HUMAN RIGHTS QUARTERLY

Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime

*René Provost**

ABSTRACT

From Pussy Riot to Michael Khodorkovskiy, the solidity of the rule of law in Russia seems rather shaky. This has translated into a troubled relationship between Russia and the European Court of Human Rights since Russia's ratification of the European Convention in 1998. Various factors explain this tension, including the structure of the judiciary, the status of the European Convention in Russia law, public mistrust of the courts, and ongoing episodes of armed conflicts. This has posed enormous challenges to the European Court of Human Rights, and even the most recent attempts to improve it are unlikely to trigger better compliance in Russia.

"Without exaggeration, Russia is a country of legal nihilism.
No European country can boast of such disregard for law."[1]
—Dmitry Medvedev, 22 January 2008

I. INTRODUCTION

The jailing of punk band Pussy Riot, the adoption of a law that blatantly discriminates against sexual minorities, and a broad crackdown on civil

* *René Provost* is Associate Professor, McGill Centre for Human Rights and Legal Pluralism & Faculty of Law, McGill University. (rene.provost@mcgill.ca)
I wish to thank Daria Boyarchuk, Will Colish, Raphaël Girard, Daniel Haboucha, and Julien Hynes-Gagné for their assistance in preparing this text. Research for this paper was conducted as part of the McGill Rule of Law in Russia Project, whose financial support is gratefully acknowledged.
1. Jackson Diehl, *Holding Medvedev to His Words*, WASH. POST, 25 Feb. 2008, at A15.

society since Putin's return to the presidency, all underscore the enormous challenges in improving compliance with human rights in Russia. Even the later release of Pussy Riot members and business tycoon Michael Khodorkovskiy, shrouded in secrecy, suggest a rather loose notion of the rule of law in that country. This has translated into a troubled relationship between Russia and the institutions of the Council of Europe (CoE) devoted to the protection of fundamental rights and freedoms in the region.[2] In 1998 the Russian Duma ratified the European Convention on Human Rights[3]—the Council's key human rights instrument—despite considerable hesitation and tremendous amount of skepticism within the Council of Europe on the "suitability of the applicant for membership."[4] The Court's legitimacy and efficiency in maintaining human rights standards in Europe have been questioned by judges, media and politicians in Russia, fuelled in part by the Court's backlog of pending applications which has reached an unprecedented magnitude. Unfortunately, Russia has been one of the countries causing the backlog. In the seventeen years since its accession to the Council of Europe, Russia has generated a large portion of the work of the Council's institutions because of the number of petitions alleging Russia's violations of human rights obligations and the state's reluctance to implement the decisions of the European Court.[5] Russia's defiance of the ECHR regime reflects a broader and deeper

2. *See inter alia* Philip Leach, *Strasbourg's Oversight of Russia: Strenuous Relationship?*, Public Law 640 (2007); Jeffrey Kahn, *A Marriage of Convenience: Russia and the European Court of Human Rights*, RadioFreeEurope/RadioLiberty, 19 June 2002, available at http://www.rferl.org/content/article/1344403.html; Mark Janis, *Russia and the "Legality" of Strasbourg Law*, 8 Eur. J. Int. Law 93 (1997).; Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?*, 6 Eur. Hum. Rts .L. Rev. 628 (1997).
3. European Convention on Human Rights, art. 19, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Eur. T.S. No. 5 (*entered into force* 3 Sept. 1953), *amended by* Protocols No. 11 and No. 14 [hereinafter ECHR].
4. The Eminent Lawyers Committee concluded that "the legal order of the Russian Federation does not . . . meet the Council of Europe (CoE) standards as enshrined in the statute of the Council and developed by the organs of the European Convention on Human Rights." Rudolf Bernhardt et al., *Report of the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards*, 15 Hum. Rts. L. J. 249, 287 (1994). *See* Peter Leuprecht, *Albert Weitzel et L'adhésion de la Russie au Conseil de l'Europe, in* Mélanges en hommage à Albert Weitzel L'Europe des droits fondamentaux (Luc Weitzel ed., 2013).
5. The Court was established pursuant to Protocol 11 to the European Convention for Human Rights. *See* Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, pmbl., *opened for signature* 11 May, 1994, C.E.T.S. No. 115 (*entered into force* 1 Nov. 1998) [hereinafter ECHR]. Beyond the Kremlin's successful execution of the monetary component, it has failed to remedy a range of systemic problems addressed by ECtHR judgments. Despite the progress that has been achieved with the adoption of the law on excessively long enforcement (non-enforcement) of judicial acts, the new legislation did not resolve the specific problem of failure to enforce decisions concerning the provisions of housing for servicemen by the state. *See generally* Ilyushkin and Others v. Russia, App. No. 5734/08 et seq., and Kalinkin and Others v. Russia, App. No. 16967/10, Eur.

ambivalence regarding the country's identity, whether it wishes to define itself as fundamentally European or not.[6] The resentment towards the Court has increased, especially since Strasbourg delivered its judgment against Russia in *Ilascu v. Moldova and Russia* in 2005[7]; Russia's Ministry of Foreign Affairs expressed "bewilderment . . . at the inconsistency, contradictoriness, subjectivity and clear political engagement of the Strasbourg Court."[8] The resulting tension between Russia and the Council of Europe led the former to refuse for several years to ratify Protocol 14 to the ECHR.[9] Protocol 14, the most recently implemented reform to the structure of the ECHR, was described by many commentators as "the crown jewel of the world's most advanced international system for protecting civil and political liberties."[10] Designed to improve the efficiency of the Court by enhancing its discretion to determine which cases to hear, Protocol 14 also enables the Committee of Ministers to request an interpretation of judgment and initiate proceedings against a member-state for non-compliance.[11] Russia had resisted ratifying

---

Ct. H.R. (2012). *See also* Demos Center, *Implementation of Judgments by the European Court of Human Rights (ECtHR)* (2008) (briefing paper drafted by Demos Center for the 8 Oct. 2008 Russia-EU Human Rights Consultations), *available at* http://www.memo.ru/2008/10/15/1510084.htm.

6. Angelika Nussberger, *Russia and European Human-Rights Law: Progress, Tensions and Perspectives: Foreword*, 37 Rev. Cent. East Eur. Law 155 (2012).
7. *See* Case of Ilaşcu and others v. Moldova and Russia, Application No. 48787/99 (2004).
8. *See, e.g.,* Uwe Klussmann, *Moscow Irked by Tide of Lawsuits: Russians Seeking Justice in European Court*, Spiegel Online, 30 July 2007, *available at* http://www.spiegel.de/international/europe/moscow-irked-by-tide-of-lawsuits-russians-seeking-justice-in-european-court-a-497462.html; Philip Leach, *Russia put to the Test on Human Rights*, The Times, 12 July 2005, *available at* http://www.thetimes.co.uk/tto/law/article2212921.ece; Alastair Mowbray, *Faltering Steps on the Path to Reform of the Strasbourg Enforcement System*, 7 Hum. Rts. L. Rev. 609 (2007).
9. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, art. 16, *opened for signature* 13 May 2004, C.E.T.S. No. 194 (*entered into force* 1 June 2010) [hereinafter Protocol No. 14]. According to President Putin, the Court's partial attribution of Russia in *Ilascu* case was one of the reasons for the Duma's refusal to ratify Protocol No. 14. *See, e.g.*, President Putin's remarks regarding the ECtHR and non-ratification of Protocol No. 14 to the Convention, at the Meeting with the Council to Promote Development of the Civil Society Institutions and Human Rights in Kremlin, Moscow (11 Jan. 2007). ("This was a purely political decision, undermining the confidence in the international judicial system.").
10. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 Eur. J. Int. Law 125 (2008). *See also* Philip Leach, *Access to the European Court of Human Rights: From a Legal Entitlement to a Lottery?*, 27 Hum. Rts .L. J. 24 (2006). For a summary of changes introduced by Protocol No. 14, see Bill Bowring, *Russia and Human Rights: Incompatible Opposites?*, 1 Göettingen J. Int'l. L. 257 (2009).
11. For a lively debate on the importance of the right of individual application and Protocol No. 14, more specifically, see M. A. Beernaert, *Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at What Price?*, Eur. Hum. Rts. L. Rev. 544 (2004); Steven Greer, *Protocol 14 and the Future of the European Court of Human Rights*, Public Law 83 (2005). *See also* Marie-Bénédicte Dembour, *"Finishing Off Cases": The Radical*

the protocol since 2006, single-handedly blocking its entry into force, in protest of what it considered to be "politically motivated" judgments against it by the Court.[12] Ultimately, it succumbed to pressure to ratify after it was agreed that a Russian judge would always sit on any panel or committee issuing a judgment on the merits of an application against Russia.[13]

Attention has not merely focused on Russia's compliance with its international obligations regarding the timely execution of ECtHR judgments, but also is aimed at the country's international obligations in the area of human rights and, in particular, ratification of Protocol Nos. 6 and 13 concerning the abolition of the death penalty[14] and Protocol 12 on non-discrimination.[15] Regarding the death penalty, Russia remains to this day the only member state of the Council of Europe that still has not ratified Protocol 6, despite having committed itself to doing so in 1996 as a condition of accession to the organization.[16] The Constitutional Court of the Russian Federation has imposed a *de facto* moratorium on capital punishment since 1999.[17] On 19 November 2009, the Constitutional Court further held that the death penalty could not be imposed in Russia because of the country's international commitments.[18]

Solution to the Problem of the Expanding ECHR Caseload, 3 Eur. Hum. Hum. Rts. L. Rev. 26 (2003). ("The *raison d'être* of the Strasbourg Court is precisely that it will hear any case, from anyone who claims to be a victim of the Convention; there are no unworthy cases (except of course those which traditionally have been declared inadmissible").

12. On the long-standing debate between the Council of Europe (CoE) and Russia's reluctance to ratify Protocol No. 14, see Bill Bowring, *The Russian Federation, Protocol No. 14 (and 14bis) , and the Battle for the Soul of the ECHR*, 2 Goettingen J. Int'l. L. 589 (2010).
13. *See, e.g.*, Ellen Barry, *Russian Attitudes Thaw on Rights Court*, N.Y. Times, 14 Jan.2010, *available at* http://www.nytimes.com/2010/01/15/world/europe/15russia.html; Antoine Buyse, *Russian Duma Has Accepted Protocol 14 Today*, ECHR Blog (2010), *available at* http://echrblog.blogspot.ca/2010/01/russian-will-ratify-protocol-14-today.html; Anton Burkov, *Improvement in Compliance of the Russian Judicial System with the International Obligations Undertaken by the Russian Federation*, EURussia Centre (2010), *available at* http://www.eu-russiacentre.org/our-publications/column/improvement-compliance-russian-judicial-system-international-obligations-undertaken-russian-federation.html.
14. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, as amended by Protocol No. 11, *opened for signature* 28 Apr. 1983, C.E.T.S. No. 114 (*entered into force* 1 Mar. 1985); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, *opened for signature* 3 May 2002, C.E.T.S. No. 187 (*entered into force* 1 July 2003).
15. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 2002, C.E.T.S. No. 117 (*entered into force* 1 Apr. 2005), *available at* http://www.conventions.coe.int/Treaty/en/Treaties/Word/177.doc.
16. President Boris Yeltsin's Decree No. 724 of 16 May 1996 "for gradual reduction of the application of the death penalty in conjunction with Russia's entry into the Council of Europe," *available at* http://www.law.edu.ru/article/article.asp?articleID=1159994.
17. Constitutional Court of the Russian Federation, Decision No. 3-P/1999 (1999). *See* Bill Bowring, Law, rights and ideology in Russia: landmarks in the destiny of a great power 174–175 (2013); *Russia Enshrines ban on Death Penalty*, BBC, 19 Nov. 2009, *available at* http://news.bbc.co.uk/2/hi/europe/8367831.stm.
18. Constitutional Court of the Russian Federation, Decision No. 1344-O-R/2009 (2009); Denis Pinchuk, *Russian Court Extends Moratorium on Death Penalty*, Reuters, 19 Nov. 2009, *available at* http://www.reuters.com/article/2009/11/19/idUSLJ330478.

The Council of Europe, along with many non-governmental organizations, perceived the Constitutional Court ruling as an important but limited step on the way to legal endorsement of the abolition of the death penalty. Ratification of Protocol 6 is still pending today and, as the President of the of the Parliamentary Assembly of the Council of Europe (PACE), Lluís Maria de Puig noted, the Constitutional ruling cannot be perceived as "just a mere technical extension of the moratorium."[19] The issue of abolishing the death penalty remains politically contentious in Russia today.

In spite of its ambivalence towards the Council of Europe human rights scheme at the time of its accession, Russia simultaneously ratified Protocol 11 to the ECHR—the most significant reform of the ECHR system since its inception, establishing the mandatory jurisdiction of the ECtHR and individual appeals to the Court.[20] The right of individual petition has become the centerpiece of the ECHR system but also, as many commentators pointed out, a "victim of its own success."[21] Since Protocol 11 has come into effect, the number of cases brought before the Court has skyrocketed.[22] Almost overnight Russia became the leader in the total number of individual claims submitted against it: throughout the year 1999, the Court had "taken up more cases from Russia . . . than from any other country. 972 of the 8,396 cases lodged with the Strasbourg-based court were from Russia."[23] More than a decade later the complaints from Russian citizens amount to nearly a sixth of all complaints brought before the Court out of the forty-seven member states.[24]

A high volume of cases concerning Russia and "unacceptable delays" in implementation were said to "slow down the execution process in the adoption of further legislative and other reforms to solve important structural problems."[25] This has put "at stake the effectiveness of the ECHR system and

19. *See* Eur. Parl. Ass., *The Honouring of Obligations and Commitments by the Russian Federation*, ¶ ¶ 395–99, Doc. No. 13018 (2012).
20. Protocol No. 11, *supra* note 5. For a detailed overview of this instrument, see Rudolf Bernhardt, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11*, 89 Am. J. Int. Law 145 (1995). *See also* CoE, *Explanatory Report on Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms* 1994, ETS No. 155, *available at* http://conventions.coe.int/Treaty/EN/Reports/HTML/155.htm; Andrew Drzemczewski, *A Major Overhaul of the European Convention Control Mechanism: Protocol No. 11*, *in* Collected Courses of the Academy of European Law 125 (1997) .
21. Helfer, *supra* note 10, at 126.
22. Christina G. Hioureas, *Behind the Scenes of Protocol No.14: Politics in Reforming the European Court of Human Rights*, 24 Berkeley J. Int'l. L. 718 (2006). The number of applications registered grew at an unprecedented rate: from 5,979 in 1998 to 13,858 in 2001. Prior to the adoption of Protocol No. 11, the Convention allowed "only Contracting States to file complaints against other Contracting States . . . and Contracting States were permitted to voluntarily enable individuals to petition the Commission."
23. Russian Cases Most Numerous at European Human Rights Court, RadioFreeEurope/RadioLiberty, 25 Jan. 2000, *available at* http://www.rferl.org/content/article/1142079.html.
24. *See* ECHR, *Analysis of Statistics 2014*, Figure 3, at 8, *available at* http://www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956867932_pointer.
25. Eur. Parl. Ass., *Implementation of Judgments of the European Court of Human Rights*, Res. No. 1516 (2006), ¶12.

should be seen as a breach of the state's obligations under the Convention and under the Statute of the Council of Europe."[26]

As the Council of Europe moves forward with plans for further reforms, Russia's position vis-à-vis the ECHR is as important for the entire Council regime as it is domestically for respect of human rights in the country. In the words of Jeffrey Kahn: "Russia is trapped: unwilling to quit one of the only European organizations willing to accept it as an equal member, the Russian government finds itself increasingly called to meet the requirements of membership."[27]

Today, Russia's human rights record remains and continues to grow as one of the poorest among the members of the Council of Europe.[28] A painstakingly sluggish compliance with international human rights obligations[29] and several recent incidents of the crackdown on civil society since Putin's return to the presidency, as demonstrated by a series of restrictive laws, harassment, and intimidation of political prisoners, interference in the work of non-governmental organizations and the notorious prosecution of the feminist punk band Pussy Riot, cast further doubt on the Kremlin's genuine commitment to perform its obligations under the Convention. The change is well-captured in the description of the radical shift in attitude of the Russian government vis-à-vis the President's Human Rights Council, first asked by president Medvedev to inquire into the legality of Khodorkovskiy's conviction and then harassed under president Putin for having found that the conviction failed to meet the requirement of due process.[30]

Part II of this article maps out the place of the ECHR in Russian law and practice, highlighting the most important hurdles to smoother relations between Russia and the ECtHR as well as to fuller enjoyment of Convention

---

26. *Implementation of Judgments of the European Court of Human Rights,* Eur. Parl. Ass. Res. 1516, ¶ 56, Doc. No. 11020 (2006). *See also* Pamela A. Jordan, *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms*, 11 Demokratizatsiya 281 (2003).
27. Jeffrey D. Kahn, *Russia's "Dictatorship of Law" and the European Court of Human Rights*, 29 Rev. Cent. East Eur. Law 1, 5–6 (2004).
28. Freedom House World Rankings (FHWR) ranks countries on a seven-point scale—one being the highest and seven being the lowest—of democratic progress. In 2014, Freedom House reported that Russia's ranking in political rights categories was six points, near the top of the scale on the worst level of democratic progress. *See* Freedom House, Freedom in the World 2014: Russia, *available at* http://www.freedomhouse.org/report/freedom-world/2014/russia.
29. Mowbray, *supra* note 8, at 610.
30. Jeffrey Kahn, *The Law is a Causeway: Metaphor and the Rule of Law in Russia, in* The Legal Doctrines of the Rule of Law and the Legal State (James R. Silkenat, James E. Hickey Jr., & Peter D. Barenboim eds., 2014). *See generally* Human Rights Watch, Laws of Attrition: Crackdown on Russia's Civil Society after Putin's Return to the Presidency (2013), *available at* http://www.hrw.org/node/115059; Amnesty International, Freedom Under Threat : Clampdown on Freedoms of Expression, Assembly and Association in Russia, *available at* http://www.amnesty.org/en/library/asset/EUR46/011/2013/en/d9fb0335-c588-4ff9-b719-5ee1e75e8ff5/eur460112013en.pdf.

rights by individuals in the country. Part III considers the current round of proposed reforms of the European human rights regime as embodied in the 2012 Brighton Declaration, with particular attention to the relevance of such reforms for Russia in view of the elements highlighted in Part III.

II. RUSSIA AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. Introduction

> A young judge in Russia asks an older judge for advice: "One side gave me $1000, and the other gave me $1020. What should I do?" The older judge responds, "Take another $20 from the first side, and rule according to the law."
>
> —Russian anecdote from 2006.

As mentioned, after its accession to the Council of Europe in 1998, Russia became the largest contributor of individual applications to the European Court in Strasbourg.[31] In 2014, of 56,275 total applications allocated to a judicial formation, 8952 came from Russia. Of the current backlog of cases, Russia accounted for 10,000 out of 69,900 at the end of 2014.[32] The largest number of judgments against Russia in 2014 concern: the right to liberty and security of the person (unlawful arrests), embodied in Article 5 of the ECHR; inhuman and degrading treatment in Russian prisons (Article 3); the right to an effective remedy (Article 2); the repeated violations of the right to a fair and public hearings in a court of law (Article 6); lack of effective investigation (Article 2); and the protection of property (Article 1 of Protocol 1).[33] The other group of violations reflect the lack of proper and adequate

31. *See* Jeffrey Kahn, *Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 Univ. Mich. J. L. Reform 641 (2001). *See also* Galina Stolyarova, *Russian Cases Deluge Strasbourg Court*, St. Petersburg Times, 19 June 2007, *available at* http://www.sptimes.ru/index.php?actionid=100&story-id=22020. For comparative analysis, see European Court of Human Rights, Annual Report 2014, at 167 (2015), *available at* http://www.echr.coe.int/Documents/Annual_report_2014_ENG.pdf. Ukraine stood at the top in 2014 with 13,650 pending cases (19.5 percent), followed by Italy, 10,100 cases (14.4 percent), and Turkey, 9,500 (13.6 percent). It should be noted that, for Ukraine, this number represents a sharp spike, linked to the conflict in that country.

32. Clearly there has been some improvement at the Registry's Office of the Court: the number of pending applications at the ECtHR, which had topped 160,000 in September 2011 and stood at 128,000 by the end of 2012, had been reduced to 70,000 by the end of 2014. For the annual statistics, see CoE, European Court of Human Rights, Annual Report 2014 (2015).

33. The violations above are listed in descending order from most frequently claimed: CoE, European Court of Human Rights, Annual Report 2014, at 173 (2015).

measures to address separatism, nationalism, and extremism linked to the multinational and multicultural structure of Russian society, as well freedom of expression, religion, assembly, and association.[34] Russia is of course also the state with the largest population in Europe, which explains to a degree for the large number of applications stemming from that country: on a *per capita* basis, the country does not feature among the top ten contributors of applications to the ECtHR.[35]

Nevertheless, the sheer number of applications lodged against Russia remains a major stumbling block for the ECHR regime.[36] For this reason, ongoing efforts by the Council of Europe to reduce the Court's massive backlog depend heavily upon Russia. These efforts include structural reforms of the ECHR system on one hand, and institutional reforms within individual member states on the other. This part focuses on domestic factors within Russia which contribute to the ECtHR's backlog and hinder prospects for reform, and assess the prospects for overcoming these barriers in the future.

B. An Overview of Russia's Judiciary and Legal System in Light of the ECHR

Russia's judiciary is large and complex, comprising some 15,000 judges and 2,500 courts across the nation's ethnically and culturally diverse regions, all too often with only weak ties to any central judicial authority.[37] Based on a model common to Continental Europe, the judiciary was until very recently divided into three discrete "streams": General courts, the *Arbitrazh* (commercial) courts, and the Constitutional Court. General courts operate

34. See Section 1.3 for greater detail on the nature of cases filed against Russia at the ECtHR.
35. CoE, European Court of Human Rights, Annual Report 2014, at 173 (2015).
36. Of course, the number of cases that are admitted against Russia is small when compared to the number of cases actually filed against it, hinting at the complexities associated with the deceptively simple admissibility requirements. In 2014, out of 25,845 applications lodged against Russia in which steps were taken, 15,574 were declared inadmissible: ECHR, *Analysis of Statistics 2014,* Figure 80, *supra* note 24, at 49. Article 37(1) of the European Convention stipulates that:

> The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that (a) the applicant does not intend to pursue his application; or (b) the matter has been resolved; or (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

One of the several strategies deployed by the ECtHR to stem the flow of applications has been the tightening of formal requirements of applications under the Rules of the Court: CoE, European Court of Human Rights, Annual Report 2014 (2015) at 5.

37. For a detailed description of the judicial system in Russia, see William Burnham, Gennadiĭ Mikhaĭlovich Danilenko & Peter B. Maggs, Law and Legal System of the Russian Federation (2009); Peter Krug, *Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, 37 Va. J. Int'l. L. 725, 729 (1997).

under the authority of the Russian Supreme Court (RSC) and deal generally with criminal, civil, and administrative matters. The *Arbitrazh* courts operate under authority of the Supreme Court of Arbitration and deal with commercial disputes. The Constitutional Court for its part determines whether laws and treaties conform to the federal constitution and addresses jurisdictional disputes between different branches or levels of government. In a move that was broadly unexpected and unpopular with the judiciary, the bar, and business, Vladimir Putin pushed through a major reform in 2014 that saw the abolition of the Supreme Court of Arbitration, replaced by a chamber within the Russian Supreme Court.[38]

Although the Russian judiciary is technically no longer structurally answerable to the legislature and the presidency,[39] the *de facto* position of courts as an instrument of the government has yet to be completely abandoned. The government continues to steer the activity of the judiciary and while it no longer attempts to control every decision of the courts through political pressures, there is evidence that politically sensitive cases are easily manipulated to serve the interests of the government.[40] As legal experts from the Parliamentary Assembly of the Council of Europe concluded in their 1994 report on Russian conformity with the fundamental principles required for full membership in the Council of Europe (human rights, the rule of law, and democratic pluralism): "The courts can now be considered structurally independent from the executive, but the concept that it should in the first place be for the judiciary to protect the individuals has not yet become a reality in Russia."[41] This dismal appreciation of the principle of judicial independence was confirmed two years later by a special rapporteur for the Council of Europe:

---

38. *See* Burnham, Danilenko & Maggs, *supra* note 37, at 122. On the abolition of the Supreme Court of Arbitration, see: Peter H. Solomon, *The Unexpected Demise of Russia's High Arbitrazh Court and the Politicization of Judicial Reform*, 147 Russian Analytical Digest 2 (2014); Alexei Trochev, *Accountability and Discretion of the Russian Courts*, 147 Russian Analytical Digest 6 (2014).
39. Along with radical changes in the Russian legal culture, the country's judiciary has undergone a number of profound institutional reforms. One of them was the adoption of Article 120 of the 1993 Constitution which introduced some level of independence for the judiciary, at least on paper, "judges shall be independent and shall obey only the Constitution of the Russian Federation and federal law." For an evolution of the rule of law in post-Soviet Russia, see generally Peter H. Solomon & Todd S. Foglesong, Courts and Transition in Russia: The Challenge of Judicial Reform 8 (2000); Phillippe Nonet & Philip Selznick, Law and Society in Transition: Toward Responsive Law (2001).
40. For an excellent commentary on the Soviet legacy of the "telephone law" and the legislative whirlwind of the post-Soviet era, see Kathryn Hendley, *Assessing the Rule of Law in Russia*, 14 Cardozo J. Int'l. Comp. Law 347 (2006); Yulia Dernovsky, *Overcoming Soviet Legacy: Non-Enforcement of the Judgments of the European Court of Human Rights by the Russian Judiciary*, 17 Cardozo J. Int'l. Comp. Law 471 (2009).
41. Bernhardt et al., *Report of the Conformity of the Legal Order*, *supra* note 4.

> [T]he mentality towards the law has not yet changed. In Soviet times, laws could be completely disregarded—party politics and 'telephone justice' reigned supreme. While it cannot be said that laws are ignored as a matter of course in present times, they are disregarded if a 'better' solution to a particular problem seems to present itself. This assertion is valid for every echelon of the Russian state administration, from the President of the Federation . . . down to local officials. . . . [I]t is very difficult to enforce the law through the courts. Often, a complaint against administrative abuse cannot even be brought to court, since the prosecutor's office is the competent state organ. But even when such cases are brought to court, and the court rules against the administration, the decision is sometimes not implemented due to the low standing courts and their decisions enjoy in public opinion.[42]

A continuing dependency on the government and its entities and the interconnected question of the lack of public confidence in the judiciary remain issues of significant concerns in the Russian judicial system.[43] They have deep roots in the legal and political culture, as in Soviet times judges were often seen not as arbiters, but rather as defenders of the interests of the government.[44] Not surprisingly, ordinary citizens have grown skeptical of the power of the law to protect their interests. This legal culture of distrust to some extent persists to the present day and has stymied efforts to more fully reform the legal system. According to the Russian polling agency, Public Opinion Foundation, Russians have a dim view of their judicial system: 56 percent of Russians do not trust their judges, while 44 percent do not trust the Attorney General. Only 42 percent of the respondents would turn to the courts to protect their rights.[45] More finely, a series of studies by Kathryn Hendley have shown that ordinary Russians have a keen sense of the circumstances under which is it reasonable to turn to courts, and when to do so would be pointless because of the risk of corruption or political

---

42. Eur. Parl. Ass., *Opinion by the Committee on Legal Affairs and Human Rights on Russia's Application for Membership of the Council of Europe,* Doc. No. 7463 (1996) *reprinted in* 17 Hum. Rts. L. J. 218, 218–19 (1996). *See also* Kahn, *Russia's "Dictatorship of Law," supra* note 27.
43. According to an opinion poll conducted in 2006, only 19 percent of Russians had confidence in the impartiality and independence of the courts (RIA Novosti, 22 June 2006). European Commission for the Efficiency of Justice (CEPEJ), Examination of Problems Related to the Execution of Decisions by National Civil Courts Against the State and its Entities in the Russian Federation (2005), *available at* https://wcd.coe.int/ViewDoc.jsp?id=1031447&Site=CM [hereinafter CEPEJ Russia 2005 Report].
44. On 15 July 2008, speaking at the Conference on developing the judicial system, President Medvedev admitted that Russia is far from having an independent judiciary, and that judges commonly encounter pressure in the courtroom. "We must take all necessary means to strengthen the independence of judges. It would seem that existing legislation should provide for it. However, it goes without saying that pressure and influence occur, that administrative leverage is applied, that direct bribery is often used." (RIA Novosti, 16 July 2008).
45. For a detailed overview of the results, see http://www.wciom.com/index.php?id=61&uid=581. *See generally* Hendley, *supra* note 40.

interference.[46] So Russians do use their courts, more so than before, but only for some types of problems. These finding may raise special concern for cases dealing with human rights issues, perhaps more likely than most to raise issues attracting outside interference.

This failure of courts to free themselves of the control of the executive became especially pronounced during Vladimir Putin's first presidency. Perhaps the most egregious example of Putin's implementation of his so-called "dictatorship of law"[47] is the case of Mikhail Khodorkovsky, whose well publicized long-term detention in contravention of criminal procedural guarantees demonstrates that courts remain willing to disregard the law for the convenience of the Kremlin.[48] "[I]nterference in judicial process by state institutions is … a problem," wrote the Organization for Economic Cooperation and Development in its report on Russia.[49] The OECD concluded that "[t]he courts are often subservient to the executive, while the security services, the prosecutors and the police remain highly politicised. The so-called "Yukos case" reflects these problems."[50] Continued interference with judicial procedures was deplored in a 2005 resolution of the Parliamentary Assembly of the Council of Europe (PACE).[51]

---

46. Kathryn Hendley, *The Puzzling Non-Consequences of Societal Distrust of Courts: Explaining the Use of Russian Courts*, 45 Cornell Int'l L. J. 517 (2012); Kathryn Hendley, *Varieties Of Legal Dualism: Making Sense Of The Role Of Law In Contemporary Russia*, 29 Wis. Int'l LJ 233 (2011).
47. "Dictatorship of Law" term was coined by Vladimir Putin in 2000. *See* Ekaterina Mikhailovskaya, *Putin Speaking: Address of the Acting President to the Citizens of Russia, in* Nationalism, Extremism, and Xenophobia: Extremism and Xenophobia in Electoral Campaigns in 1999 and 2000, Panorama Expert and Research Group, *available at* http://www.panorama.ru/works/patr/bp/6eng.html. On Putin's infamous "dictatorship of law" see J. D. Kahn, *Russia's "Dictatorship of Law," supra* note 27.
48. *See The Circumstances Surrounding the Arrest and Prosecution of Leading Yukos Executives,* Eur. Parl. Ass., Res. No. 1418 (2005), *available at* http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17293&Language=EN. *See also* Yukos v. Russia, Application No. 14902/04 (2001); Gusinskiy v. Russia, Application No. 70276/01 (2004); Kudeshkina v. Russia, Application No. 29492/05 (2009) where former Judge Kudeshkina of the Moscow City Court brings to light not only several instances of corruption in the judicial system in Russia and the "chilling effect" on judges wishing to participate in the public debate on the effectiveness of the judicial institutions; and most recently, Khodorkovskiy v. Russia (No. 1), Application No. 5829/04, Judgment (2011); Khodorkovskiy v. Russia (No. 2), Application No. 11082/06, Judgment (2013). For a commentary, see Olga Kudeshkina, *Tackling Russia's Legal Nihilism*, Open Democracy, 11 Mar. 2010, *available at* http://www.opendemocracy.net/od-russia/olga-kudeshkina/tackling-russia%E2%80%99s-legal-nihilism.
49. Organization for Economic Co-operation and Development, OECD Economic Surveys: Russian Federation 71 (2004).
50. *Id. See* Laurence A. Groen, *Iukos Affair: The Russian Judiciary and the European Court of Human Rights*, 38 Rev. Cent. East Eur. L. 77 (2013).
51. Res. No. 1418, *supra* note 48, ¶ ¶ 3, 5.

> The rule of law requires the impartial and objective functioning of the courts and of the prosecutor's office, free from undue influences of other branches of state power. [. . .] The Assembly stresses the importance of the independence of the judiciary and of the independent status of judges in particular, and regrets that legislative reforms introduced in the Russian Federation in December

The influence of the Putin administration on the decisions of the Constitutional Court is suggested by the low number of decisions where the Court invalidated legislation supported by the government.[52] In the vast majority of cases, the Constitutional Court upheld the constitutionality of legislative initiatives advanced during the Putin presidency.[53] For instance, despite the continued need to strengthen the rule of law, in 2005 the Constitutional Court issued a series of decisions upholding the Russian president's authority to abolish popular elections for governors.[54] That said, the Constitutional Court should not be taken to be a mere pawn in the executive's hand. Although stopping short of invalidating these laws, the Court did offer a serious analysis of the law according to constitutional principles.[55]

According to Trochev, as judges are an integral part of the apparatus of government, they have little incentive to "disrupt the status quo and speak the truth to power"[56] or rule against the government, for fear of being punished. With stronger loyalties to local law-enforcement officials than to top courts, "courts feel gigantic pressure from their peers, procurators, investigators, and FSB."[57] Some court decisions are bought, and others are made under obvious pressure through explicit orders or implicit signals from the court chairs, important court officials in charge of maintaining a host of vital functions in the judicial hierarchy.[58]

There is anecdotal evidence of dismissals of judges who refused to toe the line.[59] To use the words of the Moscow City Court judge who was dismissed from her post for criticizing the Russian judiciary for the courts' corrupt and unethical legal practices: "We've still got one foot in the totalitarian system, and one foot in democracy."[60] The actual number of dismissals is relatively

---

2001 and March 2002 have not protected judges better from undue influence from the executive and have even made them more vulnerable. Recent studies and highly publicised cases have shown that the courts are still highly susceptible to undue influences. The Assembly is particularly worried about new proposals to increase further the influence of the President's administration over the judges' qualification commission.

52. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po Delu of Proverker Konstitutsionnosti Otdel'nykh Polozhenni Zakona *quoted in* Dernovsky, *supra* note 40, at 483.
53. Hendley, *Assessing the Rule of Law in Russia*, *supra* note 40, at 359.
54. Dernovsky, *supra* note 40, at 483.
55. Alexei Trochev, Judging Russia 186 (2008).
56. Alexei Trochev, *All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia*, 17 Demokratizatsiya 145, 156 (2009).
57. *Id.*
58. *See generally* Peter H. Solomon, Jr., *Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform, in* Russia, Europe, and the Rule of Law 79–91 (Ferdinand J.M. Feldbrugge ed., 2007). *See also* Moiseyev v. Russia, Application No. 62936/00 (2008) and most recently, Kudeshkina v. Russia, *supra* note 48, for an overview of judicial interference in criminal trials.
59. Guy Chazan, *In Russia's Courts, A Judge Speaks Up—And Gets Fired*, at A1, Wall St. J., 5 Aug. 2004.
60. *Id.*

low, but the chilling effect should not be discounted.[61] Several Constitutional Court judges have also been forced to resign after commenting on the high levels of influence exerted by government officials—and particularly the office of the president—upon members of the judiciary.[62] Moreover, due to decentralization, judges in outlying regions such as the North Caucasus often develop close ties to local law-enforcement agencies which may cause them to deviate from the rulings or guidelines set by higher courts.[63]

Judicial independence can be also compromised by financial dependence. Budget shortfalls of the 1990s affected the courts' ability to operate: there was anecdotal evidence that courts ran out of money for such basic necessities as postage and office supplies. The payment of judges' salaries was frequently delayed, leaving judges vulnerable to offers by litigants or state officials to make up the difference in return for favorable rulings. Many assumed that their contributions influenced outcomes in the rulings. Although wage delay is a thing of the past, a Soviet-era rule that judges' housing is to be provided by the state still obtains today.[64]

An additional challenge for Russia's judiciary is its relative political weakness. Historically, "the judiciary has . . . succumbed to the will of the executive in Russia," acting as mouthpieces for the Kremlin's entities and law enforcement officials.[65] Strasbourg jurisprudence, however, has not gone unnoticed among the members of the judiciary, and judges in regional courts as much as in the Russian Supreme Court have benefited from the existence of the ECtHR. The chairman of the Belgorod County Court publicly admitted that the ECtHR inspired him to recommend that lower courts fine defendants for delays in complying with court decisions and publicly stated that "by resolving all potential applications at home, the courts [in the Belgorod County] never failed Russia in Strasbourg."[66] Russian courts can therefore dispense justice with respect to the ECHR standards, detain fewer suspects, review complaints against prison and police officials and overall provide

61. Hendley, *Assessing the Rule of Law in Russia*, *supra* note 40, at 356–57.
62. *See* Gregory L. White, *Judge Set to Retire Amid Kremlin Row*, Wall St. J., 3 Dec. 2009, *available at* http://online.wsj.com/article/SB125979340320873615.html.
63. Trochev, *Strasbourg*, *supra* note 56, at 154. *See also* Lauri Mälksoo, *Russia and European Human-Rights Law: Margins of the Margin of Appreciation*, 37 Rev. Cent. East Eur. L. 359 (2012).
64. For a discussion of the implications of judicial financial dependence, see Burnham, Danilenko & Maggs, *supra* note 37, at 58–59. *See also* Yulia Koreneva, *Providing Housing for Judges as a Means of Social Protection (Predostavlenie Zhilyh Pomeshchenii Sud'yam Kak Mery Sotsial'noi Zashchity)*, Rossiiskaya Iustitsiya 51 (2006).
65. Malksoo, *supra* note 63, at 360. *See also* Trochev, *Strasbourg*, *supra* note 56, at 147.
66. Tatiana Soboleva, *What We Learned at the Press Conference (Uznali na Press-Konferentsii)*, Belgorodskaya Pravda, 17 Dec. 2008, *quoted in* Trochev, *Strasbourg*, *supra* note 56, at 156.

a viable alternative to ECtHR petitions.[67] In other words, before courts in Russia, "justice is possible and even probable, but it is not assured."[68]

Financial dependence and political weakness are only some of the many indicators of judicial powerlessness. As President Dmitry Medvedev noted in his 2008 address to the Congress of Judges, as many as half of non-criminal judgments go unenforced.[69] The tragic deaths in custody of Sergei Magnitsky and Vera Trifonova are somber reminders of the human cost of a deficient, poorly functioning and corrupt criminal justice system, in which officials have remained above the law. Ms. Trifonova was arrested and allegedly denied medical attention for diabetes in an attempt to force her to confess to charges of fraud. She subsequently died in prison. Mr. Magnitsky, an attorney arrested on tax evasion charges and who died of medical neglect in pre-trial detention, is widely believed to have been imprisoned as retribution for his claim that government officials stole over $200 million in a tax fraud scheme involving the company he represented. The same officials he accused of corruption were responsible for his arrest. Negative publicity and international criticism have only partly shaken the atmosphere of impunity that surrounds corrupt officials and stifles the rule of law in such cases.[70]

Scholars active within the Russian legal system have underscored the significant progress, which has been realized in the fifteen years since the country's ratification of the ECHR.[71] Legislative reforms have changed the

67. *See, e.g.*, Olga Shepeleva, *Sormovo Instead of Strasbourg (Sormovo Vmesto Strasbourga)*, Gazeta, 9 July 2008, *available at* http://www.gazeta.ru/comments/2008/07/08_a_2777267.shtml.
68. Hendley, *Assessing the Rule of Law in Russia*, *supra* note 40, at 351.
69. Dmitry Medvedev, *President's Address at the 7th Judicial Convention (Vystuplenie na VII Vserossiiskom Sezde Sudei)*, 2 Dec. 2008, *available at* http://www.kremlin.ru/text/appears/2008/12/210020.shtml. Philip Leach, Helen Hardman & Svetlana Stephenson, *Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations: Burdov and the Failure to Implement Domestic Court Decisions in Russia*, 10 Hum. Rts .L. Rev. 346 (2010).
70. Ellen Barry, *Lawyer Held in Tax Case in Russia Dies in Jail*, N. Y. Times, 17 Nov. 2009, *available at* http://www.nytimes.com/2009/11/18/world/europe/18russia.html; Michael Schwirtz, *New Death in Moscow Jail Renews Calls for Reform*, N. Y. Times, 4 May 2010, *available at* http://www.nytimes.com/2010/05/05/world/europe/05moscow.html. *See also* Howard Amos, *Sergei Magnitsky's Posthumous Trial Gets Under way in Russia*, the Guardian, 22 Mar. 2013, *available at* http://www.theguardian.com/world/2013/mar/22/sergei-magnitsky-posthumous-trial-russia. ("judge Igor Alisov brushed aside objections from defence lawyers, who argued that the macabre proceedings were a violation of the Russian constitution"). For a summary of the case filed by lawyers of the Open Society Justice Initiative on behalf of Sergei Magnitsky's mother, see Open Society Justice Initiative, *Magnitskaya v. Russia: summary of application filed before the European Court of Human Right*, Open Society Foundations (2012), *available at* http://www.opensocietyfoundations.org/sites/default/files/magnitsky-summary-10182012_0.pdf. On the broader problems with detention in Russian prisons, see Lyndsay Parrott, *Tools of Persuasion: the Efforts of the Council of Europe and the European Court of Human Rights to Reform the Russian Pre-Trial Detention System*, 31 Post-Soviet Aff. 136 (2015).
71. *See* Valdislav Starzhenetskii, *Assessing Human Rights in Russia: Not to Miss the Forest for the Trees, A Response to Preclick, Schönfeld and Hallinan*, 37 Rev. Cent. East Eur. L.

judicial, procedural, civil, and criminal legal landscape to reflect the human rights standards of the ECHR. In a general sense, there has been progress in the rule of law in Russia, an evolution which some observers directly link to participation in the European human rights regime.[72] To borrow from Bill Bowring, "there are perhaps even more convincing grounds for concluding that Russia is undergoing genuine and profound transformations as a direct result of accession [to the ECHR], especially in the application of the rule of law."[73] Nevertheless, the problem is much more challenging than "rebuilding the ship at sea," to use the metaphor proposed by a volume on these issues.[74] The Russian ship of state has never had a maiden voyage propelled by the rule of law, a culture of which has never fully taken root in Russia.[75]

Despite these improvements, the general dynamic of the relation of the judiciary to the executive and legislative branches remains problematic when considering human rights issues, which pit courts against the other branches. This is all the more serious for the ECHR given that the Convention must first and foremost be implemented through each member state's domestic legal structure, with European institutions like the ECtHR intervening only in situations in which domestic institutions fail to correct violations of human rights. This brings up the question of the legal status of the ECHR under Russian law as well as the domestic recognition of judgments issued by the European Court in Strasbourg.

1. Incorporation of the ECHR in Russian Domestic Law

Like all state parties to the ECHR, Russia is under an international treaty obligation to extend to all persons under its jurisdiction the rights and freedoms contained in the Convention,[76] to abide by the decisions of the ECtHR in this regard,[77] and to recognize the right of its citizens to hold the state accountable for breaches of its international obligations.[78]

---

349 (2012). *See* Kahn, *Russia's "Dictatorship of Law" supra* note 27. ("[T]he Convention has been a catalyst for substantial reforms, especially in the criminal justice system").

72. *See* Starzhenetskii, *supra* note 71; Malksoo, *supra* note 63, at 359.
73. Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Four Years on*, 11 Helsinki Monitor 53 (2000)
74. Jon Elster, Claus Offe & Ulrich K. Preuss, Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea (1998).
75. Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 Ga. J. Int. Comp. Law 511, 516 (2008).
76. ECHR, *supra* note 3, art. 1.
77. *Id.*
78. Protocol No. 11 *supra* note 5.

Being a formally monist state,[79] the ECHR is in theory automatically incorporated into Russian domestic law.[80] A closer look at Article 15, §4 of the Russian Federation Constitution supports the conclusion that international law, including "generally recognized principles and norms" of international law, i.e. customary international law, takes effect without any additional legislative procedures of incorporation. The Constitution also provides that in the case of conflict between federal law and an international treaty to which Russia is a party, the latter prevails, whether the federal law was adopted before or after the treaty was ratified.[81] In addition, a 1995 Law on International Treaties requires the immediate and direct application of officially published treaties if no enabling legislation is required.[82]

With respect to human rights, Article 17, §1 of the Russian Constitution can be interpreted to mean that international law prevails over national laws: "In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and according to the present Constitution."[83] Similarly, the Russian Constitution stipulates:

1. The listing in the Constitution of the Russian Federation of the fundamental rights and freedoms shall not be interpreted as a rejection

---

79. Generally speaking, a monist system is one permeated by international law without the need for domestic legislative action. A dualist system requires that international treaties and other obligations be given force of law by legislative enactment. For a discussion of the monism/dualism debate in international law, see David J. Harris, Cases and Materials on International Law 68–71 (2010).

80. In the hierarchy of Russian law, the Convention and the European Court's case-law are on a par with the Russian Constitution itself. *See, e.g.*, Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] arts. 15 §4, 17 §1, 46 §3, 55 §§1 & 2 (Russ.), *available at* http://www.constitution.ru/en/10003000-02.htm. *See also* 1995 Russian Law on International Treaties, art. 5, §3.

81. *See Konstitutsiia*, *supra* note 80, art. 15, §4; Mikhail Antonov, *The Philosophy of Sovereignty, Human Rights, and Democracy in Russia* 6 (Nat'l Research Univ., Working Paper BRP 24/LAW/2013, 2013), *available at* http://papers.ssrn.com/abstract=2309369. *See also* Sergei Yu Marochkin, *Place and Role of Norms and Sources of International Law in the Legal System of the Russian Federation: The Doctrinal Exploration and the Legislative Development of the Constitutional Principle*, 3 Beijing L. Rev. 31, 32 (2012). ("This constitutional provision was included in practically all codes and federal laws adopted after the Constitution. Thus, the current Russian legislation is based on the common principle of and approaches to [international law], which remained untypical during the previous socialist period").

82. 1995 Russian Law on International Treaties, art. 5, §3 provides

> [t]he provisions of officially published international treaties of the Russian Federation which do not require the publication of intra-state acts for application shall operate in the Russian Federation directly. Respective legal acts shall be adopted in order to effectuate other provisions of international treaties of the Russian Federation.

For an excellent comparative article-by-article study of the Law on International Treaties in the regional context, see William Elliott Butler, The law of treaties in russia and the commonwealth of independent states: text and commentary (2002).

83. Konstitutsiia, *supra* note 80, art. 17.

or derogation of other universally recognized human rights and freedoms.

2. In the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms.[84]

Moreover, the jurisprudence of the Russian Federation Supreme Court and the Supreme *Arbitrazh* Court instruct all lower courts to make direct use of international law in their judgments, including the ECHR and the International Covenant on Civil and Political Rights.[85]

The massive body of international laws and regulations, however, does not always translate easily into practice. Aside from the general unwillingness to apply international law to invalidate state action, there are no precise reference points and answers in the legislation to important practical questions of correct application of international treaties and generally recognized rules. As a result, judicial practice is developing inconsistently, and the application of international law is often approximate, or even wrong.[86] Yulia Dernovsky attributes the slow progress in the application of international law in Russian courts to Russia's totalitarian past and its lingering effects on Russia's current judiciary:

This failure to implement the legal norms promulgated by the ECtHR can be attributed to the [courts'] excessively narrow construction of Russia's obligations under the Convention and the relative inexperience of the Russian judiciary with the application of international law. . . . The failure of the district court judges to effectively apply principles of the Convention and the case law of the ECtHR stems from the historically weak status of the courts and the absence of a tradition of respect for the rule of law in the Russian legal system.[87]

It thus comes as no surprise that since Russia's ratification of the ECHR in 1998, the Supreme Court has mentioned the Convention in only a few dozens of the thousands of decisions it has issued, and only some of those contain the Supreme Court's "assessment" of compliance with the Convention.[88] In

84. *Id.* art. 55, §§ 1, 2.
85. Burnham, Danilenko & Maggs, *supra* note 37, at 43, 49–50.
86. Sergei Yu Marochkin, *International Law in the Courts of the Russian Federation: Practice of Application*, 6 Chin. J. Int'l. L. 329 (2007); Antonov, *supra* note 81, at 11.
87. Dernovsky, *supra* note 40, at 484, 488. *See also* Trochev, *Strasbourg, supra* note 56, at 147:

> references to the ECtHR judgments in Russia's court decisions have been slow to trickle down, not because Russian judges are innately anti-European or against human rights but because the Russian judiciary is a part of the network of public governance: it faces a host of much stronger domestic pressures, both internal (.e.g. the influence of court chairs and agencies and overload) and external (e.g. pressure or cosy relationships with law-enforcement agencies and government officials.

88. Anton Burkov, *How to Improve the Results of a Reluctant Player: The Case of Russia and the European Convention on Human Rights*, *in* The European Court of Human Rights and its discontents: turning criticism into strength 147, 149–52 (Spyridon Flogaitis, Tom Zwart & Julie Fraser 2013).

the other four cases the Court briefly quoted the arguments of an applicant based on the Convention but did not evaluate those arguments. In the best instances, the Supreme Court merely reproduced verbatim the content of an article. In some cases, it simply stated that a particular governmental act was not contrary to the Convention as a whole.[89] Notwithstanding the fact that the Supreme Court only rarely applies the Convention, when it does it often fails to offer justification or address the relevant ECtHR case law. For example, in the case of *Trade Union of Militiamen of Moscow v. Ministry of Internal Affairs*, the Supreme Court held that the "reassignment of internal affairs officers without their consent to a different place of service . . . came within the definition of forced labor prohibition contained in Article 4 (2) of the Convention."[90] However, Article 4 of the Convention does not define what is meant by "forced or compulsory labor" and no guidance on this point is found in the various Council of Europe documents or *travaux préparatoires* on the European Convention—a fact that was specifically pointed out by the ECtHR in its *Van der Mussele v. Belgium* decision.[91]

In contrast to the relatively rare references to the Convention in the Supreme Court judgments, the district courts surveyed in Burkov's 2010 study on the implementation of the ECHR in Russian Courts actually cited ECtHR precedents and not just the Convention itself.[92] However, it should be noted that even though the district courts cited the ECtHR case law in their

89. *See, e.g.*, the so-called "Headscarf Case" where ten women of Muslim faith contested the words "without headscarf" of the Procedure for the Issuance, Replacement, Recording and Keeping of Passports of Russian Citizens, which excluded the right of citizens whose religious convictions do not allow them to be in the public without headwear to submit personal photographs in order to receive a passport of the Russian citizen depicting the person's face. See the Decision of the Supreme Court of the Russian Federation 2003, No. GKPI 03-76, in the Case upon the Application of F.J. Gaidullina, G.F. Iunusova, F.M. Kabirova, G.Sh. Muratova, G.G. Gamirova, R.G. Latypova, M.Z. Kamalova, G.G. Shafigullina, G.A. Khaiuullina, and G.M. Khairullina on Contesting point 14.3 of the Instruction on the Procedure for the Issuance, Replacement, Recording, and Keeping of Passports of a Citizen of the Russian Federation, confirmed by Order of the Ministry of Internal Affairs of Russia (2003), *available at* http://sutyajnik.ru/rus/echr/rus_judgments/sup_court/5_03_2003_platki.html [in Russian].

90. The Trade Union Military Personnel case on deeming partially invalid the "instruction on the procedure for the application of the statute on service in internal affairs agencies," Supreme Court of the Russian Federation 2000, *quoted in* A.L. Burkov, *Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts*, 1 Russian Law: Theory and Practice 68, 71 (2006).

91. Van der Mussele v. Belgium, Application No. 8919/80 (23 Nov. 1983), § 32.

92. Anton Burkov, *Direct Application of the Convention for the Protection of Human Rights and Fundamental Freedoms*, Eurussia Centre, 6 Sept. 2010, *available at* http://www.eu-russiacentre.org/our-publications/column/direct-application-convention-protection-human-rights-fundamental-freedoms.html; Burkov, *Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts*, *supra* note 90, at 71–72. Burkov attributes the increased use of ECtHR case law to the memoranda submitted to the district courts by attorneys initiating the applications as the actual cause of the growth in the references to the Convention.

decisions at a higher rate than the Supreme Court, the judges nevertheless tried to avoid invoking the Convention where they could adjudicate cases based on domestic law.[93]

As far as the practice of the *arbitrazh* courts is concerned, the situation resembles that of the jurisprudence of the Supreme Court of Russia. By 2010, of nearly 40,000 judgments, only 23 mentioned the Convention, of which eight contained a specific reference to an article of the Convention, without a single reference to the ECtHR jurisprudence.[94]

In the Russian Constitutional Court, references to the European Convention on Human Rights in Russian constitutional case law actually date back to 1996. However, it was not until the judgment of 25 January 2001 in the case of *Bogdanov and Others* that the Constitutional Court considered the status of the Convention in the Russian municipal legal order.[95] There, the Court held that:

> [The Convention] is ratified by the Russian Federation and is in force in all its territory and, consequently forms part of the domestic legal system. Furthermore, the Russian Federation accepted the jurisdiction of the European Court of Human Rights and undertook to render its law enforcement, including judicial, in full conformity with the obligations flowing from the participation in the Convention and the Protocols thereto. . . . Consequently, the [challenged legislative provisions] should be considered and applied in consistent normative unity with the exigencies of [the Convention].[96]

In essence, the Constitutional Court reaffirmed Russia's commitment, pursuant to its membership in the Council of Europe, to abide by the norms of the Convention as interpreted by the ECtHR. Read in conjunction with the Convention, the *Bogdanov* case created a "legal obligation to adopt or make laws, secondary legislation and judicial decisions in conformity with the Convention."[97] This broad interpretation of Russia's obligations under the Convention was severely limited by the Constitutional Court's Judgment of 5 February 2007.[98] According to this judgment, ECtHR jurisprudence has an effect on the Russian domestic legal system only "insofar as, on the basis of

93. *Id.* at 73.
94. The overall number of decisions was 38,068 and included the jurisprudence of the Supreme Arbitrazh Court, the Moscow City Arbitrazh Court, the Arbitrazh Court of Moscow Region, the Moscow Federal District Arbitrazh Court (*cour de cassation*) and the North-West Federal District Arbitrazh Court (*cour de cassation*).
95. *See* I.V. Bogdanov and Others, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], No. 1-P, 7 SZRF 700(2001). For analysis of the case, see Kirill Koroteev & Sergey Golubok, *Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe*, 7 Hum. Rts. L. Rev. 619 (2007).
96. *Id.* ¶ 6.
97. Koroteev & Golubok, *supra* note 95, at 624.
98. *Id.*

generally recognized principles and norms of international law, they give interpretation of the provisions of the Convention concerning guaranteed rights."[99] For Kirill Koroteev and Sergey Golubok, "[g]iven the appalling practice of the application of the Convention by Russian courts that would effectively mean first 'read and forget' and then 'forget even without reading.'"[100]

Although the practice of recent years has seen progress in the courts' use of ECtHR precedents, some scholars hesitate to conclude that there is any greater opening in the Russian legal system towards the use of international law in judicial practice.[101]

Unlike Courts in most member states of the Council of Europe, Russia does not routinely harmonize its jurisprudence with relevant judgments of the ECtHR.[102] The interaction of Russian law with the ECHR is well captured in *Konstantin Markin v. Russia* (2012).[103] *Konstantin Markin's* case was the first time the ECtHR explicitly contradicted a legal finding of the Russian Constitutional Court. The case concerned the question of whether a law prohibiting the granting of parental leave to military male personnel (but not female military personnel) was discriminatory under Article 14 of the Convention, when read in combination with Article 8 (right to respect for private and family life). The Russian Constitutional Court held that the relevant domestic provisions of the Russian Constitution were not discriminatory, due to constitutionally justified limits on the equality principle and the unique legal status and role of the military:

---

99. *Id.* at 623. *See also* Dernovsky, *supra* note 40, at 485–86.
100. Koroteev & Golubok, *supra* note 95, at 624.
101. For more details on the domestic implementation of the Convention, see A. L. Burkov, *Human Rights Law Course on the Application of the European Convention for Human Rights in the Russian Courts*, Sutyajnik.ru (2006), *available at* http://sutyajnik.ru/rus/actions/marthur04/dom_impl/ [in Russian]. *See also* Victor Olhov & Petr Orlov, *To Judge the European Way*, Rossiyskaya Gazeta, 19 Aug. 2010, *available at* http://www.rg.ru/2010/08/19/evrosud.html/. In an attempt to raise awareness about the Convention's guarantees, the Russian Supreme Court addressed the judicial bench with a request "to have key citations from European judgments in front of you so that you could consider Strasbourg in your everyday practice"; Anton Burkov, *Direct Application of the Convention for the Protection of Human Rights and Fundamental Freedoms*, Eurussia Centre, 6 Sept. 2010, *available at* http://www.eu-russiacentre.org/our-publications/column/direct-application-convention-protection-human-rights-fundamental-freedoms.html. On the general application of the ECtHR case-law on the domestic legal order, see Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 Tex. Int'l. L. J. 359 (2004).
102. Alec Stone Sweet & Helen Keller, *Assessing the Impact of the ECHR on National Legal Systems* (Yale Law School, Faculty Scholarship Series Paper No. 88, 2008), *available at* http://digitalcommons.law.yale.edu/fss_papers/88/. *See also* Marochkin, *Place and Role of Norms and Sources of International Law, supra* note 81; Kahn, *Vladimir Putin and the Rule of Law in Russia*, *supra* note 75.; Mads Andenas & Eirik Bjorge, *National implementation of ECHR Rights*, *in* Constituting Europe—The European Court of Human Rights in a National, European and Global Context 181 (Andreas Føllesdal et al. eds., 2013).
103. Konstantin Markin v. Russia, Application No. 30078/06, Judgment of the Grand Chamber (2012).

> The law in force does not give a serviceman the right to three years' parental leave. . . . This prohibition is based, firstly, on the special legal status of the military, and, secondly, on the constitutionally important aims justifying limitations on human rights and freedoms in connection with the necessity to create appropriate conditions for efficient professional activity of servicemen who are fulfilling their duty.[104]

The ECtHR reached the opposite conclusion in 2010, a position affirmed by the Grand Chamber in March 2012.[105] This case triggered opposition to the ECtHR in Russia from various quarters. President Medvedev stated in 2011 that "we will never surrender that part of our sovereignty, which would allow any international court or any foreign court to render a decision changing our national legislation."[106] The Chairman of the Constitutional Court, Judge Valery Zorkin, regarded this judgment as the ECtHR's meddling in Russian internal affairs, exceeding the "limits of flexibility" of Russia on the international arena.[107] Judge Zorkin opined that under Russian constitutional law the ECHR had precedence over "laws" but not over the Constitution; he further insisted on the need for a dialogue between the courts in Strasburg and Moscow, with the Constitutional Court playing a necessary role as mediator between the Russian and European legal orders: "The Strasbourg Court is competent to indicate errors in legislation to countries, but in the event where judgments of the ECtHR are directly contradictory to the Russian Constitution, the country must follow its national interests."[108]

In 2011, a legislative proposal was introduced in the Duma[109] that would formally have given the Constitutional Court power to uphold a law notwithstanding ECtHR objections ("limiting Russia's international flexibility" to meet its treaty obligations).[110] This position attracted criticism from the Council of Europe: the Secretary General responded that the ECHR enjoys priority over national law, and that any judgment of the ECtHR which identifies an incompatibility between national law and the European Convention must

---

104. Sobranie Zakonodatel'stva Rossiiskoi Federatssi [SZ RF] [Russian Federation Collection of Legislation] 2009, No. 187-O-O/2009.
105. For an analysis of the case and clashes between the European human rights system and the Russian Constitution, see Maria Issaeva, Irina Sergeeva & Maria Suchkova, *Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges*, 15 Sur Int'l. J. Hum. Rts. 67 (2011).
106. Ekaterina Butorina & Artem Kobzev, *Tekst Iskhodil ne ot nas (The Text Did Not Come From Us)*, Moskovskie Novosti, 21 June 2011, *available at* http://www.mn.ru/. *cited in* William E. Pomeranz, *Uneasy Partners: Russia and the European Court of Human Rights*, 19 Hum. Rts. Brief 17 (2012).
107. Valery Zorkin, *Predel Ustupchivosti (The Limit of Flexibility)*, Russian Gazette, 29 Oct. 2011, *available at* http://www.rg.ru/printable/2010/10/29/zorkin.html.
108. *Id.*
109. The lower house of the Federal Assembly of Russia (parliament), the upper house being the Federal Council of Russia.
110. Issaeva, Sergeeva & Suchkova, *supra* note 105, at 80. *Duma Considers Law to Limit Influence of European Court on Russia's Legal System*, Russia Today, 10 June 2011, *available at* http://rt.com/politics/torshin-european-court-russia/.

be followed.[111] On the face of it, the proposed Duma bill was inconsistent with Russia's obligations under the ECHR, which provides for the binding nature of the Court's decision. It is not altogether clear whether the legislative proposal enjoyed the support of the Russian presidency, and in any case the proposal was withdrawn in July 2011.[112]

The back and forth regarding the place of ECHR law within the Russian legal regime was given a significant push towards greater integration with the adoption of a resolution of the plenary of the Russian Supreme Court in June 2013. In that resolution, the Supreme Court indicates that all courts in the country must take into account the judgments of the ECtHR, not only those against Russia but also those against other states, in the interpretation of Russia law. Likewise, ECtHR jurisprudence is to be taken into account when interpreting other treaties binding on Russia.[113] This amounts to a serious strengthening of the legal significance of ECtHR decisions within Russia, opening the door to greater influence in the day-to-day interpretation of Russian law by Russian courts.

2. Enforcing ECtHR Judgments in Russia

The ECtHR's finding that a member state has violated one or more articles of the Convention triggers an inherent duty of that state to provide reparation.[114] In general terms, ECtHR judgments give rise to three sorts of state obligations: the obligation to pay compensation to the victim ("just satisfaction"),[115] the obligation to restore individuals to the situation they would have been in but for the violation (*restitutio in integrum*) through non-pecuniary

---

111. Thornbjorn Jagland, Speech at the St. Petersburg International Legal Forum (20 May 2011), *available at* http://www.coe.int/t/secretarygeneral/sg/speeches/2011/20110519_St_Petersburg_Legal_Forum.asp.
112. Malksoo, *supra* note 63, at 364. In accordance with European Convention on Human Rights, *opened for signature* 4 Nov. 1950, art. 46(1), 213 U.N.T.S. 221, Eur. T.S. No. 5 (*entered into force* 3 Sept. 1953), member states of the CoE undertake to "abide by the final judgments of the Court in any case to which they are parties," execution of which is supervised by the Committee of Ministers.
113. Ruling Of The Plenary Session Of The Supreme Court Of The Russian Federation No. 21, "On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction," 27 June 2013, *available at http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155*. The significance of this decision is underscored by Dean Spielmann, President of the ECtHR, in CoE, European Court of Human Rights, Annual Report 2014 (2015) at 33.
114. Ress, *supra* note 101.
115. ECHR, *supra* note 3, art. 41 ("If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."); Rules of Court, Eur. Ct. H.R. , R. 60 (2014); *See also* Eur. Ct. of Human Rights, *The ECHR in Fifty Questions*, Question 42: What is just satisfaction? ("When the Court finds against a State and observes that the applicant has sustained damage, it awarded the applicant just satisfaction, that is to say a sum of money by way of compensation for that damage."), *available at* http://www.echr.coe.int/Documents/50Questions_ENG.pdf.

means,[116] and the obligation to undertake legislative or policy reforms to prevent the violation from recurring ("general measures").[117] Achieving *restitutio in integrum* may require further actions on the part of respondent states, such as reopening of unfair criminal and other proceedings, destroying information gathered in breach of the right to privacy, implementing an unenforced domestic judgment, or revoking a deportation order issued despite a real risk of torture or other forms of ill-treatment in the country of destination.[118] General measures often require more creative solutions than simply resolving legislative deficiencies, as some structural problems are too deeply rooted in the day-to-day practices of authorities.[119]

Russia has a record of somewhat satisfactory compliance with the ECtHR monetary awards.[120] At first blush, Russia's prompt payment of "just satisfaction," in spite of an ever-increasing number of judgments issued against the state, appears to signal respect for the values and judgments of the ECtHR.[121] While these payments to victims are important symbolically, the actual amounts are very small.[122] According to Yulia Lapitskaya, "Russia's payments mask the ways the Russian government has ignored or even actively undermined the goals of the ECHR."[123] Beyond executing monetary judgments, Russia has failed to remedy a range of systemic problems addressed by the ECtHR. In particular, it has failed to carry out legislative reforms, conduct proper investigations, and hold individual officials accountable for their misdeeds.[124] That said, at a systemic level, there has never been a frontal attack of the executive against the legitimacy of the ECtHR's jurisdiction.[125]

---

116. Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 6th Annual Report of the Committee of Ministers 2012, at 22–23 (2013), *available at* http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2012_en.pdf [hereinafter 6th Annual Report].
117. *Id.*
118. *Id.* at 22, ¶ 11.
119. Issaeva, Sergeeva & Suchkova, *supra* note 105, at 68, 82.
120. Demos, *Implementation*, *supra* note 5. Following the entry into force of Protocol 14, the Committee of Ministers also supervises the execution of the terms of friendly settlements endorsed by the Court (art. 39 of Convention), including any sum that the state has agreed to pay the applicant under the terms of such a settlement.
121. Eur. Parl. Ass., *Execution of Judgments of European Court of Human Rights: Obligation to Comply with Judgments*, Res. 1787 (2011), *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1787.htm.
122. Kahn, *Vladimir Putin and the Rule of Law in Russia*, *supra* note 75. Despite the fact that damages awarded by the Court are small, the highest awards of just satisfaction concerned cases against Moldova, Portugal, Albania, Italy, Romania, Spain, and the Russian Federation. *See 6th Annual Report*, *supra* note 116.
123. Julia Lapitskaya, *ECHR, Russia, and Chechyna: Two is Not Company and Three is Definitely a Crowd*, 43 N. Y. Univ. J. Int'l. L. Polit. 479, 490 (2010).
124. Res. 1418, *supra* note 48, for CoE's criticism of Russia's continued defiance of international human rights obligations ("The European Court continues to identify new problems relevant to Russia's compliance with human rights and fundamental freedoms as stipulated by the European Convention"). Claire Bigg, *Russia: Russians Increasingly Seek Redress In European Court*, RadioFreeEurope/RadioLiberty, 3 Feb. 2006, *available at* http://www.rferl.org/content/article/1065415.html.
125. Kahn, *Vladimir Putin and the Rule of Law in Russia*, *supra* note 75, at 540.

Various domestic barriers with regard to the enforcement of ECtHR judgments are discussed in detail in the coming sections, including weak or inconsistent judicial authority, political animosity to the Court, insufficient resources, institutional inefficiencies, and bureaucratic obstacles. Another barrier worth noting here is the complexity of Russian judicial procedure. There are separate codes of procedure for criminal, civil, and commercial matters, each outlining slightly different criteria for the reopening of cases.[126] For example, while the Criminal Procedural Code expressly authorizes reopening a domestic case based on the finding of a violation by the ECtHR,[127] no such provision can be found in the Civil Procedure Code. An additional problem is that Russia's Duma is not well structured to oversee the government's performance on human rights issues: no specific committee exists to monitor human rights, as human rights are deemed to be a cross-cutting issue which affect all areas of law.[128]

3. Root Causes of Russian Applications to the ECtHR

Of the 1,604 judgments of the Court (through the end of 2014) which found at least one violation of the ECHR by Russia, nearly half (655) found violations of the Article 6 right to a fair trial. 501 judgments concerned the protection of property (Article 1 of Protocol 1), 605 judgments dealt with the right to liberty and security (Article 5), and 368 invoked the right to an effective remedy (Article 13). Russia supplanted Turkey as the country with the most Article 2 (right to life) and Article 3 (prohibition of torture) judgments against it, a position it now holds by a wide margin among the 47 states members of the CoE; of particular note, 244 judgments against Russia found a deprivation of the right to life (Article 2), and 504 found inhuman or degrading punishment (Article 3).[129]

Scholars have identified a number of systemic problems in Russia, which contribute to its large share of the ECtHR's case load, upon which I elaborate in the subsections which follow. First, bureaucratic overlap, resource deficiencies, and the decentralization of the judiciary have resulted in the frequent delayed enforcement or non-enforcement of domestic courts' decisions. Second, the process of *nadzor* (supervisory review of judicial decisions) allows authorities to re-open closed cases including criminal cases where the defendant was acquitted, which has been found to infringe on the principle of legal certainty. Third, harsh detention conditions in prisons have often been found to amount to inhuman or degrading punishment. Finally,

126. Issaeva, Sergeeva & Suchkova, *supra* note 105, at 71.
127. Ugolovno-Protsessual'nyi Kodeks [UPK] [Criminal Procedural Code] art. 413 subsec. 4.2.
128. Issaeva, Sergeeva & Suchkova, *supra* note 105, at 75.
129. ECtHR, Annual Report 2014, *supra*, note 35, at 177.

political and bureaucratic obstacles often result in a failure to investigate serious allegations of human rights violations.

4. Delayed or Non-Enforcement of Domestic Rulings: The Burdov decisions

In Russia, court decisions condemning the state to the payment of sums to the applicants have often not been executed or not executed in a timely fashion.[130] Although the situation did gradually improve, it still suffers from a backlog of cases.[131] By far the largest single source of Russian cases at the ECtHR is the non-execution of domestic judgments in civil and administrative cases.[132]

The case of *Burdov v. Russia*[133] was the first judgment delivered by the ECtHR concerning Russia.[134] Mr. Burdov was engaged in emergency operations at the site of the Chernobyl nuclear disaster and, as a result, suffered extensive exposure to radioactive emissions and, under the domestic law, was entitled to government benefits. In his application to the ECtHR he complained of the non-payment of benefits awarded to him on account of injury sustained through his work. Even after a four-year legal struggle and a ruling in his favor from a domestic court, his pension was not paid to him. The ECtHR held that Russia had violated Article 6(1) (right to a fair hearing) by making him wait four years after appealing to a domestic court, and Article 1 of Protocol 1 (right to property) by denying him income that he was reasonably entitled to expect.[135]

The CoE Committee of Ministers, responsible for overseeing the implementation of ECtHR decisions, identified four systemic problems in Russia

---

130. CEPEJ Russia 2005 Report, *supra* note 43, ¶ 11. *See also* Medvedev Rasskazal Sud'iam o Reforme: Otkryto, Effektivno, Bezopasno [Medvedev Told Judges that Reform Should be Transparent, Effective and Foolproof], Newsru, 2 Mar. 2008, *available at* http://palm.newsru.com/russia/02dec2008/medsud.html.
131. CEPEJ Russia 2005 Report, *supra* note 43, ¶ 11; Trochev, *Accountability and Discretion, supra* note 38, at 8.
132. Trochev, *Strasbourg, supra* note 56, at 149.
133. Burdov v. Russia (No. 1), Application No. 59498/00 (2002).
134. Kahn, *Vladimir Putin and the Rule of Law in Russia*, *supra* note 75.

> Between May 1998 and June 2001, not a single Russian case was declared admissible by the European Court of Human Rights. The dearth of admissible cases was not, however, for lack of complaints. By the end of 1999, Strasbourg [Court] had received 1787 complaints alleging breaches in the jurisdiction of the Russian Federation. [. . .] Most of [them] have been rejected as inadmissible on grounds of *ratione personae* (e.g. complaints about Soviet-era violations against deceased relatives), *ratione materiae* (e.g., complaints about pensions, housing or banking problems), or *ratione temporis* (complaints about a violation committed prior to Russian accession to the Convention).

For a more thorough commentary, see Bowring, *Russia's Accession to the Council of Europe and Human Rights: Four Years on*, *supra* note 73.

135. Burdov v. Russia (No. 1), *supra* note 133, ¶ 37 ("By failing for years to take the necessary measures to comply with the final judicial decisions in the present case, the Russian authorities deprived the provisions of Article 6 § 1 of all useful effect.")

which hinder the domestic enforcement of decisions: 1) inefficiencies within the bailiff system; 2) lack of coordination between domestic agencies; 3) domestic courts' failure to clearly identify the debtor in administrative cases; and 4) administrative confusion over how to claim the required funds from the Finance Ministry.[136] Some positive steps were implemented in response to the 2002 *Burdov* decision. In 2005, citing *Burdov*, the Constitutional Court struck down part of the federal budget because it did not require authorities to pay compensation for procedural delays within a fixed time frame. In 2007, also citing *Burdov*, the Russian Supreme Court found that courts' tolerance of procedural delays violated the Constitution and the ECHR, and it encouraged the Duma to speedily adopt legislative reforms on the right to trial within a reasonable time.[137]

Despite a decision of the ECtHR in his favour, Mr. Burdov was still not paid the full amount that was owed to him. He brought his case back to the Court, resulting in the 2009 *Burdov v. Russia (No. 2)* judgment.[138] This case was selected to be a 'pilot' decision on Russian non-compliance with the ECtHR and was the first pilot judgment concerning Russia. A pilot judgment is a procedure used to deal with systematic human rights violations, which give rise to a large number of applications from a particular country. The Court selects a 'pilot' application to decide the given case but also, in addition to individual compensation, to indicate general measures which should be taken to remedy the situation, which gave rise to it. Other comparable cases are then put on hold until the state has the opportunity to respond to the findings of the pilot decision.[139] In addition to finding violations of Article 6, §1 and Article 1, Protocol 1, the Court in *Burdov (No. 2)* also found a violation of Article 13—the right to an effective remedy for the violation of a Convention right—even though this argument had not been raised by the applicant. Moreover, the Court deviated from its past practice by ordering Russia to remedy the situation within a strict time limit.

Burdov (No. 2) raised awareness within Russia of the need to address entrenched and systemic human rights shortcomings, and received acknowledgement from then-President Dmitry Medvedev. In the words of Anatoly Kovler, the Russian judge on the ECtHR, *Burdov (No. 2)* was symbolically selected as the pilot case to remind Russia of the repeated nature of its violations. According to Kovler, *Burdov (No. 2)* signaled the end of the EC-

136. Leach, Hardman & Stephenson, *supra* note 69, at 348.
137. *Id.* at 352.
138. Burdov v. Russia (No. 2), Application No. 33509/04 (2009).
139. *See* Dominik Haider, The Pilot-Judgment Procedure of the European Court of Human Rights (Martinus Nijhoff Publishers ed. 2013).; Philip Leach et al., Responding to Systemic Human Rights Violations: An Analysis of "Pilot Judgments" of the European Court of Human Rights and their Impact at National Level (Intersentia ed. 2010); Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 Ger. L. J. 1231 (2011).

tHR's patience with Russia and the fact that its continued failure to resolve systemic problems could result in its expulsion from the CoE.[140] Although Russia's response to *Burdov (No. 2)* was far from perfect, the Committee of Ministers noted with satisfaction Russia's 2010 law granting compensation to individuals whose right to a speedy trial is violated, to be assessed by taking into account a series of factors which include the practice of the ECtHR.[141]

The *Burdov (No. 2)* judgment in 2009 is generally viewed as having sparked an improvement in the cooperation between Russia and the CoE Committee of Ministers. Despite this progress, the ECtHR held in two judgments in 2012 that the new legislation did not resolve the specific problem of failure to enforce decisions ordering the provision of housing for servicemen by the state in specific cases.[142] In another pilot judgment in 2014, *Gerasimov v. Russia*, the ECtHR found that there were still systemic hurdles to the enforcement of court decisions in the country.[143]

5. Nadzor: Supervisory Review of Judicial Decisions

A second significant systemic hurdle to fuller implementation of the ECHR in Russia is the institution of *nadzor*.[144] Under Article 320 of the Russian *Code of Civil Procedure* (1964), government officials have the discretionary authority to reopen final judgments where they feared that there has been a wrongful application of the law, a procedure which clashes with the principle of *res judicata*. The conditions under which *nadzor* can be activated in civil cases have been restricted by legislative reforms in 2002 and again in 2007. It nevertheless remains an important institution of civil and criminal law in Russia today.[145] *Nadzor* has been explained by the Constitutional Court as necessary to balance the rights of the victim with those of the accused.[146]

In *Ryabykh v. Russia*,[147] the first and most important case against Russia dealing with *nadzor*, the ECtHR found that the principle of supervisory review

---

140. *See* Leach, Hardman & Stephenson, *supra* note 69, at 355.
141. *See* Issaeva, Sergeeva & Suchkova, *supra* note 105, at 76; Burkov, *How to Improve the Result of a Reluctant Player, supra* note 88, at 148–49.
142. Lyushkin and Others v. Russia; Kalinkin and Others v. Russia, *supra* note 5. See: Lisa McIntosh Sundstrom, *Advocacy Beyond Litigation: Examining Russian NGO efforts on implementation of European Court of Human Rights judgments*, 45 Communist Post-Communist Stud. 255 (2012); Leach, Hardman & Stephenson, *supra* note 69, at 356.
143. Gerasimov v. Russia, Application No. 29920/05, Judgment (2014).
144. *Nadzor*, otherwise known as supervisory review, is a form of extraordinary appeal against a final judicial decision inherited by Russia and other former Soviet bloc states from Soviet law.
145. William E. Pomeranz, *Supervisory Review and the Finality of Judgments under Russian Law*, 34 Rev Cent E Eur L 15 (2009). *See also* Koroteev & Golubok, *supra* note 95; Eur. Parl. Ass., *The Honouring of Obligations*, *supra* note 19, ¶ ¶ 353–58.
146. Trochev, *Strasbourg, supra* note 56, at 158.
147. Ryabykh v. Russia, Application No. 52854/99 (2003).

violated the right to legal certainty implied by Article 6, §1 of the ECHR.[148] Despite this, the practice continues, raising tensions between Russia and the ECtHR. Attempts to ban it have been quashed by the Constitutional Court. In 2007, 185,800 criminal cases were reviewed under *nadzor*, though the practice has since diminished substantially.[149]

Since the *Ryabykh* judgment, Russia implemented two reforms with a view to bring the procedure into line with the Convention requirements. The first reform took place in 2002 with the adoption of the new Code of Civil Procedure. The second reform was carried in 2007 notably in response to the ruling of the Russian Constitutional Court of 5 February 2007. On 12 February 2008, this reform was supplemented by a Decree of the Plenum of the Supreme Court of the Russian Federation in which it provided lower courts with guidelines with a special emphasis on the need to comply with ECHR requirements and in particular with the principle of legal certainty.

The matter reverted to Strasbourg the next year in *Martynets v. Russia*, where the Court judged that these reforms were insufficient to solve the problem.[150] According to the Court, despite tangible changes introduced by the above-mentioned reforms, the supervisory review still could not be regarded as being compatible with the Convention.

A third reform of the Code of Civil Procedure was adopted in December 2010 and aimed to introduce appeal courts in the system of Russian courts of ordinary jurisdiction and thus to limit recourse to supervisory review. The reform came into force on 1 January 2012 and has not yet been subject to assessment by the European Court of Human Rights. Likewise, the Code of Criminal Procedure has been amended to provide for appellate review, changes that came into effect on 1 January 2013. However, it is doubtful that the reform will end the discussion, as the main shortcomings of the supervisory procedure identified by the Court in its judgments were not removed. In the meantime, the ECtHR found the supervisory review procedure as provided by the Code of Commercial Procedure to be in compliance with the Convention.[151]

The main shortcomings of *nadzor* include the multiplicity of instances in which a judgment can be challenged after it becomes final, and the related problem of time limits. There are still three instances in which a final judgment may be quashed, sending the case back for a new examination and possibly a new decision. As a result, the starting point for the six-month limit for lodging an application with the ECtHR is unclear. Finally, the discretionary powers of the President and of the Vice-President of the

148. *Id.* ¶ ¶ 46–50.
149. Trochev, *Strasbourg, supra* note 56, at 159.
150. Martynets v. Russia, Application No. 29612/09 (2009).
151. *See* Kovaleva and Others, Application No. 6025/09 (2005).

Supreme Court remain unchanged: they both have the possibility to disagree with the decision of a judge following the examination of a cassation or a *nadzor* request, introducing further uncertainty as to the finality of judicial decisions.[152]

6. Detention Conditions Amounting to Inhuman or Degrading Punishment

In cases such as *Khodorkovskiy v. Russia (No 1)*, Russia has been taken to task by the ECtHR for the poor conditions in its pre-trial detention and prison facilities—specifically, lack of space, poor sanitary conditions, and humiliating treatment by prison officers.[153] The Court has further noted that Russian judges appear to routinely approve extension of detention orders requested by law-enforcement officials without considering whether they are actually necessary or the availability of alternative options. After *Khodorkovskiy* and other judgments, Russia improved the conditions in many pre-trial detention centers in what has been called a gesture of goodwill toward the Court.

Other routine practices in Russia, such as excessive physical punishment of soldiers, have similarly been found to constitute a violation of Article 3 (prohibition of torture).[154]

7. Failure to Investigate Grave Human Rights Violations: The Caucasus Cases

Finally, violations allegedly committed by Russian security forces during the Second Chechen War (1999–2004) have been the subject of thousands of applications to the ECtHR.[155] The conflict with Georgia occasioned a further

---

152. *See* Open Society Justice Initiative, *National Implementation of the Interlaken Declaration*, 16–17, CoE Doc DH-GDR(2012)009 (2012).
153. Khodorkovskiy v. Russia, Application No. 5829/04 (2011).
154. *See, e.g.*, Kalashnikov v. Russia, Application No. 47095/99, (2002); Premininy v. Russia, Application No. 44973/04, (2011); Ananyev and Others v. Russia, Application Nos. 42525/07, 60800/08 (2012).
155. *See inter alia,* Bazorkina v. Russia, Application No. 69481/01 (2006), Imakayeva v. Russia, Application No. 7615/02, ¶ 164 (2006); Luluyev and Others v. Russia, Application No. 69480/01, ¶ ¶ 110–12 (2006); Isigova and Others v. Russia, Application No. 6844/02, ¶ ¶ 120–26 (2008); Ibragimov and Others v. Russia, Application No. 26586/08 (2008); Shakhgiriyeva and Others v. Russia, Application No. 27251/03, ¶ ¶ 181–85 (2009); more recently, Vakayeva and Others v. Russia, Application No. 2220/05, ¶ 170 *et seq.* (2010); Ilyasova v. Russia, Application No. 26966/06, ¶ 130 *et seq.* (2010); Tovsultanova v. Russia, Application No. 26974/06, ¶ 98 *et seq.* (2010). For a detailed analysis of Russia's statistics on prosecutions of military and police personnel, see *Deceptive Justice: Situation on the Investigation on Crimes Against Civilians Committed by Members of the Federal Forces in the Chechen Republic During Military Operations 1999–2003*, "MEMORIAL" Human Rights Center (2003), *available at* http://www.memo.ru/hr/hotpoints/chechen/d-d0603/eng/index.htm; International Helsinki Federation for Human Rights, Impunity: A Leading Force Behind Continued Massive Violations in Chechnya (2005), *available at* http://www.mhg.ru/files/engl/chreport.doc; Human Rights Watch, Who Will Tell Me What

bulk of applications from South Ossetia in the more recent period. In addition, Georgia introduced interstate applications against Russia, one of only a handful of such applications in the history of the ECtHR.[156] Both situations constitute one of the key flashpoints of the tensions between Russia and the ECtHR because of their politically sensitive nature. A similar pattern emerged in 2014 following the events in Ukraine, with three interstate applications brought by Ukraine against Russia, in addition to more than 160 individual applications against Russia.[157]

In many of these cases Russia failed to cooperate with the ECtHR by refusing to share requested documents, in violation of Article 38, and not adequately investigating instances of killings, forced disappearances, and torture, in violation of Articles 2 and 3. In at least four instances, the government explicitly refused to investigate alleged crimes even after the ECtHR ordered it to do so.[158] Russia has sometimes invoked Article 161 of its Code of Criminal Procedure (which prohibits compromising the interests of the parties while an investigation is ongoing) to justify its refusal to turn over documents to the Court, but the Court has rejected this argument saying that Russia's application of Article 161 has been inconsistent and that in any event the parties' privacy can be adequately protected by Rule 33 of the ECtHR.[159]

Even in cases where Russia did agree to launch internal investigations, it often refused to provide adequate information to the victims' families, in violation of their Article 13 right to an effective remedy, and in many cases the ECtHR found the government's superficial responses to applicants' complaints to constitute inhumane punishment in violation of Article 3.[160] Legal and bureaucratic barriers often hinder investigations, such as institutional overlap and a prohibition on disclosing names of officers involved in counter-terrorism operations.[161] A report by Human Rights Watch found that in none of the cases it analyzed were individuals held accountable for

---

Happened to My Son? Russia's Implementation of European Court of Human Rights Judgments in Chechnya 7 (2009), *available at* http://www.hrw.org/en/node/85744; Amnesty Int'l, Rule Without Law: Human Rights Violations in the North Caucasus 4 (2009) (explaining that ECHR "judgments have not been fully implemented to ensure justice for the applicants, and non-repetition of the violations in the future.").

156. Georgia v. Russia, Application No. 38263/08, Judgment (2014). See Petr Preclik, *Culture Re-Introduced: Contestation of Human Rights in Contemporary Russia*, 37 Rev. Cent. East Eur. Law 173, 198–201 (2012).
157. Ukraine v. Russia I, Application No. 20958/14 (2014); Ukraine v. Russia II, Application No. 43800/14 (2014); Ukraine v. Russia III, Application No. 49537/14 (2014).
158. Human Rights Watch, Who Will Tell Me What Happened to My Son, *supra* note 155, at 14.
159. Ole Solvang, *Russia and the European Court of Human Rights: The Price of Non-Cooperation*, 15 Hum Rts. Brief 14 (2008). Rule 33 of the ECtHR provides that Court documents, which are ordinarily made public, can be shielded from public scrutiny in the interests of public order or national security.
160. *See, e.g.*, cases listed at *supra* note 155.
161. Human Rights Watch, Who Will Tell Me What Happened to My Son, *supra* note 155, at 29.

crimes they committed in Chechnya, even when powerful evidence against them was available.[162]

In *Tangiyeva v. Russia*,[163] the ECtHR censured Russia for its failure to investigate the alleged crimes and turn over requested documents to the Court by drawing inferences in favor of the applicant. Having found that the applicant had made a *prima facie* case against the government, the Court held that the burden of proof had shifted to Russia, and found Russia liable for the killings of the applicant's family.[164] This prompted rare dissents from the Russian and Azerbaijani judges on the Court, who thought this decision went too far. Later cases determined the limits of how far the Court was prepared to go: in *Zubayrayev v. Russia*, the Court found that there was not sufficient evidence to draw a similar inference in favor of the applicant despite Russia's failure to investigate.[165] For some, there is a risk that this case will signal to Russia that it can sometimes benefit from non-cooperation with the Court.[166]

These are the four main causes which directly impede fuller implementation of the ECHR in Russia, to which could be added a number of secondary ones such as the general unavailability of the ECtHR jurisprudence in the Russian language until HUDOC became available in Russian in 2014, or obstacles to the free operation of civil society organizations in the country. More broadly, commentators have questioned whether the attitude of various segments of Russian society regarding the ECHR is sufficiently positive to foster a local human rights culture.

C. Russian Attitudes Toward the ECtHR

Like many governments around the world, Russia tends to resist external constraints on its exercise of sovereign authority. Europe generally is a figure of exception in this respect, with every state accepting the mandatory competence of the ECtHR. In Russia, as indeed in a number of other European countries like the United Kingdom, political figures often deliver polemical speeches against the Court. Some senior Russian judges have forcefully argued that the ECHR should be subordinate to the Russian Constitution. Even among ordinary Russians, support for the ECtHR is far from unquestioned. The significance of the ECHR in Russia to a certain extent reflects its perceived legitimacy within various quarters of that society. In this respect, the manner in which the ECHR is perceived in public opinion,

162. *Id.* at 11.
163. Tangiyeva v. Russia, Application No. 57935/00 (2007).
164. Solvang, *supra* note 159, at 16.
165. Zubayrayev v. Russia, Application No. 67797/01 (2008).
166. Solvang, *supra* note 159, at 17.

in the eyes of the judiciary, and in those of the executive branch, helps to better appreciate the sites of resistance and acceptance of the ECHR and, ultimately, its compliance pull within the Russian legal order.

1. Public Opinion in Russia

Polls indicate that in the early years after Russia's accession to the ECtHR, ordinary Russians knew very little about the Court and how it functioned.[167] As the confidence of Russians in their own judiciary has waned, their knowledge of and willingness to apply to the ECtHR has increased. Between 1996 and 2004, the number of Russians who indicated a willingness to challenge government actions in a domestic forum decreased from 41 percent to just 1 percent. Trochev argues that domestic pressure on courts to cover up abuses by the government rather than properly investigate them feeds people's willingness to submit applications to the ECtHR and largely accounts for the rise in applications.[168] In some regions, civil society organizations have realized the political leverage that could be generated from merely filing an application before the ECtHR, again resulting in a dramatic spike in the number of Russian applications to the Strasbourg court.[169] In 2008, 61 percent of Russians knew of their ability to bring complaints to the Strasbourg Court, 29 percent indicated that they were prepared to do so, and 68 percent agreed that such a court should exist.[170]

It has been argued that the attitudes of Russian society towards the ECHR regime reflect a broader uncertainty regarding the country's identity as a European state. For Russia, straddling the border between Europe and Asia, European integration presents a complex, arduous and progressive process. In relation to the ECHR, the ambition should realistically be seen as the vernacularization of European human rights standards rather than the forced adoption, lock stock and barrel, of a monolithic Strasbourg law.[171] It has been suggested that this reflects a somewhat different sense of the proper balance of collective and individual interests.[172] Participants in the effort to implement human rights in Russia have denied that there is anything like a fundamental incompatibility between human rights and Russian values.[173]

167. Theodore P. Gerber & Sarah E. Mendelson, *Russian Public Opinion on Human Rights and the war in Chechnya*, 18 Post-Sov. Aff. 271 (2002); Malksoo, *supra* note 63, at 360; James L. Gibson, *Russian Attitudes Towards the Rule of Law: An Analysis of Survey Data*, *in* Law and Informational Practices: The Post-Communist Experience (Denis J. Galligan & Marina Kurkchiyan eds. 2003); Arthur H. Miller, Vicki L. Hesli & William M. Reisinger, *Conceptions of Democracy Among Mass and Elite in Post-Soviet Societies*, 27 Br. J. Polit. Sci. 157 (1997); Ellen Carnaghan, *Thinking about Democracy: Interviews with Russian Citizens*, 60 Slav. Rev. 336 (2001).
168. Trochev, *Strasbourg, supra* note 56, at 148.
169. Sundstrom, *supra* note 142, at 4.
170. Trochev, *Strasbourg, supra* note 56, at 148.
171. Preclik, *supra* note 157, at 203, 229.
172. Antonov, *supra* note 81, at 14–17.
173. Starzhenetskii, *supra* note 71, at 356.

D. Attitudes of the Russian Judiciary

The 1993 Russian Constitution acknowledges the right of citizens to bring complaints to international bodies, yet politicians and jurists alike agree on the need to find means of stemming the flow of Russian complaints to the ECtHR by improving Russians' reliance on domestic forums. The issue is particularly sensitive when the Russian Constitutional Court's interpretation of certain human rights conflicts with that of the ECtHR.

Constitutional Court Chairman Zorkin has adamantly defended Russia's "judicial sovereignty," emphasizing the primacy of the national constitution and stating that the public interest must be determined first and foremost at the domestic level.[174] Although Judge Zorkin recognizes ECtHR case law as legally binding if it reflects international legal norms, he denies that Russia ever surrendered to the ECtHR the power to change Russian law without the intervention of Russian courts. The Chairman's position is echoed more generally in the attitudes of the legal profession, including judges, which consider that this constitutes a political externality that can "encroach on the sovereign rights of the people."[175] That being said, even in his knee-jerk reaction to the overturning of the Constitutional Court decision in the *Markin* case, he insisted on the positive nature of the dialogue between the ECtHR and the Constitutional Court, providing examples of Russian decisions, which gave effect in domestic law to holdings of the Strasburg court.[176] Still, his position can be contrasted with that of Thorbjorn Jagland, the Secretary-General of the Council of Europe, to wit that human rights and, by implication, ECtHR judgments, categorically enjoy primacy over national law.[177]

The principle of subsidiarity and the doctrine of the margin of appreciation appear to support the notion that the ECtHR should show a significant level of deference to national courts' interpretations of human rights, yet the tension surrounding the question of how much deference is appropriate remains ongoing. Krug argues that an over emphasis on the ECtHR's perceived pre-eminence could serve as a disincentive for the development of Russian constitutional law. Instead, he argues that the two fields should begin to merge organically. Indeed, Krug points to developments in the area of civil defamation law (specifically, an RSC directive ordering lower courts to "take into account" ECtHR practice in that field, which will be discussed further below) to show that Russia has begun a transition from "mere compliance" with ECtHR judgments to "genuine respect" for the ECHR's norms; he expects this to have broad effects on freedom of speech and freedom of the press.[178] Another example of the ECtHR's influence on Russian judicial attitudes can

174. See discussion above on the limits to flexibility of Russia on the international arena.
175. Antonov, *supra* note 81, at 8.
176. Zorkin, *supra* note 107, passim.
177. Issaeva, Sergeeva & Suchkova, *supra* note 105, at 80.
178. Krug, *supra* note 37, at 752.

be seen in the law of personal capacity. In 2009, the Russian Constitutional Court interpreted the law so as to recognize intermediate stages of capacity, internalizing the ECtHR decision in *Shtukaturov v. Russia*.[179]

As could be expected, individual judges differ widely in their attitudes toward the ECtHR. On one hand, many influential judges appear more prepared to support the ECHR through words than through action. Many may not have time to properly understand or apply ECtHR decisions, decline to hear arguments based on ECtHR case law, or neglect to fully explain their judicial reasoning despite RSC guidelines to that effect.[180] Yet, overall, there are indications that judges—including many of those appointed by Vladimir Putin, known for his hostility to the Court—are increasingly drawing on ECtHR case law, including cases to which Russia was not a party, without fear of political sanction. In doing so, these judges are asserting their independence from the political apparatus, and helping to improve public confidence in the courts.[181] Russian judges regularly participate in international conferences with other CoE members, and ECtHR judgments are becoming more readily available in Russian. Local and international civil society organizations and the CoE have invested significant efforts to train lawyers and judges in ECHR law over the last decade, with some positive results.[182] In 2003, as mentioned earlier, the plenum of the Russian Supreme Court adopted a resolution mandating that judges should know and apply the jurisprudence of the ECtHR.[183] That said, Trochev opines that the Constitutional Court remains the Russian judicial body which has the most stable and positive attitude toward the ECtHR.[184]

The systemic effect of the ECHR in Russia is to push towards better enforcement of domestic court decisions, improved professionalism of judges, and greater independence from political interference. For at least a portion of the Russian judiciary, the ECtHR offers an inspiring model to emulate at the national level.[185]

---

179. *Cited in* Issaeva, Sergeeva & Suchkova, *supra* note 105, at 77.
180. Trochev, *Strasbourg, supra* note 56, at 157.
181. *Id.* at 166.
182. Sundstrom, *supra* note 142, at 4. Burkov makes the point that despite these efforts, to a large extent, the Convention is still largely not used and unknown by the legal profession. He argues for the implementation of further education mechanisms for judges, national litigators, and law students: Burkov, *How to Improve the Result of a Reluctant Player, supra* note 88, at 153–55.
183. *Id.*
184. Trochev, *Strasbourg, supra* note 56, at 157.
185. Sundstrom, *supra* note 142, at 6, 12.

E. Attitudes of the Russian Executive Branch

Although it is far from the only government to exhibit antipathy to the Court, the Russian Executive has shown mounting hostility to the ECtHR as the wave of judgments against Russia brought increasing international scrutiny and condemnation of that country's human rights practices—thus challenging President Putin's claims to have brought law and order to Russia. This tension is particularly evident surrounding politically contentious issues such as the war in Chechnya. There have been documented instances of political intimidation and coercion aimed at discouraging Russians from filing applications with the ECtHR, and officials have called applicants "anti-Russian" and "public enemies."[186] In 2007, President Putin restructured the office of Russia's representative to the ECtHR to make it subordinate to the Justice Ministry. Previously it had been under the office of the President, and this change was seen as in effect a bureaucratic demotion.[187]

Moreover, Russian officials have shown resistance to implementing reforms mandated by the ECtHR where such reforms would be inexpedient or would reduce their own power or influence. Given the fragile state of democracy and rule of law in Russia, the task of effecting systemic reform that would satisfy the CoE's standards seems like a daunting one. Along with Turkey and Ukraine, Russia has been singled out by the Parliamentary Assembly of the CoE as one of the least cooperative states, and one with the most substantial implementation problems.[188]

Yet, the picture is not entirely bleak, and there are a number of success stories and causes for optimism. As Keller and Stone Sweet note, the ECHR is not merely an external regime but rather one which inevitably operates in significant ways within national legal orders.[189] In many fields of law, Russian courts are gradually internalizing ECtHR jurisprudence, as law professor Gennady Danilenko predicted it would in 1999.[190] The 2003 RSC directive to lower courts to "take into account" relevant ECtHR practice is a case in point.[191] A number of politicians (most notably Dmitry Medvedev) have espoused the cause of judicial reform in response to ECtHR judgments, and funding for prisons and the judiciary has been increased. Prison conditions in many areas have improved, and there have been arguable improvements in judicial procedure, such as the introduction of the doctrine of "effective remedy" for procedural delays.[192]

---

186. Trochev, *Strasbourg, supra* note 56, at 146.
187. *Id.* at 151
188. Bigg, *supra* note 124.
189. Sweet & Keller, *supra* note 102, at 710.
190. Gennady M. Danilenko, *The New Russian Constitution and International* Law, 88 Am. J. Int'l L. 451, 464–67 (1994); Krug, *supra* note 37, at 42.
191. Krug, *supra* note 37. at 787.
192. Trochev, *Strasbourg, supra* note 56, at 155.

F. Conclusion

Trochev argues that given the massive numbers in which Russian citizens have flooded the ECtHR, the Court is turning into something like a "super-cassation" court for Russia.[193] In fact, however, relative to its population Russia does not contribute especially disproportionately to the Court's case load. Judgments of the Court have placed serious pressure on Russian leaders, often demanding radical overhauls of public institutions beyond what officials were willing or able to implement. This has resulted in frequent friction between the CoE and Russia, perhaps more than with any other member-states.

Yet construing the Court as an external force bullying Russia into compliance or eliciting resistance would not be entirely accurate. As noted, the Court also operates as an internal force in many respects. Most notably, the mere possibility of ECtHR litigation is sometimes sufficient to alter the behavior of Russian citizens or authorities. Scholars have noted that in many areas Russian law is gradually converging with the ECHR and CoE practice, and there is reason to expect that this trend will continue.

After several years of increases, the number of Russian applications to the ECtHR dropped significantly from 2011. This should be seen as a decidedly positive development, as ultimately the success of Russia's integration into the CoE can be measured by whether actions taken in response to adverse judgments result in a reduction of the number of analogous applications filed.

Despite the more recent decrease, which remains to be confirmed as a long term trend, Russia still stands as the largest state contributor to the ECtHR's docket. Beyond Russia, there are still institutional issues marring the Court making it imperative to continue the work of improving its structures after the coming into force of Protocol 14. I now turn to consider the latest round of discussions within the CoE, centered on the 2012 Brighton Declaration, with a view to assessing whether if offers the promise of better implementation of human rights in Russia.

III. PART II. THE BRIGHTON DECLARATION AND REFORMS TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ANSWERS TO RUSSIA'S TROUBLES?

A. Introduction

The ECHR now provides protection to roughly 800 million people stretching from Azerbaijan to Iceland and from Gibraltar to the Bering Straits, across

193. *Id.* at 165.

an area that is significantly vaster than Europe itself. The Court's jurisdiction expanded steadily over the 1990s to incorporate Russia and other post-Soviet states, but few reforms have been passed to cushion the impact of their arrival in the Council of Europe.[194] Enlargement brought not only more people, but also a broader range of issues, a more diverse cultural context, a wider spectrum of national capacities, and differing degrees of political commitment to the ECHR project. As a result, since the Court's creation in 1959, more than 90 percent of its judgments have been delivered following the "enlargement process."[195] The Convention's main enforcement tool, the ECtHR, has not been transformed in a manner that matches the changes to the *espace juridique* of the ECHR; as a result, the Court is stretched to the breaking point.[196] Added to the excessive number of applications reaching the Court, concerns exist over the disproportionate number of applications coming from a small group of states,[197] the enforcement of the Court's judgments, and the frequency of repetitive cases.[198]

The 2012 Brighton Declaration is the latest round in the continuing attempt to reform the ECHR system. This section outlines the problems that have plagued the ECHR system leading up to Brighton (I), and analyses how the declaration addresses those problems (II). The memo concludes with an analysis of the impact that Brighton will have on Russia and its relationship to the Convention system as a whole.

B. Persistent problems of the Court needing reform

Enlargement of the ECHR brought with it not only the promise that human rights would be respected throughout Europe but also the risk that the ECtHR would fail to absorb its increased workload. While the ECHR system has evolved since enlargement, certain problems are recurring: caseload, repetitive cases, national concentration of cases, execution of judgments, and

194. All former Soviet states have acceded to the Convention with the exception for Belarus and Central Asia countries (Kyrgyzstan, Kazakhstan, Turkmenistan, Tajikistan, and Uzbekistan).

195. European Court of Human Rights, 50 Years of Activity: The European Court of Human Rights—Some Facts and Figures 5 (2010), *available at* http://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf.

196. As of December 2013 the total number of pending applications stood at 99,900, ECtHR, *Pending Applications Allocated to a Judicial Formation 31/21/2013*, ECHR.COE.int (2013) *available at* http://www.echr.coe.int/Documents/Stats_pending_month_2013_BIL.pdf.

197. As of 31 March 2013, more than 60 percent of all pending applications allocated to a judicial formation come from five countries: Russia, 21,1 percent; Turkey, 13.6 percent; Italy,11.4 percent; Ukraine, 9.1 percent; Serbia, 9 percent. *See* ECtHR, *Statistics*, ECHR.COE.int (2015), *available at* http://echr.coe.int/Pages/home.aspx?p=reports.

198. *See generally*, Ed Bates, The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights (2010).

preservation of the individual petition. Russia is one of the member states of the Council of Europe whose presence looms large in each of these problems.

C. Caseload

From 1999 to 2011, the number of applications allocated to a judicial formation—that is, a formation of either a full panel of judges to decide on the merits or a smaller committee to decide on admissibility—rose by an alarming 767 percent.[199] In 2007, ECtHR President Jean-Paul Costa remarked that "without far-reaching reforms—some would say radical reforms—the flood of applications reaching a drowning Court threatens to kill off individual petition *de facto*."[200] Since this warning, the flood has continued despite the introduction of new protocols, declarations, and the work of various conferences. Although 90 percent of cases reaching the Court are rendered inadmissible, the Court must still process these claims. As of 1 January 2015, there were 69,900 cases pending before a judicial formation.[201] Consequently, this enormous volume of applications saps much of the judicial attention of the ECtHR, leaving less time to address urgent matters and develop important case law.[202] It bears repeating that, for many years, Russia was by a wide margin the state contributing the largest number of cases each year to the Court.

Protocol 14, which came into effect in 2010 after Russia finally relented in its opposition, introduced new procedures to reduce the amount of judicial attention given to admissibility decisions—declarations of inadmissibility can now be made by one instead of three judges, for instance—but the protocol did not itself limit the number of applications reaching the Court. The results of the more efficient procedures introduced by Protocol 14 can be already observed as the number of pending applications fell from 151,600 at the end of 2011 to 69,900 by the beginning of 2015.[203]

---

199. CoE, Annual Report 2011 of the European Court of Human Rights 14 (2012), *available at* http://www.echr.coe.int/Documents/Annual_report_2011_ENG.pdf [ECtHR, 2011 Annual Report].
200. Jean-Paul Costa, President of the ECtHR, Speech Given on the Occasion of the Opening of the Judicial Year, *in* European Court of Human Rights: Dialogue Between Judges 7 (2007).
201. CoE, European Court of Human Rights, Annual Report 2014, at 6 (2015).
202. *See* European Court of Human Rights President Jean-Paul Costa's remarks in his 2011 annual address: ECtHR, 2011 Annual Report, *supra* note 199, at 37–38; CoE, *Explanatory Report: Protocol 14*, ¶ 37 [CoE, *Explanatory Report*].
203. The ECtHR continuously updates numbers and offers statistical analysis on its website. *See* ECtHR, *Statistics*, *supra* note 197.

D. Repetitive Cases

Repetitive or "clone" cases are cases, which center on a similar legal issue. They are a troubling phenomenon at the ECtHR for two reasons: first, they drain the Court's resources when national courts could address these cases by following ECtHR jurisprudence; second, they indicate a failure at the national level to fully implement the ECHR. As Ed Bates puts it, "[r]epetitive cases contribute nothing new to the jurisprudence of the ECHR, however they clearly sap the Court's ability to function efficiently and threaten to deprive it of the opportunity to focus sufficient attention on cases raising new or otherwise more important features of ECHR law."[204] Non-enforcement of domestic judicial decisions is one of the most important systemic problems, which are at the origin of numerous clone cases.

Unlike the judicial resources devoted to admissibility hearings, repetitive cases are difficult to address by changes in procedure. They are usually well founded and most often reflect a systemic failure at the national level to implement the ECHR.[205] Much of the phenomenon of repetitive cases can be attributed to enlargement: "[t]he consequence of [enlargement] was that certain of the newer states joined the ECHR before putting their house in order, so to speak, and so brought with them 'structural problems of Convention compliance' that were entirely foreseeable."[206] These states react to decisions of the ECtHR on an *ad hoc* basis rather than engaging in the true reforms that are often needed to address the root causes of the problem. Russia is one of these enlargement states that matches this description.

In 2004, Protocol 14 became open for signature, which contained some measures to reduce the number of repetitive cases.[207] Protocol 14 empowers three-judge committees to decide on the merits of a case that "is already the subject of well-established case-law of the Court."[208] The previous regime required seven-judge panels to decide upon the merits of a case. The protocol additionally encourages friendly settlements by making ECtHR available to secure this end and avoid a lengthy trial.[209] Along with the Protocol 14 changes, the ECtHR started to resort more often to the pilot-judgment procedure when it receives "a significant number of applications deriving from the same root cause."[210]

---

204. Bates, *supra* note 198, at 486.
205. ECtHR , 2011 Annual Report, *supra* note 199, at 38.
206. Bates, *supra* note 198, at 492.
207. For a critical analysis of the reform process leading to the adoption of Protocol No. 14, see Leach, *supra* note 2; *see also* Steering Committee for Human Rights (CDDH), Reforming the European Convention on Human Rights: A Work in Progress (2009), *available at* http://www.echr.coe.int/librarydocs/dg2/isbn/coe-2009-en-9789287166043.pdf.
208. Protocol No. 14, *supra* note 9, art. 8.
209. *Id.* art. 15.
210. ECtHR, The Pilot-Judgment Procedure, ¶ 2 (2009), *available at* http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf.

Despite these reforms to stem the tide of repetitive cases, the phenomenon continues to preoccupy the ECtHR. On 1 October 2012 the Court had a total of 39,100 pending cases, which had been identified as repetitive cases. "The main States concerned are ranked as follows: Italy (9,400), Turkey (7,700), Serbia (6,000), Romania (5,100), Ukraine (3,500), the United Kingdom (2,300) and the Russian Federation (1,600)."[211] The explanatory report for Protocol 14 clearly acknowledged that "[o]nly a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the Court's present overload."[212] The issue of clone cases is likewise a significant preoccupation at the level of the Committee of Ministers, entrusted with the enforcement of ECtHR decisions. There were 1,325 cases concerning the Russian Federation pending before the Committee of Ministers and awaiting execution on 31 December 2013. Out of this figure, 1,155 were clone cases.[213] In other words, over 90 percent of all cases concerning the Russian Federation awaiting execution before the Committee of Ministers are clone cases relating to major systemic problems.

In order to stem the flow of repetitive cases, reform will likely need to occur at the national level and address specific aspects of the ECHR implementation, including adoption of general measures following ECtHR judgments. In 2011, more than a third of the ECtHR's decisions where a violation of the ECHR was found concerned the fairness and length of a trial provided for in Article 6, while another 15 percent concerned the prohibition of torture and inhumane or degrading treatment.[214] Such cases will continue to reach the Court so long as national governments like Russia fail to address systemic failures to fully implement the ECHR.[215]

E. National concentration of applications

Related to the issue of repetitive cases is the concentration of applications coming from a small group of member states. More than half of the pending cases on January 1, 2015 came from four member states: Russia (14.3 percent), Turkey (13.6 percent), Italy (14.4 percent), and Ukraine (19.5 percent).[216] This is more than the remaining 43 states put together. The national

211. ECtHR, The Interlaken Process And The Court (2010), *available at* http://www.echr.coe.int/Documents/2012_Interlaken_Process_ENG.pdf.
212. CoE, *Explanatory Report, supra* note 202, ¶14.
213. Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 7th Annual Report of the Committee of Ministers 2013, at 40 (2014), *available at* http://www.coe.int/t/dghl/monitoring/execution/Documents/Publications_en.asp.
214. ECtHR, *The ECHR in Facts and Figures 2011*, at 9.
215. There has been a slowing down of repetitive cases: *6th Annual Report, supra* note 116, at 11.
216. ECtHR, *Analysis of Statistics 2014, supra* note 24, Figure 3, at 8.

concentration has varied over time, with different states producing the bulk of applications to the Court. The majority of the Court's cases in the mid-2000s on the length of proceedings came from Italy, France, Slovakia, the Czech Republic, and Poland. In the well-known case of *Kudla v. Poland*, the Court remarkably ordered the reform of domestic law in order to avoid similar cases reaching the Court in the future.[217] Despite this specific attention given to repetitive cases in *Kudla*, just three years later the Court found itself delivering 50 to 60 percent of its judgments on repetitive cases.[218] In addition to the systemic failure that national concentrations indicate, they also risk "creat[ing] political fault lines that threaten to derail the ECtHR reform process."[219] The heavy burden that these few states generate for the Court also gives them disproportionate negotiating leverage in any discussion of possible reform of ECHR institutions. Thus, the fact that Russia accounted for nearly a quarter of all pending cases gave it particular importance in the context of the troubled coming into force of Protocol 14 aiming to streamline the treatment of applications to the ECtHR.

Perhaps due to the politically sensitive nature of national concentrations, the issue is hardly mentioned in the various post-enlargement reform efforts. Where it is evoked at all, it is subsumed into the issue of repetitive cases, despite the fact that there is no strict correspondence between the states concerned by national concentration and repetitive cases. That said, Russia for its part does figure on both lists.

F. Delays in Execution of Judgments

Although most respondent states comply with the majority of judgments delivered against them, occasionally states do disregard the ECtHR's pronouncements in politically sensitive matters. In addition to flat out refusals to comply, which remain unusual, some states are simply slow to execute the ECtHR's judgments. The impact of these refusals and delays is felt on an individual and a systemic level: applicants do not have their cases re-examined at the national level, which risks undermining their faith in the ECHR in general. Recall the example of Mr. Burdov, who had to re-apply to the ECtHR to complain about the Russian authorities' persistent failure to enforce domestic judgments in his favor without delay, despite the previous finding of violation by the Court in his case.[220]

---

217. Kudla v. Poland, Application No. 30210/96, Grand Chamber (2000). *See also* Bates, *supra* note 198, at 485.
218. Bates, *supra* note 198, at 486. Given the systemic failure of local law that underlies national concentrations, this phenomenon dovetails the problem of repetitive cases.
219. Helfer, *supra* note 10, at 157.
220. Burdov v. Russia (No. 2), *supra* note 138.

Currently, the Committee of Ministers is responsible for overseeing the execution of judgments, leaving the problem to be dealt with through political arm-twisting. In an ideal setting, their work would be minimal in nature. Since enlargement, however, the Committee has had to increase the time it devotes to enforcing judgments. The Committee now releases annual reports on the matter, which figured prominently in the conferences in Interlaken and Izmir, as well as the work of the Group of Wise Persons. The latest report was made public in March 2014 and Russia figures, again, prominently among the states with the most significant delays in the execution of judgments.[221]

G. Balancing Individual Petitions and Systemic Reform

A tension has emerged in recent years as to whether the ECtHR should remain directly accessible to all as a guarantor of individual relief, or whether it should select by way of a leave system the cases that present the most interesting prospects for developing ECHR jurisprudence. This reflects different constitutional models, with a supreme court playing either the role of a high court of justice directly accessible through petition, or a constitutional court agreeing to hear only cases of fundamental significance.

In the lead up to drafting Protocol 14, an Evaluation Group was struck to consider ways to reduce the Court's workload; chief among the group's proposals was empowering the Court to decline to examine applications that "raise no substantial issue under the Convention."[222] The proposal was subsequently championed by the co-author of the Evaluation Group's report, then-President of the ECtHR Lucius Wildhaber, who felt that the primary aim of the Court should be to probe and raise the bar of human rights across Europe.[223] Despite his efforts, the proposal did not make its way into Protocol 14. Opponents challenged President Wildhaber's view of the ECtHR and argued that instead "the soul of the ECHR is the entitlement of each and every complainant to examination of his or her complaint."[224]

While this tension does not present a serious problem for the ECtHR directly, it does have an impact on other areas of reform. Favoring the individual petition forces the Court to take on repetitive cases, whereas a constitutional-style court could turn its attention away from similar cases. Moreover, a leaner "constitutional" ECtHR would have an overall reduced

221. *See, e.g.*, *7th Annual Report*, *supra* note 213.
222. Bates, *supra* note 198, at 497. *See also* Costas Paraskeva, *Reforming the European Court of Human Rights: An Ongoing Challenge*, 76 Nord. J. Int.l L. 185 (2007).
223. *See* Bates, *supra* note 198, at 498.
224. Paraskeva, *supra* note 222, at 213.

workload, producing fewer judgments requiring the Committee of Ministers to supervise their enforcement.[225]

H. The Brighton Declaration

The Brighton Declaration was adopted in April 2012 by states parties to the ECHR at the conclusion of a "High Level Conference on the Future of the European Court of Human Rights" convened by the United Kingdom as Chair of the CoE Committee of Ministers.[226]

The Brighton Declaration focuses broadly on the role of national authorities to preserve the ECHR system and make it more effective.[227] The holistic approach of the Brighton Declaration is in line with what one commentator identifies to be the fundamental problem confronting the ECHR: "the need for effective implementation of the Convention at the national level so as to reduce the extent of the tasks required of what, after all, remains an international system capable of achieving only so much."[228] While the themes in Brighton only address some of the problems identified in the preceding section head-on, they do indirectly tackle the overall efficiency of the ECHR system. In the wake of the Brighton Declaration, two new protocols to the ECHR were adopted. The evolution represented by the Brighton process is first analyzed, followed by a discussion its significance for Russia's challenges in implementing the ECHR.

1. Main themes raised in Brighton

The Brighton Conference and Declaration touched on a number of issues directly bearing on the questions examined so far in this essay, most notably the national implementation of the ECHR, the interaction between the ECtHR and national authorities, the need to control applications to the ECtHR, the processing of such applications, the nomination of judges and the execution of judgments.

---

225. *See id.*
226. CoE, *The Brighton Declaration* (19–20 Apr. 2012) [hereinafter Brighton Declaration], *available at* http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.
227. The number of repetitive "clone" cases in 2011, for example, decreased for the first time in many years. *See* Committee of Ministers, *supra* note 152, at 9.
228. Bates, *supra* note 198, at 515. On the Interlaken-Brighton process generally, see: *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration*, 30 Neth. Q. Hum. Rts. 349 (2012). Eva Brems & Laurens Lavrysen, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, 35 Hum. Rts. Q. 176 (2013). James A. Sweeney, *Restorative Justice and Transitional Justice at the ECHR*, 12 Int'l. Crim. L. Rev. 313 (2012). Alastair Mowbray, *The Interlaken Declaration: The Beginning of a New Era for the European Court of Human Rights?*, 10 Hum. Rts. L. Rev. 519 (2010).

The ECHR is uneven in its effectiveness at the national level, reflecting the varied strength of domestic judicial structures, solidity of the rule of law, and degree of public commitment to the ECHR. Bilateral cooperation and assistance from the ECtHR itself can help improve the implementation of the ECHR. The Brighton Declaration listed specific measures that states can adopt if they have not already done so: establishing national human rights commissions; ensuring compatibility of national legislation and draft bills with convention law; introducing new legal remedies that best conform with the ECHR; encouraging national courts to take note of convention decision; training public officials, judges, lawyers on the ECHR; providing convention information to potential applicants; and translating significant decisions and practical guides on admissibility criteria into national languages.[229]

The Brighton Declaration invited states to allow their highest court to request advisory opinions from the ECtHR, a competence created by way of an optional Protocol to the ECHR.[230] Advisory opinions are not only seen as promoting dialogue between the national authorities and the ECtHR but also as reducing the number of applications made to the ECtHR. Stronger, local application of the ECHR lessens the burden on the ECtHR to enforce the convention.

The Brighton Declaration also noted that national authorities interact with the ECtHR through the principle of subsidiarity and the doctrine of the margin of appreciation, which combine to promote dialogue and allow for local variations of ECHR implementation. These two aspects of interaction were reaffirmed in the Brighton Declaration by inviting the Committee of Ministers to include them in a revised Preamble to the ECHR.[231] It is unclear, however, what force this change to the Preamble could have. The Committee could have been invited to make the change to the text of the Convention itself, as opposed to the Preamble, thus leaving less interpretative room for the Court to decide what impact this change will have. As it stands, there might be little gained from this amendment.[232]

The Brighton Declaration affirmed the right of individual application to the ECtHR as the cornerstone of the ECHR system, but aimed to reduce the burden it places on the ECtHR by encouraging the Committee of Ministers to shorten the period within which an application can be made from six to

229. Brighton Declaration, *supra* note 226, § A.
230. *See* Steering Committee for Human Rights, *Draft Explanatory Report to Protocol No. 16*, CoE, Doc. No. DH-GDR(2012)020 (2012), *available at* http://www.coe.int/t/dghl/standardsetting/cddh/DH_GDR/DH-GDR%282012%29020_Draft%20Explanatory%20Report_Protocol%20no%20%2016_ECHR%20%283%29.pdf
231. Brighton Declaration, *supra* note 226, § B.
232. *See* Antoine Buyse, *Brighton Outcomes*, ECHR Blog (2012), *available at* http://echrblog.blogspot.ca/2012/04/brighton-outcomes.html.; Ed Bates, *The Brighton Declaration and the "Meddling Court,"* UK Human Rights Blog (2012), *available at* http://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/#more-13662.

four months. Leading human rights NGOs expressed their concern relating the proposed four month rule.[233] Stricter application of admissibility criteria, applicants better informed of admissibility criteria, and developed case law on the exhaustion of domestic remedies are also envisioned by the Brighton Declaration as ways of reducing the burdensome number of applications reaching the ECtHR.[234]

The processing delays remain a major preoccupation of ECtHR reform. Continuing with the adjustments made by Protocol 14—namely the reduced number of judges required to dismiss an application or hear one based on well-established case law—the Brighton Declaration proposed minor modifications that should accelerate application processing. For instance, the secondment of national judges and lawyers to the ECtHR's Registry increases its handling capacity. The Declaration also encouraged the ECtHR to consider grouping a sample of representative cases to be decided as applicable to the whole group. Protocol 14 empowered the ECtHR to hear cases on "well-established case law" in committees of three rather than seven; the Brighton Declaration supported a broad application of the term "well-established" so as to make increased use of this change of procedure from Protocol 14. The Declaration also contemplated the appointment of additional permanent judges and invites the Committee of Ministers to determine whether the ECHR should be amended and more judges appointed by the end of 2013.[235]

The Brighton Declaration noted the importance of selecting high-quality judges who are nominated at stages early enough in their career. To these ends the Declaration supports the work of an expert advisory panel on judicial nominations and invites the Committee of Ministers to amend the ECHR to bar nominations of judges older than sixty-five years of age.[236]

The Brighton Declaration, without using the expression "*stare decisis*" or "binding precedent," affirmed "the Court's long-standing recognition that it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart without cogent reason from precedents laid down in previous cases."[237] This echoes and amplifies the reliance on "well-established case law" mentioned previously.

While noting the delays and sometimes non-compliance in executing the ECtHR's judgments, the Brighton Declaration mildly pushed for improvement in this area. It encouraged the Committee of Ministers to continue its

233. Amnesty Internationl et al., *Joint NGO Statement: The Brighton Declaration Must Strengthen Human Rights Protection in Europe and Preserve the Integrity and Authority of the European Court of Human Rights*, Statewatch.org (13 Apr. 2012), *available at* http://www.statewatch.org/news/2012/apr/eu-brighton-declaration.pdf.
234. Brighton Declaration, *supra* note 226, § C.
235. *Id.* § D.
236. *Id.* § E.
237. *Id.* ¶ 25(c).

work overseeing the execution of judgments, called on national authorities to publicize action plans to implement judgments, and invited national parliaments to scrutinize more closely compliance with the ECtHR's rulings.[238] An essential tool to ensure the execution of the ECtHR's judgments was the introduction, in 2009, of an obligation to present to the Committee of Ministers adequate action plans, with timetables, covering the different measures required for execution.[239] Following the Brighton Conference, the Committee of Ministers has decided to examine the question whether more efficient measures are required vis-à-vis states that fail to implement judgments in a timely manner.[240]

The penultimate section of the Brighton Declaration acknowledged the steps that the Committee of Ministers has taken, following the conferences in Interlaken and Izmir, to reflect on the future of the ECHR system. No specific action plan is proposed in the Declaration, but there is recognition of the fundamental importance of effective implementation of the ECHR at the national level.[241]

2. Problems Remaining

The Brighton Declaration steers clear of the institutional changes made by Protocol 14—reducing judicial attention given to admissibility decisions and applications regarding well-established case law—and focuses instead on the overall effectiveness of the ECHR system. This orientation of the Declaration stems partly from a desire to allow the Protocol 14 changes to take effect, and from a clearly stated aim to follow the direction taken at Izmir and Interlaken, namely, to consider the long-term future of the ECtHR.[242] There are few concrete proposals in the Declaration that could secure the viability of the Court for years to come. Moreover, there are areas of reform that were notably undertreated in Brighton and will remain issues that will need to be addressed in the future, including the execution of judgments, national concentration of cases, the right of individual petition, and domestic implementation of the ECHR, issues which have particular salience in relation to Russia.[243]

---

238. *Id.* § F.
239. CoE, Ad hoc Working Party on Reform of the Human Rights Convention System, *Measures to Improve the Execution of the Judgments and Decisions of the Court*, Doc. No. GT-REF.ECHR(2013)2 rev2 (2 May 2013).
240. *6th Annual Report*, *supra* note 116.
241. Brighton Declaration, *supra* note 226, § G.
242. Noreen O'Meara, *Brighton rocked! Next steps for reforming the European Court of Human Rights*, UK Constitutional Law Group (2012), *available at* http://ukconstitutionallaw.org/2012/04/20/noreen-omeara-brighton-rocked-next-steps-for-reforming-the-european-court-of-human-rights/.
243. *Id.*

No significant change was proposed in Brighton to ensure execution of the ECtHR's judgments. Primary responsibility remains with the member states to implement the ECtHR's judgments, but there is little change to the structure that leaves non-compliance with the Committee of Ministers.[244]

The national concentration of the ECtHR's workload is not even mentioned in the Brighton Declaration. While proposals were made to support local application of the ECHR, there appears to be no publicly stated desire to address repeat offenders of the Convention. While national concentration statistics are available in ECHR documents and the problem is well known, the politically sensitive nature of the matter explains why it has not figured prominently in any discussions of ECHR reform. Unsurprising as this omission may be, the unwillingness to even name the issue signals how deep the problem lies.

The changes to admissibility proposed in Brighton could reduce the workload of the Court, but they also pose a threat to the right of individual petition. The Declaration recommended to reduce the application period from six to four months, with the aim that there be fewer applications reaching the Court. This reduced number of applications, however, would not reflect an increase in respect for human rights.[245] It is an arbitrarily selected cut-off, and there is no indication for those who do not file within the proposed four-month window that their rights have been protected or reaffirmed by some other means. Ultimately, the wisdom of reducing the application window depends on the promise of a more effective application of the ECHR locally—but here too Brighton may fall short.

Finally, while the overall approach of the Declaration is to enact low key, incremental changes that address the efficacy of the ECHR system, there is little in the text that suggests major improvements in how the Convention will be applied locally. The principle of subsidiarity places primary responsibility for the ECHR's application with the member states. The Declaration reaffirms this responsibility and encourages member states to set up national human rights commissions, but there is no movement toward a binding commitment to create a national body that oversees the implementation of the ECHR.

---

244. *See* Press Release, Amnesty Int'l, *Brighton Declaration: States Must be Serious About European Court's Judgments Instead of Tampering With its Independence* (20 Apr. 2012), *available at* http://www.amnesty.org/en/for-media/press-releases/brighton-declaration-states-must-be-about-serious-court-s-judgments-instead. A political declaration by the forty-seven CoE member states fails to address key challenges faced by the European Court of Human Rights even if it contains some positive measures, Amnesty International said. 'The amendments to the Convention proposed today will do little to alleviate the workload of the Court, while some of them instead undermine the independence of the Court and curtail individuals' access to justice,' said Michael Bochenek, Director of Law and Policy at Amnesty International."). Joint NGO statement, *supra* note 233.

245. *See* Joint NGO statement, *supra* note 233.

3. Follow-Up to the Brighton Declaration

Following the adoption of the Brighton Declaration in April 2012, the Committee of Ministers directed the CoE Steering Committee for Human Rights (CDDH) to prepare drafts of two additional protocols, a process that led to the adoption of Protocols 15 and 16 to the ECHR.

The initial draft of Protocol 15 was made public in October 2012. Protocol 15 provides for a new paragraph to be added to the Preamble of the ECHR, which refers to the principle of subsidiarity and the doctrine of the margin of appreciation, as reflective of member states' primary duty to ensure respect for the rights enshrined in the Convention via their domestic legal systems. The Protocol further sets sixty-five as the maximum age for nominees for appointment as a judge of the ECtHR and facilitates relinquishment by a chamber of the Court in favor of the Grand Chamber in cases that warrant it. Finally, Protocol 15 reduces from six to four months the delay within which to file an application with the ECtHR and eliminates the need for an applicant to show that he would suffer a "significant disadvantage" if the case is not heard.[246]

In February 2013, the ECtHR issued an Opinion on Draft Protocol 15 at the request of the CoE. In general, the Court stressed that it saw no difficulty and welcomed the changes introduced by the Draft. This situation is unsurprising, considering that three of the five amendments to the ECHR proposed in Protocol 15 were suggested by the Court, "namely the repeal of the compulsory retirement age (Article 23 § 2), the removal of the parties' veto over the relinquishment of a case to the Grand Chamber (Article 30), and the reduction of the time-limit for making an application from six months to four months (Article 35 § 1)."[247] Similarly, in March 2013, the Committee on Legal Affairs and Human Rights of the CoE's Parliamentary Assembly issued a report on Protocol 15. Most importantly, the report stressed that "[t]he Parliamentary Assembly is of the view that Protocol 15 to the [ECHR], as submitted to it on 17 January 2013, can be adopted by the Committee of Ministers and open for signature and ratification as presently drafted, without amendment."[248] The report added that "[d]ue to the fact that the proposed changes to the text are principally of a technical and uncontroversial nature, the Assembly urges all the Parties to the Convention,

246. Steering Committee for Human Rights, *Draft Explanatory Report to Protocol No. 15*, CoE, Doc No. DH-GDR(2012)R2 Addendum IV (2012), *available at* http://www.coe.int/t/dghl/standardsetting/cddh/DH_GDR/DH-GDR(2012)R2_Addendum%20IV_Draft%20Explanatory%20Report_Protocol%20no%20%2015_ECHR%20(2).pdf.

247. ECtHR, Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights (2013), *available at* http://www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf.

248. Committee on Legal Affairs and Human Rights, *Draft Protocol No. 15 to the European Convention of Human Rights*, ¶ 1, Eur. Parl. Ass., (2013), *available at* http://www.assembly.coe.int/Communication/ajdoc11_2013.pdf [provisional version].

and in particular their legislative bodies, to ensure this instrument's rapid signature and ratification."[249] Further to this recommendation, the Committee of Ministers adopted Protocol 15 in May 2013. The Protocol became open for signature by member states on 24 June 2013 and had garnered ten ratifications by early 2015. It will enter into force when all members of the CoE have ratified it.

The initial draft of Protocol 16 was made public in October 2012. Protocol 16 provides for the possibility for the highest court of any member state to request an advisory opinion from the ECtHR regarding a case pending before the national court. If the ECtHR agrees to deliver such an advisory opinion, it shall not be binding on member states, including the state whose high court requested the opinion.[250] In May 2013, the ECtHR issued an Opinion on Draft Protocol 16 at the request of the CoE.[251] The Court welcomed the possibility of advisory opinions at the request of a national high court, opening a door for a direct dialogue between the ECtHR and national judicial institutions. Upon approval by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the CoE (PACE), Protocol 16 was adopted by the Committee of Ministers in October 2013 and opened for signature by member states.[252] There was no ratification as of early 2015.

The two protocols, however timid they may be in many respects, do signal a desire by the Council of Europe to keep moving in reforming the ECHR. A fourth high-level meeting, following Izmir, Interlaken, and Brighton, is being convened in Brussels in March 2015. There was little information yet available at the time of publication, but the familiar themes of better cooperation between the ECtHR and national courts and a more effective implementation of ECtHR judgments were expected to figure prominently.

4. Relevance of the Brighton Declaration for Russia

The broad approach to the ECHR taken in the Brighton Declaration and the ensuing protocols is unlikely to have a specific impact on Russia, leaving many recurring issues related to Russia's application of the Convention unaddressed. These documents seem to be politically palatable moves that are unlikely to raise concerns from the Russian government or, conversely,

249. *Id.* ¶ 3.
250. *Draft Explanatory Report to Protocol 16*, *supra* note 230.
251. ECtHR, *Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention* ECHR. COE.INT (2013), *available at* http://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf.
252. *See* Committee on Legal Affairs and Human Rights, *Report of PACE Committee on Legal Affairs and Human Rights on the draft Protocol No. 16 to the European Convention on Human Rights*, EUR. PARL. ASS. (2013), *available at* http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=19771&lang=EN.

provide concrete solutions to a better interface between the ECHR and the Russian legal order. Four aspects can be highlighted as calling for continued engagement with Russia in improving compliance with the ECHR.

First, pockets of the Russian Federation remain afflicted by more rights abuses than others, and the ECtHR seems unable to contribute to effectively curb these violations. The Northern Caucasus region has produced a high number of applications to the ECtHR, and many applicants have received favorable judgments. The execution of these judgments, however, has been less than satisfactory. While monetary awards have been paid, state officials have not been convicted of criminal offences corresponding to the breaches found by the ECtHR. Moreover, where paramilitary forces that are not state agencies within the terms of the ECHR commit violations, those forces escape the Court's jurisdiction.[253] This situation leads to further gaps in the rights protection that the ECHR system is supposed to provide.

Second, an office in the Russian Ministry of Justice is responsible for ensuring execution of the ECtHR's judgments, among other tasks that deal with the relationship between the Russian government and the ECtHR. It is said, however, that this office "lacks the resources and political weight to engage in a comprehensive coordination of the execution of judgments as concerns general measures."[254] While recommendations could have been made to equip local authorities with the necessary tools to ensure execution, the focus at Brighton was on the sharing of good practices between states, encouraging parliamentary supervision of execution, and making locally developed action plans.[255] These proposals are certainly valid, but it seems unlikely that they will have any material impact on the Russian office that is responsible for the execution of ECtHR judgments. For instance, although encouraging parliamentary supervision is laudable, this proposal lacks the institutional details to make the role of parliaments effective. As previously explained, Russia has adopted a horizontal approach to human rights protection within the Duma, with the result that no single committee is responsible for human rights, let alone execution of the Court's judgments.[256] Sharing this responsibility can increase overall awareness of human rights protection among parliamentarians; it may also, however, allow the issue to fall through the cracks. This is exactly what seems to have been happening in the Duma.[257]

253. Grigor Avetisyan, *Strasbourg: Supreme Court of the North Caucasus*, Open Democracy, 24 Aug. 2012, *available at* http://www.opendemocracy.net/od-russia/grigor-avetisyan/strasbourg-supreme-court-of-north-caucasus.
254. Issaeva, Sergeeva & Suchkova, *supra* note 105, at 74.
255. Brighton Declaration, *supra* note 226, ¶ 29.
256. Issaeva, Sergeeva & Suchkova, *supra* note 105, at 75.
257. *Id.*

Third, parliamentarians and academic commentators in Russia, a civil law jurisdiction, have questioned the force of ECtHR precedents, a debate which the Brighton Declaration could further complicate. [258] The authors of one article argue that the reasoning that fuels this debate is erroneous: the ECtHR, they claim, is entrusted with the responsibility to ensure that the contracting parties of the ECHR meet their obligations pursuant to that treaty. Whether the ECtHR decides to bind itself to its own judgments, as the Brighton Declaration timidly invites it to do,[259] has no bearing on whether Russia must follow decisions made against it.[260] It remains to be seen, however, whether Russian parliamentarians and commentators will be convinced of this argument.

Fourth, the ECtHR has taken issue with Russia's practice of allowing government officials to reopen judicially settled matters—otherwise known as the practice of *nadzor*—but this is not addressed in the Brighton Declaration or ensuing protocols. While the practice has diminished, each use is nevertheless a threat to the principle of legal certainty entrenched in Article 6 of the Convention.[261]

IV. CONCLUSION

On 11 September 2013, Vladimir Putin took the rather extraordinary step of publishing an editorial in the *New York Times*, to directly address the American people on the dangers he saw in a possible NATO military intervention against the Assad regime in Syria following its apparent use of chemical weapons. Equally surprising, perhaps, was Putin's claim that Russia was urging caution not to prop up the Assad regime, but rather to protect international law. For the Russian president, "preserving law and order in today's complex and turbulent world is one of the few ways to keep international relations from sliding into chaos. The law is still the law, and we must follow it whether we like it or not."[262] Given the findings of this essay regarding Russia's troubled aspirations regarding international human rights law, one might be forgiven for seeing this as either cynical or selective in the choice of which parts of international law must be followed. There is another possible reading, reflecting Putin's notion of a "dictatorship of law" whereby the formal laws (*zakon, lois, gezets)* as emanations of the powers of

258. *Id.* at 81–82.
259. *See* Brighton Declaration, *supra* note 226, § F.
260. Issaeva, Sergeeva & Suchkova, *supra* note 105, at 81–82.
261. *See* Ryabykh v. Russia, Application No. 52854/99 (2003).
262. Vladimir V. Putin, *What Putin Has to Say to Americans About Syria*, N. Y. Times, 11 Sept. 2013, *available at* http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html.

the state must be supported, without necessarily implying the supremacy of the rule of law (*pravo, droit, recht*) as constraining the powers of the state.[263] It is possible to find in the idea of the dictatorship of law the spirit of Grant Gilmore's famous quip that "[i]n Hell, there will be nothing but law, and due process will be meticulously observed."[264] It is in that sense that Russia is teetering on the edge of legal nihilism, not because there will be no laws but rather because an overabundance of laws can stifle the very idea of the rule of law by allowing it to be instrumentalized or selectively applied.[265]

The ambiguity, which surrounds the invocation of the idea of law in Russia, reflects the challenge of using a supra-national judicial body like the ECtHR to improve respect for the rule of law in that country. The obstacles to a better implementation of the ECHR in Russia echo an ongoing ambivalence regarding the role of law in that country. There is no denying that Russia's ratification of the ECHR in 1998 was an important step that brought about real changes in the enjoyment of human rights and triggered an evolution of the role of law in Russian society. The process has been slow and frustrating for those whose rights continue to be trampled, but it seems unlikely that any improvement to Strasbourg machinery as envisaged in Brighton can radically accelerate this process. What we can hope is that the ratification of the ECHR was a significant milestone in a continuous process of thickening normative commitments to the idea of human rights and the rule of law by a wide range of public and private actors in Russia.

263. *See* Kahn, *Vladimir Putin and the Rule of Law in Russia*, *supra* note 75, at 516–17; *The Law is a Causeway*, *supra* note 30, at 8–13 (manuscript paging).

264. Grant Gilmore, The Ages of American Law 111 (1977) (the full passage is worth citing: "The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed").

265. Kathryn Hendley, *Who Are the Legal Nihilists in Russia?*, 28 Post-Sov. Aff. 149, 179 (2012) ("Legal nihilism is an inescapable feature of Russian legal culture.").

ledge, 2004). Her second monograph, *Terror in Chechnya: Russia and the Tragedy of Civilians in War* (Princeton University Press, 2011) examines the war crimes committed by Russian soldiers against the civilian population of Chechnya. The study places the conflict in Chechnya within the international discourse on humanitarian intervention in the 1990s and the rise of nationalism in Russia. This book was awarded the 2012 Book Award from the Institute for the Study of Genocide.

William H. Meyer is a Professor of International Relations in the Political Science Department at the University of Delaware. His publications include *Security, Economics and Morality in American Foreign Policy* (Pearson & Prentice-Hall) and *Human Rights and International Political Economy in Third World Nations* (Praeger). He is currently working on a book about global governance and human rights.

Mahmood Monshipouri, Ph.D., teaches Middle Eastern Politics at San Francisco State University and University of California, Berkeley. He is the editor of a forthcoming book, *Inside the Islamic Republic: Social Change in Post-Khomeini Iran*.

René Provost is Associate Professor, McGill Centre for Human Rights and Legal Pluralism & Faculty of Law, McGill University.

Naomi Roht-Arriaza is Distinguished Professor of Law at the University of California, Hastings College of the Law in San Francisco. Professor Roht-Arriaza is the author of *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005) *and Impunity and Human Rights in International Law and Practice* (1995). She is coeditor of *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006). She is a coauthor of *The International Legal System: Cases and Materials* (Foundation Press 2010) and of numerous articles on accountability for international crimes, reparations, and transitional justice. In 2011 she was a Democracy Fellow at the US Agency for International Development, and in 2012 she was a Senior Fulbright Scholar in Botswana. She is the president of the Board of the Due Process of Law Foundation and a legal advisor to the Center for Justice and Accountability.

Gery Ryan, Ph.D. is Assistant Dean for Academic Affairs at the Pardee RAND Graduate School and a senior behavioral scientist at the RAND Corporation.

Ronli Sifris has a B.A. and LL.B. (Hons) from Monash University, an LL.M. from New York University, and a Ph.D. from Monash University. She is a Lecturer in the Monash University Faculty of Law and Associate of the Castan Centre for Human Rights Law.

David Stoelting is a trial lawyer in New York City.

Eric Stover is Faculty Director of the Human Rights Center and Adjunct Professor of Law and Public Health at the University of California, Berkeley.