The Court held that

[t]he payment as a result of the ECtHR decision to former [Yukos] shareholders who engaged in illegal scheming to avoid taxation, as well as to their heirs and legal successors, of such significant sums of monetary compensation from public funds which were systematically deprived by the company of due amounts of tax payments necessary for meeting public obligations to all the citizens and overcoming the financial and economic crisis, contradicts the principles of equality and fairness in tax relations.<sup>185</sup>

Thus, the Court held that the decision of the ECtHR pertaining to payment of compensation could not be enforced.<sup>186</sup>

The decision of the majority regarding the impossibility of implementation of the ECtHR decision in the Yukos case was a predictable outcome, given the majority's reasoning in the *Anchugov and Gladkov* case. What is notable, however, despite the predictable conclusion, is a more cautious statement by the Court regarding its relationship with the ECtHR, framing cases of nonimplementation as exceptional, as well as engaging with dissenting reasoning in the *Anchugov and Gladkov* case. This case, similar to the *Anchugov and Gladkov* case, contains a dissent written by Justice Yaroslavtsev. Justice Yaroslavtsev stated that the Court should not have admitted the request of the Ministry of Justice. The Russian authorities should have appealed the 2011 judgment by the ECtHR to the Grand Chamber within a three-month period, as provided for by Article 43 of the ECHR. Having failed to exercise their right to appeal, the Russian Federation acknowledged, at least formally, the legal validity of the ECtHR's conclusions pertaining to the violations of the

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183. *Id.*

184. *Id.* ¶ 4.5.

185. *Id.*

186. *Id.* ¶ 5.2.



ECHR.<sup>187</sup> The inconsistent and contradictory position of the Russian authorities created a “legal dead end.”<sup>188</sup> The current attempt by the Ministry of Justice to find a “simplified solution” to the situation by filing a case before the Court was flawed in that this case could not be admitted due to a principle that “no one can be a judge in his own case.”<sup>189</sup> The conclusions of the ECtHR regarding violations of the ECHR were in large part based on the finding that the Court violated the principle of legality in its 2005 judgment that stated that the statutory limitation period did not apply in the case of dishonest taxpayers.<sup>190</sup> Justice Yaroslavtsev stated that

the Ministry of Justice of the Russian Federation should not seek easy ways of resolving the problem by means of applying to the Constitutional Court. Instead, it is necessary to continue a dialogue with the Committee of Ministers of the Council of Europe, using the process outlines in Article 46 of the ECHR.<sup>191</sup>

This continued dialogue, rooted in the process contained in Article 46 of the ECHR, would increase the interaction of the ECtHR and domestic organs of state power, will aid in the implementation of the ECHR, and will not harm Russia’s national sovereignty.<sup>192</sup>

When it came to the majority’s reasoning specifically dealing with tax matters, Justice Yaroslavtsev stated that only the legislator could establish and change statutory limitation periods.<sup>193</sup> Hence, the Court exceeded its own jurisdiction by assuming the role of legislator in setting aside the statutory limitation period.<sup>194</sup> The federal legislature did exercise its proper role by amending the provisions of Article 113 of the Tax Code to interrupt the statutory limitation period under certain circumstances in January 1, 2007.<sup>195</sup> Therefore, the provisions of Article 113 of the Tax Code in their amended version could only be applied from January 1, 2007 onward. Thus, until January 1, 2007, the Tax Code imposed a three-year limitation term that was mandatory and unconditional. Hence, the Court went beyond its powers in permitting retroactive application of tax law in regard to Yukos.<sup>196</sup>

Comparing the judgment of the majority with Justice Yaroslavtsev’s dissent, it becomes apparent that Justice Yaroslavtsev is speaking out against legal isolationism and calling for re-

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187. *Id.* ¶ 2.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* ¶ 3.

193. *Id.* ¶ 1.

194. *Id.*

195. *Id.*

196. *Id.* ¶¶ 1, 2.

engagement, regardless of how difficult the dialogue it may entail. He points out that this type of interaction between national and transnational bodies will not undermine Russia's sovereignty. Hence, Justice Yaroslavtsev's dissent represents continuity in terms of the arguments he espoused in his earlier dissent in *Anchugov and Gladkov*. His dissent also aligns well with another dissenter—Justice Kazantsev—in challenging the existing political consensus<sup>197</sup> that is reinforced by the majority judgments in both the *Anchugov and Gladkov* and *Yukos* cases. The very existence of dissents in such politically charged cases as *Anchugov and Gladkov* and *Yukos* is a positive development for Russian legal culture, due to the historical legacy of law and courts “serving the needs of the regime, not the people.”<sup>198</sup> The law and the courts were both used in pre-Soviet and post-Soviet Russia in order to suppress all opposition. Hence, “[i]nstead of being courts of justice, they became forums for propaganda and a means by which enemies of the state could be ‘legally’ disposed or severely punished.”<sup>199</sup>

The presence of dissenting opinions in the rulings of the Court serves to increase the legitimacy of the judiciary and may eventually help in reshaping the public opinion that views the judicial branch as a simple extension of the executive one.<sup>200</sup> While law serves the function of establishing the framework where, supposedly, “the truth” will be determined,<sup>201</sup> courts (especially constitutional courts) are tasked with the “creation of a regularized and legalized form of truth.”<sup>202</sup> Thus, having multiple truths emerge by way of judicial dissents has the potential to not only challenge the commonly espoused “consensus,” but also to provide a legitimizing voice for the marginalized, such as prisoners or the shareholders of a company that fell into governmental disfavor.

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197. See generally N.S. Raikova, *Problemy Obespecheniya Nezavisimosti Sudei Konstitutsionnogo Suda Rossiiskoi Federatsii* [Problems of Ensuring the Independence of the Judges of the Constitutional Court of the Russian Federation], 341 VESTNIK TOMSKOGO GOSUDARSTVENNOGO UNIVERSITETA 130 (Russ.).

198. Shawn S. Cullinane, *Can the Constitutional Court of the Russian Federation Lead the Way to the Creation of a True Democratic Society in the New Russia in the 21st Century?*, 17 TOURO L. REV. 397, 400–01 (2001).

199. *Id.* at 401.

200. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 340–41 (2007) (“Paradoxically by undermining the authority of the Court, dissent increases the power of the Court and the law by insulating it from potential political attacks.”).

201. *Id.* at 288.

202. *Id.* at 289.

## IV. DISSENT, CIVIL SOCIETY, AND DEMOCRACY

In addition to challenging consensus and providing a legitimizing voice to disempowered groups, judicial dissents have the capacity to transcend and exceed the institutions from which they arise, hence impacting public debate and, potentially, public action. In other words, judicial dissents certainly have the capacity to spill over into the public sphere,<sup>203</sup> as was recently illustrated by a highly politically charged speech made by the chairman of the Court, Valeri Zorkin, in the media, and the ensuing response to his speech. On October 9, 2018, the *Rossiiskaya Gazeta* newspaper, the official governmental mouthpiece and the most widely circulated newspaper in Russia, published an article by Zorkin regarding his vision for future constitutional reform.<sup>204</sup> Zorkin acknowledged that the Russian Constitution is not a static document, but rather contains in its text “transformational potential” that allows it to be forward looking and to ensure the preservation of social compromise in changing social realities, thus guaranteeing sociopolitical stability.<sup>205</sup>

After Zorkin acknowledged the “living tree” aspect of the Russian Constitution, he provided lengthy statements regarding Russia’s unique constitutional identity, public consensus, and minority rights. Zorkin stated that the changes generated by globalization are not always beneficial and at times carry enormous risks and costs in various spheres of human life—from economic to social life, from politics to culture—in all regions of the world.<sup>206</sup> Thus, a desire to oppose processes of sociocultural globalization arises within various jurisdictions. There emerges a greater resistance to universalization:

At the level of mass consciousness, this is manifested in the desire to formulate their religious, national, or regional (for example, European) identity, to preserve and strengthen the traditional values of the family, culture, life, etc. And at the level of public authorities, this is manifested in the desire to prevent the erosion of national state sovereignty and to solidify national constitutional identity.<sup>207</sup>

When it comes to constitutional law, Zorkin stated that the dissatisfaction of citizens within national jurisdictions stems from the expansion of influence of supranational bodies such as the ECtHR, the “democratic deficit[s] of which are becoming increasingly

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203. Basangov, *supra* note 8, at 30.

204. Valerii Zorkin, *Bukva I duh Konstitutsii*, ROSSIISKAYA GAZETA [ROS. GAZ.], (Oct. 9, 2018, 6:00 PM), <https://rg.ru/2018/10/09/zorkin-nedostatki-v-konstitucii-mozhno-ustranit-tochechnymi-izmeneniami.html> [https://perma.cc/6MAG-Q9J4] (Russ.)

205. *Id.*

206. *Id.*

207. *Id.*

obvious.”<sup>208</sup> Thus, the increasing influence and judicial activism exhibited by supranational bodies necessitates the creation of “certain ‘counter-limits’” that would constrain the actions of supranational institutions.<sup>209</sup> Zorkin stated that the idea of Russian constitutional identity was first utilized in the *Anchugov and Gladkov* case dealing with prisoner voting rights. He then pointed out that

the ECtHR’s unwillingness to take into account the fact that national constitutional review bodies do not have the degree of freedom to interpret the Constitution, which the ECtHR judges allow themselves in their interpretation of the abstract provisions of the European Convention, looks particularly unclear. The so-called evolutive interpretation of the Convention by the [ECtHR], in fact, is aimed at creating a new unified European law and order. And national constitutional justice cannot go beyond the limits of interpretation established both by the Constitution itself and the conventions that have been established within the society, which are the basis of the constitutional identity of the people.<sup>210</sup>

Zorkin went on to state that the principle of national constitutional identity is reflective of the fact that (1) social consensus pertaining to the issues of human rights in various states has sociocultural specificity, and (2) this public consensus pertaining to human rights is established by the majority of society and is established for the majority. Zorkin stated that he does not mean to say that the concept of constitutional identity is focused only on the protection of the rights of the majority. However, he did emphasize that the rights of minorities can be protected only to the extent that the majority agrees. It is impossible to impose on society a legislative norm that denies or calls into question the basic values of the common good shared by the majority of the country’s population.<sup>211</sup>

Zorkin’s argument makes clear the powerful nature of “public consensus” and the way that this consensus has been intimately connected to the idea of local constitutional identity as a mechanism of resistance to Western influences and interpretations of minority rights. Zorkin’s newspaper article did not go unchallenged. For example, another more pro-Western newspaper, *Novaya Gazeta*, published a response to Zorkin’s article by Elena Lukyanova, professor at the Russian Higher School of Economics. Lukyanova questioned Zorkin regarding his vision of majoritarian consensus. She asked, “What type of majority are you talking about? Is this the majority formed by dishonest television propaganda? Is it the parliamentary majority that became the majority due to not quite fair

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

and not quite free elections?”<sup>212</sup> Lukyanova also criticized Zorkin’s view regarding Russia’s constitutional identity. She stated that “it looks like [Zorkin] wants [the Russian Constitutional] Court to become a supplier of ultimate truth, in case of disagreements with the European Court of Human Rights.”<sup>213</sup> Ultimately, different versions of the “truths” represented in the *Anchugov and Gladkov* and *Yukos* cases have been placed into the public realm, demonstrating the potentially powerful nature of judicial ideas.

The very public nature of debate regarding Russian constitutional identity, sovereignty, and the relationship with Western institutions such as the ECtHR raised very similar issues to those raised by the majority and dissenting opinions in the *Anchugov and Gladkov* case as well as the *Yukos* case. Hence, the issues that were debated within the confines of the courtroom have now firmly entered the public sphere—a debate that has become much more relevant given Russia’s potential exit from the Council of Europe and the ECtHR.<sup>214</sup> Some of the key points expressed in judicial dissents in *Achugov and Gladkov* as well as in *Yukos* have been restated outside of the courtroom as possible alternatives for Russia’s future, especially given Russia’s current path toward disengagement from the West.<sup>215</sup> Hence, despite the limited view expressed by the majority of the Court regarding judicial dissents not constituting independent acts and having no impact on the rights and responsibilities of litigants, it is hard to disagree with the dissenting opinion of Justice Gadjiev, who emphasized the potential “soft power”<sup>216</sup> of dissent as having the ability to impact legal

212. Elena Lukyanova, *Bolshinstvo, Govorite...Otvét predsedatelu Konstitutsionnogo suda Valeriu Zorkinu, opublikovavshemu v ‘Rossiiskoi gazete’ statú ‘Bukva I duh Konstitutsii [Majority, You Say...Response to the Chairman of the Constitutional Court Valery Zorkin, who Published an Article in the Rossiyskaya Gazeta “The Letter and Spirit of the Constitution”]*, NOVAYA GAZETA (Oct. 10, 2018, 10:35 AM), <https://www.novayagazeta.ru/articles/2018/10/10/78151-bolshinstvo-govorite> [https://perma.cc/Z3T4-CZKX] (Russ.).

213. *Id.*

214. See Vladimir Kara-Murza, *Russia Is Preparing to Back Out of Its Last Human Rights Commitments in Europe*, WASH. POST (Oct. 30, 2018), [https://www.washingtonpost.com/news/democracy-post/wp/2018/10/30/russia-is-preparing-to-back-out-of-its-last-human-rights-commitments-in-europe/?noredirect=on&utm\\_term=.688ebcdb8072](https://www.washingtonpost.com/news/democracy-post/wp/2018/10/30/russia-is-preparing-to-back-out-of-its-last-human-rights-commitments-in-europe/?noredirect=on&utm_term=.688ebcdb8072) [https://perma.cc/M6ZA-P8MR].

215. See generally O.A. Krapivkina, *Priroda Instituta Osobogo Mneniya Sudi v Razlichnyh Pravovyh Sistemah*, 97 VESTNIK IRGTU 272 (2015) (Russ.) (stating that judicial dissent plays a key role when it comes to civil society, as it demonstrates alternative ways of solving complex issues and allows the law to slowly adjust to societal changes).

216. L.A. Marshava, *Nekotorye Problemy Neofitsialnogo Sistemicheskogo Tolkovaniya Norm Konstitutsii Rossiiskoi Federatsii [Some Problems of the Informal Systematic Interpretation of Norms of the Constitution of the Russian Federation]*, VESTNIK CHELYABINSKOGO GOSUDARSTVENNOGO UNIVERSITETA 1, 26 (2012) (Russ.). The term “soft power” generally refers to the ability of one side to persuade others to do what it wants without utilizing coercion. See Eric X. Li, *The Rise and Fall of Soft*

consciousness.<sup>217</sup> Hence, judicial dissents remind us that court rulings can have profound impacts “on real people living normal lives—and that these impacts and lives matter[].”<sup>218</sup>

Judicial dissents represent a right to confrontation, which is crucial in a democratic society.<sup>219</sup> In a way, judicial dissents democratize judicial decision making.<sup>220</sup> Judicial dissents, while not leveling the playing field, can certainly provide a voice to the disempowered through the legitimacy of judicial argument,<sup>221</sup> as well as provide greater engagement for all sides by forcing dialogue (at least within the confines of the courtroom, as a start).<sup>222</sup> Ultimately, one of the key problems in trying to achieve and maintain consensus at all costs is that

if people concentrate on the consensus, problems emerge. As a result of bracketing others’ ideas, people ignore diverse alternative arguments, however rational, severely limiting practical criticisms. They have to judge within a very limited range of communication.<sup>223</sup>

To argue against the value of judicial dissent is to hope for the constitutional law to remain fixed or frozen, rather than to be responsive to social changes.<sup>224</sup> The indirect impact of dissent can be quite significant.<sup>225</sup> Dissents frequently act as placeholders, in order to create space for social or legislative actions to advance democracy when the conditions permit.<sup>226</sup>

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*Power*, FIN. POST (Aug. 20, 2018), <https://foreignpolicy.com/2018/08/20/the-rise-and-fall-of-soft-power> [<https://perma.cc/27N9-TE56>] (archived Apr. 4, 2019).

217. *Opređenje iz Konstitucionnog Suda Rossijskoy Federatsii Stat'yami 301 i 312 Ugolovno-protsessual'nogo kodeksa Rossijskoy Federatsii ot 17 yanvarya 2012*, [Determination of the Constitutional Court of the Russian Federation regarding Article 301 and 312 of the Criminal Procedure Code of the Russian Federation of January 17, 2012], SOBRANIE ZAKONODATEL'STVA ROSSIJSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 174-O-O.

218. Charles L. Zelden, *How Do You Feel About Writing Dissents?* *Thurgood Marshall's Dissenting Vision for America*, 42 J. SUP. CT. HIST. 77, 83 (2017).

219. See Roberta Kevelson, *Dissent and the Anarchic in Legal Counter-Culture: A Peircean View*, 15 RATIO JURIS 16, 17 (2002).

220. See generally O.A. Krapivkina, *Osoboe Mnenie Sudi vs. Kollegialnoe Reshenie Suda ili Individualism vs. Konstitutsionalizm [Judicial Dissent vs. Judicial Consensus or Individualism vs. Constitutionalism]*, 61 VESTNIK IRGTU 231 (2012) (Russ.).

221. See Kevelson, *supra* note 219, at 19.

222. See *id.* at 22.

223. Suzuki & Sekido, *supra* note 87, at 12.

224. See Carissima Mathen, *Dissent and Judicial Authority in Charter Cases*, 52 UNIV. NEW BRUNSWICK L.J. 321, 327–28 (2003).

225. E.E. Novopavlovskaya & E.A. Pereverzev, *Osoboe Mnenie Sudi Konstitucionnogo Suda Rossijskoi Federatsii: problemy pravovoi reglamentatsii i praktika primeneniya [Dissenting Opinion of the Judge of the Constitutional Court of the Russian Federation: Problems of Legal Regulation and Practical Application]*, VESTNIK DKONOMIKI, PRAVA I SOTSIOLOGII 1, 107 (2017) (Russ.).

226. See Belleau & Johnson, *supra* note 4, at 163 (recognizing the argument that a dissent can operate as a holding space).

A carefully thought-out and appropriate dissent can “salvage for tomorrow the principle that was sacrificed or forgotten today . . . [and] keep the democratic ideal alive in days of regression, uncertainty, and despair.”<sup>227</sup> Dissent serves to invite those excluded by the majority opinion and by broader social consensus back into the dialogue, as well as to extend the dialogue outside of the courtroom.<sup>228</sup> In the absence of dissent, “the constant evolution and revolution that is democracy dies.”<sup>229</sup>

## V. CONCLUSION

While arguments regarding positive and negative aspects of judicial dissents remain among Russian and Western scholars, it is hard to discount the “soft power” of dissent to challenge the prevailing consensus. Hence, dissents can be a powerful tool when it comes to debate and democracy, precisely due to their capacity to show the availability of “multiple truths” and keep the conversation open. In a way, dissents force the majority to deal with dissenting arguments and can transcend the confines of the courtroom. Hence, while not all decisions to dissent are driven by ideological criteria,<sup>230</sup> the ones that truly challenge the unanimity of consensus can be profoundly impactful.

One of the most important strategic considerations that should drive the writing of dissents should be “to look beyond the immediate differences of opinion, and craft dissents in such a way that we can eventually shape the law as collective wisdom says it should be, not as we selfishly want it to be.”<sup>231</sup> Thus, if judges become reluctant in writing dissents, then such dissent aversion can impose significant costs on law and society.<sup>232</sup> While dissent in the legislature, for the most part, is not readily accessible to the general public, the visibility of judicial dissent, while certainly taking courage to write, can also serve to foreshadow and contribute to social transformation.<sup>233</sup>

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227. Randall T. Shepard, *Perspectives: Notable Dissents in State Constitutional Cases: What Can Dissent Teach Us?*, 68 ALB. L. REV. 337, 342 (2005) (quoting William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 JUDICATURE 104 (1948)).

228. Claire L'Heureux-Dubé, *The Dissenting Opinion: Voice of the Future?*, 38 OSGOODE HALL L.J. 495, 504, 510 (2000).

229. Victoria A. Brownworth, *Dissent. It Makes a Difference. So Why Aren't We Doing It?*, LAMBDA BOOK REP., Nov.–Dec. 2002, at 47.

230. See Lee Epstein, William M. Landes & Richard A. Posner, *Why (And When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 135 (2011).

231. Shepard, *supra* note 227, at 347.

232. Bernice B. Donald, *The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts*, 47 U. MEM. L. REV. 1123, 1140 (2017).

233. *Id.* at 1142–43.

Judicial dissent legitimizes challenges to consensus by displaying the diversity of societal views, including those views that go against popular opinions that seem entrenched.<sup>234</sup> While in the short run, judicial dissents may not convince the majority (either in or outside the courtroom) to change its mind, they contribute to “forming a polity where people’s rights are the subject of an ongoing political debate.”<sup>235</sup> Thus, ultimately dissents inspire hope for change by challenging the permanence of both law and consensus.<sup>236</sup> They show that disagreement matters.<sup>237</sup>

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234. Priel, *supra* note 3, at 392.

235. *Id.* at 393.

236. Belleau & Johnson, *supra* note 4, at 165 (explaining the importance of dissenting views such that the current law is understood as a provisional holding place).

237. *Id.* at 172.