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## 6

### *Russia's Cases in the ECtHR and the Question of Implementation*

**Bill Bowring**

#### 6.1 Introduction

This chapter starts and finishes with events at the time of writing and revision.

The question concerns the nature and quality of Russia's engagement, for twenty years now, with the Council of Europe (CoE), the European Convention on Human Rights (ECHR), and the European Court of Human Rights (ECtHR).

Since I started work on this chapter in June 2015, dramatic events have taken place. I submitted a draft in January 2016, shortly after the enactment in December 2015 of the law enabling the Constitutional Court of the Russian Federation (Russian CC) to rule on the possibility or impossibility of implementation of a judgment of the ECtHR. This was described by commentators as marking a decisive break from international law and European human rights.<sup>1</sup> I explore this development in the first section of this chapter.

But since then the Russian CC on 19 April 2016 issued its judgment on its newly acquired powers to refuse the implementation of the rulings of the ECtHR contradicting the Russian Constitution (RF Constitution). The case under review

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<sup>1</sup> See in this chapter my references to comments by Halya Coynash and Vladimir Kara-Murza.

was *Anchugov and Gladkov v. Russia*<sup>2</sup> on prisoners' voting rights. As I show in this chapter, this judgment attempted to leave open the possibility by Russia of compliance with the Strasbourg judgment.

On 19 January 2017, however, the Russian CC issued its long-awaited judgment in the *Yukos* case<sup>3</sup>, concerning the 2014 judgment of the Strasbourg Court on just satisfaction, ordering Russia to “pay the applicant company’s shareholders as they stood at the time of the company’s liquidation and, as the case may be, their legal successors and heirs EUR 1,866,104,634 (one billion, eight hundred sixty six million, hundred and four thousand, six hundred thirty four euros), plus any tax that may be chargeable, in respect of pecuniary damage.” This judgment, whose significance is still being assessed at the time of writing, can be said to have stretched the meaning of “impossibility” impermissibly far. I turn to this judgment in the final section of this chapter and to the two powerful dissenting opinions, published a few days later, by judges Yaroslavtsev and Aranovskiy.

Can this be said to demonstrate the failure of attempts to “socialize” Russia into the ECHR system?

To answer this question, I turn first to an examination of the “spiral model” of socialization<sup>4</sup> that, starting (to my surprise) with an explanation of the

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<sup>2</sup> Applications nos. 11157/04 and 15162/05, Judgment of 14 July 2013.

<sup>3</sup> *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application No. 14902/04, Judgment (just satisfaction) of 31 July 2014, at, for example, <http://www.italaw.com/sites/default/files/case-documents/italaw7752.pdf> (accessed on 29 January 2017).

<sup>4</sup> See Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); and see Gerald Robert Pace “Human Rights from Paper to Practice: How Far Have We Come? A Review of *The Power of Human Rights: International Norms and Domestic Change*” v. 1 n. 1 (2001) *Human Rights and Human Welfare*, pp. 9–11, at <http://www.du.edu/korbel/hrhw/volumes/2001/1-1/risse.pdf> (accessed on 29 January 2017), and Beth Simmons “From Ratification to Compliance: Quantitative Evidence on the Spiral Model” in Risse, Ropp, and Sikkink (eds.) *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013), pp. 43–59, at

Soviet understanding of the role of law as social educator, has migrated from developmental psychology to constructivist theories of international relations, and thence to human rights law, with special reference to Russia.

Next, I give an overview of what has been a deep and significant engagement between Russia and the ECtHR and point to recent scholarly publications that confirm my own view that this engagement, while it has not turned Russia into the Netherlands or Norway, has brought about real change. I then report on and analyze the two recent judgments of the Russian CC.

Finally, in my conclusion, I illustrate my thesis that the character of Russian approaches to law, and in particular international law and human rights, can only be understood in the context of the intense and unfinished debates that have continued from the eighteenth century to the present day, with the extraordinary debate in 2015 between Yelena Lukyanova and Valeriy Zorkin.

## 6.2 Act One: Amending the Law on the Constitutional Court

On 14 December 2015 President Putin signed the Federal Law “On enacting amendments to the Federal constitutional law on the Constitutional Court of the Russian Federation.”<sup>5</sup> One headline on the day of signature read, “Putin approved a law permitting the non-implementation of decisions of the European Court of Human Rights.”<sup>6</sup> The Law came into force on its publication on 15 December

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[http://scholar.harvard.edu/files/bsimmons/files/chapter\\_3\\_quant\\_ev\\_on\\_spiral\\_model.pdf](http://scholar.harvard.edu/files/bsimmons/files/chapter_3_quant_ev_on_spiral_model.pdf) (accessed on 29 January 2017).

<sup>5</sup> Федеральный закон Российской Федерации от 14 декабря 2015 г. N 7-ФКЗ “О внесении изменений в Федеральный конституционный закон “О Конституционном Суде Российской Федерации” (*Federalniy zakon Rossiiskoi Federatsii ot 14 Dekabrya 2015 N 7-FKZ “O vnesenii izmeneniy v Federalniy konstitutsionniy zakon “O Konstitutsionnom Sude Rossiiskoi Federatsii”*).

<sup>6</sup> <http://newsru.com/russia/15dec2015/podpisal.html> (accessed on 29 December 2015).

2015 in the *Russian Gazette*<sup>7</sup>. It amends Article 3(3) of the Federal Law of the Constitutional Court so as to give the Court the jurisdiction to decide the question on the possibility (*vozmozhnost*) of implementing the decision of an international organ for the protection of the rights and freedoms of the person; the Court can declare “possibility” or “impossibility.”

The word “possibility” is not defined. I will turn to its deployment in the Court’s Resolution of 14 July 2015 in the context of the judgment of the ECtHR in *Anchugov and Gladkov v. Russia* of 14 July 2013,<sup>8</sup> the Russian *Hirst v. UK*,<sup>9</sup> and the recent *Yukos* judgment.

It should be noted that the State Duma’s own lawyers had expressed concerns<sup>10</sup> as to the legality of the amendments in the context of the following

1. Article 15(4) of the RF Constitution of 1993, according to which international treaties ratified by Russia have priority over domestic law;
2. Article 1 of the Federal Law of 30 March 1998 No. 54-FZ on Ratification of the European Convention on Human Rights; and
3. the Ruling of the Plenary Session of the Supreme Court of the Russian Federation (RF Supreme Court) of 27 June 2013 “On the Application of the Convention for the Protection of Human Rights...”

<sup>7</sup> <http://www.rg.ru/2015/12/15/ks-site-dok.html> (accessed on 29 December 2015).

<sup>8</sup> Application Nos. 11157/04 and 15162/05.

<sup>9</sup> *Hirst v. the United Kingdom (No 2)* [2005] ECHR 681, Application No. 74025/01, Judgment (Grand Chamber) of 6 October 2005.

<sup>10</sup> Anna Pushkarskaya “Duma Staff Lawyers Have Criticised the Amendments to the Law on the CC on the Conditions of Non-Implementation of the Decisions of the ECtHR” 1 December 2015 *Kommersant* at <http://www.kommersant.ru/doc/2866415> (accessed on 29 December 2015).

It is quite clear that Russian courts in the system of Courts of General Jurisdiction headed by the RF Supreme Court are obliged to implement Strasbourg judgments.

The response of some observers was apocalyptic in tone: this was the end of Russia's participation in international law. Halya Coynash wrote on 2 December 2015 under the headline, "Russia Moves to legislate impunity from international law," that "there seems every reason to suspect that the law will be invoked whenever Moscow does not wish to comply with international law."<sup>11</sup>

The headline of the commentary by Vladimir Kara-Murza of Mikhail Khodorkovsky's *Open Russia*, writing on 24 December 2015 in *World Affairs Journal*, was "Putin 'Outlaws' European Justice in Russia."<sup>12</sup>

Last week, Vladimir Putin signed a law that effectively banishes international legal norms from Russian territory and denies Russian citizens access to European justice. The measure, overwhelmingly passed in both houses of Russia's rubber-stamp Parliament, gives the Constitutional Court—whose chairman, Valery Zorkin, recently called for "transforming the legal system in the direction of military harshness"—the right to ignore rulings by the European Court of Human Rights by declaring them "non-executable."

On 19 December 2015, Philip Leach and Alice Donald wrote under the headline: "Russia Defies Strasbourg: Is Contagion Spreading?"<sup>13</sup> This was a reference to their article of 21 November 2013, "Hostility to the European Court and the risks of contagion,"<sup>14</sup> which focused not on Russia but on the United Kingdom's position. They quoted the former President of the European Court, Sir Nicolas Bratza, who had expressed his concern about the risks of contagion:

There is a risk of this attitude in the UK to judgments of the Court negatively impacting on other states and complaints being made of double standards ...

<sup>11</sup> <http://khpg.org/en/index.php?id=1449011289> (accessed on 29 December 2015).

<sup>12</sup> <http://www.worldaffairsjournal.org/blog/vladimir-kara-murza/putin-%E2%80%99outlaws%E2%80%99-european-justice-russia> (accessed on 29 December 2015).

<sup>13</sup> <http://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/> (accessed on 29 December 2015).

<sup>14</sup> <http://ukhumanrightsblog.com/2013/11/21/hostility-to-the-european-court-and-the-risks-of-contagion-philip-leach-and-alice-donald/> (accessed on 29 December 2015).

[which] could result in a wider refusal to implement ECtHR judgments across the Council of Europe. (p. 176)

And they referred to the Commissioner for Human Rights of the CoE, Nils

Muižnieks, who suggested in a memorandum to Nick Gibb MP that

continued non-compliance would have far-reaching deleterious consequences; it would send a strong signal to other member states, some of which would probably follow the UK's lead and also claim that compliance with certain judgments is not possible, necessary or expedient. That would probably be the beginning of the end of the ECHR system, which is at the core of the Council of Europe.<sup>15</sup>

Their fears of “contagion” seemed to be confirmed by the new Russian law. In their view, it did not “simply concern the relationship between the Strasbourg Court and the domestic courts (reflecting, for example, the long-standing debate in the UK about the implications of [\[s\]ection 2](#) of the Human Rights Act).”<sup>16</sup> It went, they asserted, much further than that. It denied the enforceability of ECtHR judgments as regards the Russian state altogether, thereby purporting to extinguish the effect of Article 46 of the ECHR, unprecedented in the history of the European human rights regime.

The response of the CoE was more measured. On 15 December 2015 the

Secretary General of the CoE, Thorbjørn Jagland, said:

[I]t will be up to the Constitutional Court of Russia to ensure respect for the Convention if it is called upon to act under the new provisions. The Council of Europe will only be able to assess Russia's compliance with its obligations when and if a specific case arises. The compatibility of Strasbourg judgments with the national constitutions has been examined in some other member States. So far, countries have always been able to find a solution in line with the Convention. This should also be possible in Russia.<sup>17</sup>

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<sup>15</sup> Nils Muižnieks “Observations for the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill” 10 October 2013, at

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2933800&SecMode=1&DocId=2062696&Usage=2> (accessed on 29 January 2017).

<sup>16</sup> <http://ukhumanrightsblog.com/2013/11/21/hostility-to-the-european-court-and-the-risks-of-contagion-philip-leach-and-alice-donald/> (accessed on 29 January 2017).

<sup>17</sup> [http://www.coe.int/en/web/secretary-general/news/-/asset\\_publisher/EYIBJNjXtA5U/content/russia-s-new-law-on-the-constitutional-court-jagland-a-solution-should-be-possible-/16695?desktop=true](http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYIBJNjXtA5U/content/russia-s-new-law-on-the-constitutional-court-jagland-a-solution-should-be-possible-/16695?desktop=true) (accessed on 21 July 2017).

The reference by Kara-Murza was to the speech of Valeriy Zorkin, the Chairman of the Russian CC<sup>18</sup> on 24 November 2015 for a legal forum in Moscow, in the context of Turkey's shooting down of a Russian fighter plane that day.<sup>19</sup> Zorkin's remarks were discussed by Anna Pushkarskaya and Viktor Khamraev in *Kommersant* on 25 November 2015, under the headline "Valeriy Zorkin is Ready for Tougher Russian Laws in Conditions of 'Military Harshness.'"<sup>20</sup> They referred to Zorkin as saying that a dilemma as to the necessity of a choice between freedom and security was senseless. Security was one of the most important human freedoms, therefore the state may "limit other freedoms" and could "transform the legal system in the direction of military harshness, so as to exclude in present circumstances the risk of forgetting about human rights in the midst of the struggle against terrorism."<sup>21</sup>

I will return to Zorkin's sometimes unfortunate interventions later in this chapter.

### 6.3 Legal Socialization and Russia

At this point I turn, critically, to some pertinent features of the "socialization" thesis that is a theme of this collection.

Ironically, perhaps, one of the first applications of the concept of "legal socialization" appeared in the works of Harold J Berman on Soviet law, from

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<sup>18</sup> Chairman of the Russian CC from 29 October 1991 to 6 October 1993, and again from 21 March 2003 to the present. See biography (in Russian), at <http://tass.ru/tass-dos-e-rossiya/564929> (accessed on 29 January 2017).

<sup>19</sup> <http://www.bbc.co.uk/news/world-middle-east-34912581> (accessed on 29 December 2015).

<sup>20</sup> <http://www.kommersant.ru/doc/2861672> (accessed on 29 December 2015). See also <https://www.zaks.ru/new/archive/view/147253> (accessed on 29 December 2015).

<sup>21</sup> *Ibid.*



1963 onwards.<sup>22</sup> In their seminal article, “Legal Socialization: Strategies for an Ethical Legality,”<sup>23</sup> June Louin Tapp and Felice J. Levine pointed out, “[t]he respective legal and psychological works of Berman<sup>24</sup> and Bronfenbrenner,<sup>25</sup> for example, on the United States and the Soviet Union, describe the allocation of ‘social’ education functions to other than customary socializing agents.” They continued that in respect of the Soviet Union:

Berman described the function of law (especially through the courts) as an agent of socialization for the entire citizenry, educating the public to societal values and legal expectations. In a revealing comparison in *Justice in the USSR*, at pages 333–4, he reported similar ordinances in the U.S.S.R. (from the mid-1930’s) and two towns in the state of Oregon (from the 1940’s) that prescribed parents’ moral and legal responsibility to bring up (i.e., socialize) their children for honesty and conformity to law.

In his 1972 article Berman used the word “socialization” twice. First, he compared two models of adjudication: “In the first model litigation is seen as a contest among equals, with the judge acting as an umpire; in the second model, litigation is seen as a process of socialization, with the judge acting as a parent and the litigants as children,”<sup>26</sup> while later on, referring directly to the Soviet approach, he wrote:

To appreciate the strengths and weaknesses of the concept of the educational role of the court requires a consideration of the processes by which people learn to think and act in ways considered desirable by the society in which they live. Psychologists have studied this in terms of the socialisation of children.<sup>27</sup>

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<sup>22</sup> Harold Berman *Justice in the USSR* (revised ed. Harvard University Press, 1963); Berman “The Educational Role of the Soviet Court” v. 21 n. 1 (1972) *International and Comparative Law Quarterly*, pp. 81–94; Berman “The Use of Law to Guide People to Virtue: A Comparison of Soviet and American Perspectives” in J. Tapp and F. Levine (eds.) *Law, Justice, and the Individual in Society: Psychological and Legal Issues* (New York: Holt, Rinehart and Winston, 1977).

<sup>23</sup> v. 27, n. 1 (1974) *Stanford Law Review*, pp. 1–72.

<sup>24</sup> Berman *Justice in the USSR*; Berman “The Educational Role of the Soviet Court,” pp. 81–94 (this was his lecture the previous year at University College, London); Berman “The Use of Law to Guide People to Virtue.”

<sup>25</sup> Urie Bronfenbrenner *Two Worlds of Childhood: US and U.S.S.R.* (New York: Simon & Schuster, 1970); Bronfenbrenner “Soviet Methods of Character Education: Some Implications for Research” 57 (1962) *Religious Educational Research Supplement*, p. 345.

<sup>26</sup> Berman “The Educational Role of the Soviet Court,” pp. 81–94, at p. 82.

<sup>27</sup> *Ibid.*, p. 93.

Indeed, the concept of legal socialization had its roots in research into educational and developmental psychology. How has this concept migrated to international law?

The answer is to be found in the pronounced turn of the international relations theory in the last two decades toward “social constructivism.”<sup>28</sup>

Thomas Risse and Kathryn Sikkink first developed the concept of “socialization” in this context in 1999 in the edited volume *The Power of Human Rights: International Norms and Domestic Change*.<sup>29</sup> In their [chapter 1](#), “The Socialization of International Human Rights Norms into Domestic Practices: Introduction,” they introduced “socialization” as the “process by which international norms are internalized and implemented domestically.”<sup>30</sup> They developed a “five-phase spiral model” of norms socialization that specifies the causal mechanisms and the logic of action prevailing in each phase of the socialization process.<sup>31</sup> They were explicit as to the character of social constructivism:

While materialist theories emphasize economic or military conditions or interests as determining the impact of ideas in international and domestic politics, social constructivists emphasize that ideas and communicative processes define in the first place which material factors are perceived as relevant and how they influence understandings of interests, preferences, and political decisions.<sup>32</sup>

This is how the developmental psychology concept of “socialization” finds its way into the study of human rights: states are treated as if they were people, and the interaction of states and international instruments and mechanisms is explained wholly in the realm of ideas. Social constructivism is “idealist.” By

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<sup>28</sup> For my own critique of this trend, see Bill Bowring “What is Realism in International Law and Human Rights?” in Jonathan Joseph and Colin Wight (eds.) *Scientific Realism and International Relations* (Palgrave Macmillan, 2010), pp. 101-14.

<sup>29</sup> Risse, Ropp, and Sikkink *The Power of Human Rights*.

<sup>30</sup> *Ibid.*, p. 5.

<sup>31</sup> *Ibid.*, p. 6.

<sup>32</sup> *Ibid.*, pp. 6-7.

contrast, my approach can be described as “materialist” or “realist,” or, to put it another way, Marxian<sup>33</sup>; that is, I am interested in states and institutions as historically determined and causally effective.

In 2004 Ryan Goodman and Derek Jinks published their article, “How to Influence States: Socialization and International Human Rights Law,”<sup>34</sup> in which they introduced the notion of “acculturation, whereby conformity is elicited through a range of socialization processes.”<sup>35</sup> Their conclusion, drawing from Risse and Sikink, was as follows: “We suggest that a central problem for human rights regimes is how best to socialize ‘bad actors’ to incorporate globally legitimated models of state behavior and how to get ‘good actors’ to perform better.”<sup>36</sup> In 2005 Harold Hongju Koh responded in the same journal with “Internalization through Socialization.”<sup>37</sup> He hailed the dramatic change “less than two decades ago, when international law finally met international relations theory.”<sup>38</sup>

Jose Alvarez also responded in the same issue of the *Duke Law Journal* with “Do States Socialize?”<sup>39</sup> His informed and sympathetic critique concluded with the following rather pertinent comment:

[A]cculturation as presently described may not in the end advance Goodman and Jinks’s ultimate goals as much as they would like. It is not at all clear that the

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<sup>33</sup> Friedrich Engels wrote in 1890: “Just as Marx used to say, commenting on the French ‘Marxists’ of the late [18]70s: ‘All I know is that I am not a Marxist.’” See Engels to C. Schmidt, in Berlin, London, 5 August 1890, at [https://www.marxists.org/archive/marx/works/1890/letters/90\\_08\\_05.htm](https://www.marxists.org/archive/marx/works/1890/letters/90_08_05.htm) (accessed on 29 January 2017).

<sup>34</sup> Ryan Goodman and Derek Jinks “How to Influence States: Socialization and International Human Rights Law” v. 54 n. 3 (2004) *Duke Law Journal*, pp. 621–703; see also Goodman and Jinks “Incomplete Internalization and Compliance with Human Rights Law” v. 19 n. 4 (2008) *European Journal of International Law*, pp. 725–48.

<sup>35</sup> Goodman and Jinks “How to Influence States,” p. 630.

<sup>36</sup> *Ibid.*, p. 702.

<sup>37</sup> Harold Hongju Koh “Internalization through Socialization” v. 54 n. 4 (2005) *Duke Law Journal*, pp. 975–82.

<sup>38</sup> *Ibid.*, p. 975.

<sup>39</sup> Jose Alvarez “Do States Socialize?” v. 54 n. 4 (2005) *Duke Law Journal*, pp. 961–74.

best route to getting state actors to be more fully and genuinely engaged with human rights regimes lies through an implicit affront to their sovereign pride and autonomy; that is, through mechanisms for compliance based on the premise that states act or should act like unthinking teenagers socially opting for the latest fad.<sup>40</sup>

I share his misgivings.

In 2008 Eran Shor identified three serious problems with the “spiral model” of socialization.<sup>41</sup> Focusing on Israel, he first challenged the model’s over-deterministic and idealistic arguments. The authors suggest that once states adopt the rhetoric of human rights and begin to move toward norm compliance, there is no turning back. I will demonstrate the weakness of this unidirectional argument and show its failure to predict the developments in a number of countries, including Israel.<sup>42</sup>

Second, the spiral model “treats a country’s repressive practices as a homogeneous conglomerate” that prevents the model from accounting for differentiation in the practices and policies of a given country. Lastly, the model “fails to account for the role of serious conflicts and security threats in shaping state’s repressive policies. Such threats severely impede the power of human rights norms to bring a change.”<sup>43</sup>

Shor concluded with a criticism of direct relevance to this chapter:

The third major weakness of the spiral model lies in its overarching claims. The model does not specify the scope of its generalization and fails to indicate countries and conditions to which it may not apply. One set of such countries are political and economic superpowers such as Russia and China, or states that enjoy geopolitical importance, such as Pakistan and Saudi Arabia. Pressures from human rights networks in these countries have only minor effects on state policies. While Israel may be another example of a state with geopolitical centrality, it is also an example of a second set of countries for which the model fails to work in full: states that suffer from intense political conflicts, most notably wars and large insurgency campaigns. Under such conditions states find it much easier to justify (to themselves and to the international community) the violation of human rights, and thus the power of human rights norms significantly weakens. While the global human rights regime has meaningful consequences, it is seriously undermined when confronted by severe conflicts and security threats. Russia, for example, has justified severe human rights violations since the late 1990s with the need to fight Chechnyan terrorism. Similarly, Turkish repression of Kurdish rights exacerbated significantly during the late 1980s and the early 1990s, following the formation of the PKK (i.e., the Kurdistan Workers Party) and its subsequent terror attacks. Other salient

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<sup>40</sup> Ibid., p. 974.

<sup>41</sup> Eran Shor “Conflict, Terrorism, and the Socialization of Human Rights Norms: The Spiral Model Revisited” v. 55 n. 1 (2008) *Social Problems*, pp. 117 – 38.

<sup>42</sup> Ibid., p. 118.

<sup>43</sup> Ibid., p. 118.

examples include the bloody fight of Sri Lanka's government against the Tamil separatist movement and the repressive response of the Algerian government to fundamental Islamic terrorism since 1992. In all of these cases, the ability of human rights networks to achieve major changes through normative pressures is highly limited by the presence of intense domestic conflicts.<sup>44</sup>

In 2010 Brian Greenhill introduced the idea of a "socialization effect"<sup>45</sup>:

An alternative and perhaps more subtle way in which IGOs (Inter-Governmental Organisations) might influence states' human rights performance is through a socialization effect. Unlike the mechanism described above, socialization effects refer to behavioral changes that presumably come about through changes in the actors' interests. ... Socialization effects are of particular interest to constructivist theories of IR because they specify a mechanism through which states' interests can change as a result of interaction with others. ... This makes intuitive sense; IGOs provide venues in which policymakers from different countries regularly come together to discuss common problems.<sup>46</sup>

In his conclusion, Greenhill mentioned Russia:

This may lead to situations where, for example, human rights activists ought to be more concerned with encouraging a state like Russia to continue to work closely with an IGO like the Nordic Council of Ministers (which has a very high average PIR Score<sup>47</sup>) than to join up with IGOs whose mandate might appear to be more directly relevant to human rights issues, but whose member states have far poorer human rights records.<sup>48</sup>

In Greenwood's case, application of the "spiral model" of socialization has led him, in my view, to a rather eccentric conclusion.

There has to my knowledge been one book-length attempt to apply the "spiral model" of socialization to Russia: Sinikukka Saari's 2010 *Promoting Democracy and Human Rights in Russia*.<sup>49</sup> In this text, a revised version of her PhD thesis defended at the London School of Economics, she too subscribed to "the constructivist understanding, which asserts that states seek to act according to their identities. Identities are definitions of self in relation to others, and they are constructed – and reconstructed – in intersubjective processes between

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<sup>44</sup> Ibid., pp. 131–32.

<sup>45</sup> Brian Greenhill "The Company You Keep: International Socialization and the Diffusion of Human Rights Norms" v. 54 n. 1 (2010) *International Studies Quarterly*, pp. 127–45.

<sup>46</sup> Ibid., p. 129.

<sup>47</sup> Personal Integrity Rights (PIR), "[T]he PIR score reflects the actual behavior of each state with respect to certain types of human rights violations, and takes no account of whether each state may or may not have passed legislation in an effort to protect these rights. The PIR index should therefore be thought of as an indicator of a country's compliance with human rights norms, rather than merely a reflection of its expressed commitment to upholding these norms," p. 133.

<sup>48</sup> Greenhill "The Company You Keep," p. 143.

<sup>49</sup> Sinikukka Saari *Promoting Democracy and Human Rights in Russia* (Abingdon: Routledge 2010).

states and international structures.”<sup>50</sup> She applied this methodology to three specific European human rights norms: “... the open-ended process through which norms are actively promoted, resisted and reinterpreted and renegotiated in practice between Russia and the European intergovernmental organizations.”<sup>51</sup> She meant the Organization for Security and Cooperation in Europe (OSCE), the CoE, and the European Union (EU).

She selected three case studies on specific norms “related to the ideals of functioning democracy and respect for human rights”: the establishment and functioning of a human rights ombudsman institution; the abolition of the death penalty; and the organization of free and fair federal-level elections in Russia.<sup>52</sup> Her introduction to the CoE was brief and cursory,<sup>53</sup> and she had almost nothing to say about Russia’s experience of the Strasbourg Court or even the role of Russian advocates and domestic NGOs in bringing many hundreds of cases. She was apparently not aware of the considerable literature on these topics.<sup>54</sup>

At note 39 she set out an overview of case statistics to 2005 only. Her conclusion as to the death penalty was as follows:

What we have here is neither a great failure nor a success case of socialization ... it seems that Russia has been socialised to the practice of cooperation with the European organisations, but it clearly has not been socialized to the norms and values of the organizations. ... Russia is willing to cooperate with the organisations. However, it is only willing to do so on its own terms.<sup>55</sup>

She concludes:

As this book has argued, Russia’s creeping challenge has proved to be much harder to deal with as it has developed gradually under the surface of “sustained efforts” to implement the norm. The organizations have placed too much

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<sup>50</sup> Ibid., p. 5.

<sup>51</sup> Ibid., p. 6.

<sup>52</sup> Ibid., p. 10.

<sup>53</sup> Ibid., pp. 22–26.

<sup>54</sup> Including my own, for example, Bill Bowring “The Death Penalty and Russia” in Jon Yorke (ed.) *The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics* (Abingdon: Routledge, 2010), pp. 269–88.

<sup>55</sup> Saari *Promoting Democracy and Human Rights in Russia*, p. 77.

emphasis on the declared rhetorical goals of the Russian leadership. Even in cases where legislation has been passed and official rhetoric seems to be consistent, the change in practice will not necessarily follow – particularly in a country like Russia with a strong tradition of Soviet double-speak.<sup>56</sup>

Serious though Saari's work was in conception and execution, the end result exemplifies to my mind the failure of the social constructivist international relations theory to illuminate the complex relationship of Russia to international law, instruments, and mechanisms, in particular its almost twenty years' engagement with the CoE and the ECHR. The problem may well lie in the attempt to explain Russia as a difficult teenager.

More recent scholarly work has tended to highlight the positive side of Russia's relationship with the CoE.

In 2012 the Canadian political scientist Lisa McIntosh Sundstrom focused on the work of Russian NGOs in the implementation of judgments against Russia, mobilizing thorough and wide-ranging empirical research.<sup>57</sup> She concluded:

The analysis in this paper thus leads us to a number of preliminary conclusions. NGOs can and do have a significant impact on the progress of implementation of ECHR principles in Russia when the key domestic actors involved have incentives to comply. This can be the case at lower levels of the bureaucracy as a result of professional norms or fear of reprimand for causing further cases against the government. At higher political levels, implementation may be more successful because measures demanded in ECtHR rulings are compatible with other high-level policy agendas, such as modernization and purification of the legal system from corruption.<sup>58</sup>

She returned to these issues in 2014<sup>59</sup> and concluded:

It is clear that ECtHR litigation is a significant new area of human rights activism in Russia, and it is unique in that the vast majority of Russian citizens are now aware of this mechanism and read about it in the domestic news, while many other forms of human rights activism remain largely unknown among the public. The ECtHR does remain as one of the few binding international mechanisms to pressure the Russian government to improve its human rights practices, and in this sense, as long as Russia maintains its membership in the

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<sup>56</sup> Ibid., pp. 118–19.

<sup>57</sup> Lisa McIntosh Sundstrom "Advocacy beyond Litigation: Examining Russian NGO Efforts on Implementation of European Court of Human Rights Judgments" v. 45, n. 3–4, 2012 *Communist and Post-Communist Studies*, pp. 255–68.

<sup>58</sup> Ibid., p. 265.

<sup>59</sup> Lisa McIntosh Sundstrom "Russian NGOs and the European Court of Human Rights: A Spectrum of Approaches to Litigation" v. 36 n. 4 (2014) *Human Rights Quarterly*, pp. 844–68.

Council of Europe, its potential is enormous and the trajectory of its impact has only just begun.<sup>60</sup>

In 2015 Lindsay Parrott looked in detail at the pilot judgment procedure in relation to Russia, employing, as I noted earlier, the constructivist “spiral model” of socialization.<sup>61</sup> As she summarized her argument:

This paper argues that although many are unconvinced of the CoE’s ability to precipitate change within the Russian penal system, due to a lack of financial incentives and Russian skepticism of the West, the creation of an intensified discussion of shortcomings within the pre-trial detention system as a result of the current measures taken by the ECHR and the CoE should be seen as a success.<sup>62</sup>

She concluded:

Deciding how best to approach systemic issues in member states has not been easy, as there are a limited number of mechanisms available to the CoE and ECHR, and each state has its own political agenda to keep in mind. To undertake systemic changes to Russia’s penal system to curb pre-trial violations, the ECHR and the CoE determined that the pilot judgment procedure would produce more worthwhile and durable results, since Russia had already started making legislative changes by its own initiative. The pilot judgment procedure allowed the Russian government to remain in control of the decision-making process, as it developed its own action plan and time frame in which to make changes. Russia acted as an equal partner, but the ECHR and the CoE have been able to use financial penalties as a means to keep the pressure on in ensuring that Russia meets its obligations.<sup>63</sup>

The interventions by these two scholars do not at all mirror the apocalyptic remarks made by the commentators to whom I referred in the first section of this chapter. However, recent developments may turn out to show that those comments were in fact rather prophetic.

And in my own recent historical-legal work,<sup>64</sup> I have shown that from at least the eighteenth century onward, Russian law has developed in close connection with European law. Indeed this was the case with the first professor of law to teach in Russian in 1768 at the recently established Moscow University,

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<sup>60</sup> *Ibid.*, pp. 868.

<sup>61</sup> Lindsay 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,” (2015) v. 31, n. 2 *Post-Soviet Affairs*, pp. 136–75.

<sup>62</sup> *Ibid.*, p. 137.

<sup>63</sup> *Ibid.*, p. 159.

<sup>64</sup> Bill Bowring *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Abingdon: Routledge, 2013).



Semyon Yefimovich Desnitsky (1740–89), who was awarded his Doctorate in Civil Law by Glasgow University after six years of study from 1761 to 1767, including attending the lectures on constitutional law by Adam Smith. He proposed to Catherine II abolition of serfdom and a constitutional monarchy. The first of these was achieved in 1861 (failure to achieve the second was one of the causes of revolution in Russia), and in 1864, as part of Aleksandr II’s great legal reforms,<sup>65</sup> trial by jury was introduced to the Russian Empire. Although all existing models were studied, Russian reforms followed the English model.<sup>66</sup> The titles of the Justices of the Peace also created in 1864, and now restored, were a direct translation of the English. Starting in 1993, trial by jury has been restored for serious crimes in all parts of the Russian Federation, the last being Chechnya. The same reforms created the Bar, whose highest category were the *prisyazhniy poverenniy*, advocates who were permitted to defend in jury trials.<sup>67</sup> The most famous jury trial was that of the revolutionary Vera Zasulich in 1878. She was acquitted.<sup>68</sup>

The independent bar, the *advokatura*, which retained its independence even in the Soviet period, is now in my view the shining light sometimes illuminating the grim wasteland of contemporary Russian legality.

As I show in my Conclusion, the fierce debates that characterized three centuries of Russian legal thinking and practice have continued into the present day.

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<sup>65</sup> Ibid., [chapter 3](#) “The 1850s and 1860s in Russia: Revolutionary Situation or Great Reforms?” pp. 33–47.

<sup>66</sup> Ibid., pp. 36–37.

<sup>67</sup> Ibid., p. 42.

<sup>68</sup> Ibid., p. 39.

## 6.4 Russia's Engagement with the Strasbourg Court

The background to Russia's twenty-year engagement with the ECHR system is that post-Soviet Russia has a "monist" approach to international law, and Article 15(4) of the 1993 RF Constitution provides that treaties take priority over domestic law.<sup>69</sup>

4. The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Article 46(3) contains the necessary corollary:

3. Everyone shall have the right to appeal, according to international treaties of the Russian Federation, to international bodies for the protection of human rights and freedoms, if all the existing internal state means of legal protection have been exhausted.

On ratification in 1996, the ECHR became an integral part of Russian law, a fact that has been many times repeated by the Russian CC (and by Mr. Zorkin himself), most recently in its judgment of 19 January 2017, when it stated:

By virtue of Article 15 ([section 4](#)) of the Constitution of the Russian Federation, the [ECHR] as an international treaty of the Russian Federation is an integral part of its legal system, which obliges the State to execute judgments of the [ECtHR] based on the Convention and delivered on complaints against Russia, in respect of persons participating in the case. The [RUSSIAN CC] in its practice adheres to the approach aimed at undeviating execution of judgments of the [ECtHR], even if their content is based on application of methods of "evolutive interpretation," "priority of the substance over form" and others, which can entail deviation from the positions elaborated by it earlier.

On 10 October 2003 the RF Supreme Court adopted a Resolution "On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation."<sup>70</sup> This Resolution, drafted with the participation of the justices of

<sup>69</sup> <http://www.constitution.ru/en/10003000-01.htm> (accessed on 30 December 2015).

<sup>70</sup> Ruling of the Plenary session of the RF Supreme Court No. 5, "On Application by Courts of General Jurisdiction of the Commonly Recognized Principles and Norms of the International Law and the International Treaties of the Russian Federation," 10 October 2003, at [www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801](http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801) (accessed on 21 July 2017).

the Russian CC and Anatoliy Kovler, then Russia's judge at the ECtHR, is binding on all lower courts and contained the following with reference to the ECHR:

10. It is clarified to the courts that international treaties should be interpreted in accordance with the Vienna Convention on the Law of Treaties of 23 May, 1969 (section 3; articles 31–33).

In accordance with item "b" of paragraph 3 of Article 31 of the Vienna Convention, any subsequent practice in the application of a treaty, which establishes the agreement of the parties regarding its interpretation, should be taken into account along with its context for the purposes of interpretation of the treaty.

As a member state of the [ECHR], the Russian Federation recognizes the jurisdiction of the [ECtHR] as compulsory in issues of interpretation and application of the Convention and its Protocols in the event of presumed breach of provisions of said treaty acts by the Russian Federation, if such a breach took place after their entry into force in respect of the Russian Federation (Article 1 of Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols," No. 54-FZ of 30th March 1998). This is why the said Convention should be applied by courts with regard to the practice of the [ECtHR] in order to avoid any violation of the Convention.

11. The [ECHR] has its own mechanism, which includes compulsory jurisdiction of the [ECtHR] and a systematic supervision of execution of the Court's judgments by the Committee of Ministers of the Council of Europe. Pursuant to paragraph 1 of Article 46 of the Convention, final judgments concerning the Russian Federation are binding for all state bodies of the Russian Federation, including the courts.

The execution of judgments concerning the Russian Federation implies, if necessary, the obligation of the state to take individual measures, aimed at erasing the violations of human rights, stipulated by the Convention, and the consequences of those violations for the applicant, as well as general measures, aimed at preventing further similar violations. Within their scope of competence, the courts must act so as to ensure the fulfillment of obligations of the state, arising from the participation of the Russian Federation in the [ECHR] Convention for the Protection of Human Rights and Fundamental Freedoms.

If, during the consideration of a case, circumstances are discovered that contributed to the violation of citizens' rights and freedoms, guaranteed by the Convention, the court may issue a special ruling (or judgment), drawing the attention of corresponding organizations and officials to the circumstances and facts of the violation of said rights and freedoms, that require necessary measures to be taken.

Early on, as could have been expected, Russia (like other members of the CoE, for example, the United Kingdom) began to lose a number of high-profile cases in the Strasbourg Court. In May 2004, in *Gusinskiy v. Russia*<sup>71</sup> the Court held that Russia had acted in bad faith in using the criminal justice system to force a commercial deal, by arresting the TV magnate. In July 2004, in *Ilaşcu and Others*

<sup>71</sup> *Gusinskiy v. Russia*, ECHR, Application No. 70276/01, Judgment of 19 May 2004; 41 EHRR, 17.

*v. Moldova and Russia*<sup>72</sup> the majority of the Grand Chamber of the Court found in a controversial ruling that Russia had rendered support to Transdniestria, which broke away from Moldova, amounting to “effective control.”<sup>73</sup> The first six Chechen applicants against Russia won their applications to Strasbourg in February 2005.<sup>74</sup> In April 2005 in *Shamayev and 12 others v. Russia and Georgia*,<sup>75</sup> the Court condemned Russia for deliberately refusing to cooperate with the Court despite diplomatic assurances.

On 15 January 2009 the ECtHR applied the pilot judgment procedure in the case of *Burdov v. Russia* (no. 2).<sup>76</sup> This case addressed Russia’s ongoing failure to honor judgments in respect of which no effective domestic remedies were available to the parties concerned. In its judgment, the ECtHR explicitly ordered that Russia set up such a remedy within six months from the date on which the judgment became final (by 4 November 2009) and grant “adequate and sufficient redress” by 4 May 2010 to all persons in the applicant’s position in the cases lodged with the Court before the delivery of the pilot judgment (paragraphs 141, 145).

Leach, Hardman, and Stephenson<sup>77</sup> concluded:

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<sup>72</sup> *Ilaşcu and Others v. Moldova and Russia*, ECHR, Application No. 48787/99, Judgment of 8 July 2004, 2004-VII; 40 EHRR 1030.

<sup>73</sup> See for a discussion of this and later judgments in Bill Bowring “Geopolitics and the Right to Education, and Why ‘No Person’ Is in Fact a Child,” v. 26 n. 2 (2014) *Child and Family Law Quarterly*, p. 196.

<sup>74</sup> *Isayeva, Yusupova and Bazayeva v. Russia*, Application Nos. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005; 41 EHRR 847. These applicants were represented, from 2000, by me and my colleagues from the European Human Rights Advocacy Centre, which I founded, in partnership with the Russian human rights NGO “Memorial,” with €1 million EU funding, in 2002.

<sup>75</sup> *Shamayev and 12 others v. Russia and Georgia*, ECHR, Application No. 36378/02, decision of 12 April 2005. ECHR 2005-III.

<sup>76</sup> Judgment of 15 January 2009, *Burdov v. Russia* (no. 2), Application No. 33509/04.

<sup>77</sup> Philip Leach, Helen Hardman, and 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 (2) (2010) *Human Rights Law Review*, pp. 346–59.

Arguably, the Russian Federation's response to Burdov (No. 2) is another important indicator of the effectiveness of the ECtHR, when faced with a deluge of cases, many of which highlight systemic or endemic structural problems. Its timely implementation of the judgment will be keenly anticipated.<sup>78</sup>

There is also a case study of a good result. On 27 March 2008 the ECtHR gave judgment in *Shtukurov v. Russia*.<sup>79</sup> The judgment, which became final in June 2008, concerned issues of judicial deprivation of legal capacity in the absence of the person concerned and involuntary admission to a psychiatric hospital. The Court indicated that the standards existing in Russia in regard to this particular matter differed from those adopted at the European level. Although there were no general measures indicated by the Court in its judgment, at the end of 2008 the Committee of Ministers noted that the relevant provisions of Russian law on the incapacity of adults had not been modified.<sup>80</sup> On 27 February 2009 the Russian CC considered an application lodged by Mr. Shtukurov and others to challenge the compliance of the relevant provisions of Russian law with the RF Constitution and agreed with the applicant.<sup>81</sup> The provisions were declared to be incompatible with the RF Constitution and discontinued with immediate effect. Relevant amendments to the legislation were initiated by the Russian Parliament. These were finalized and entered into force in 2011.<sup>82</sup>

There has been domestic legislation designed to improve compliance with judgments of the Strasbourg Court.

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<sup>78</sup> Ibid., p. 359.

<sup>79</sup> Judgment of 27 March 2008, *Shtukurov v. Russia*, Application No. 44009/05.

<sup>80</sup> Committee of Ministers. Decisions adopted at 1043rd DH meeting, 2–4 December.

<sup>81</sup> Constitutional Court of the Russian Federation, 27 February 2009, in a case concerning review of the constitutionality of several provisions of Articles 37, 52, 135, 222, 284, 286, and 3791 of the Civil Procedure Code of the Russian Federation and part 4 of Article 28 of the Law of the Russian Federation "On Psychiatric Assistance and Related Guarantees to the Rights of Citizens" further to the applications of Messrs. Yu. K. Gudkova, P. V. Shtukurov and M. A. Yashina, Judgment, No. 4-P/2009.

<sup>82</sup> Federal Law No. 67-FZ "On the Introduction of Amendments to the Law of the Russian Federation 'On Psychiatric Assistance and Related Guarantees to the Rights of Citizens' and the Civil Procedure Code of the Russian Federation," 6 April 2011.

In May 2011, a Russian presidential decree, “On the monitoring of the application of law in the Russian Federation,” was adopted.<sup>83</sup> It provides that one of the goals of such monitoring is to ensure the enforcement of those judgments of the ECtHR that require legislative change.<sup>84</sup>

The Russian Law on Compensation went into effect on 4 May 2010.<sup>85</sup> This law enables claims for compensation based on a violation of the right to a fair trial, and to enforcement, within a reasonable time. The compensation awarded is not dependent on the establishment of fault of any competent authorities responsible for delayed enforcement.

On 7 October 2010 the Chamber of the ECtHR gave judgment in the case of *Konstantin Markin v. Russia*, a controversial case concerning violations of Article 14 (discrimination) with Article 8 (respect for family and private life), denying a serving male officer leave to look after his children, which would have been available to a female officer.<sup>86</sup> The Chamber strongly criticized the ruling of 15 January 2009 of the Russian CC.<sup>87</sup>

In their 2011 article, Issaeva, Sergeeva, and Suchkova concluded:

In our view, if used wisely, the Convention mechanisms will enable Russia to do the “impossible”: to bring its legal system to the level of international standards, a feat which it has not yet been able to accomplish. However, this aim will always need to be balanced against the anxiety shown by the Russian

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<sup>83</sup> President of Russia. Decree No. 657 “On the Monitoring of the Application of Law in the Russian Federation,” 20 May 2011.

<sup>84</sup> Maria Issaeva, Irina Sergeeva, and Maria Suchkova “Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges,” (2011) v. 8 n. 15 *SUR – International Journal on Human Rights*, pp. 67–90.

<sup>85</sup> Federal Law No. 68-FZ “On Compensation for Violation of the Right to a Trial within a Reasonable Time or the Right to Enforcement of a Judgment within a Reasonable Time,” 30 April 2010.

<sup>86</sup> *Konstantin Markin v. Russia* (n1).

<sup>87</sup> In paras. 48, 57, and 58, for example, in para. 58: “In view of the above consideration, the Court finds that the reasons adduced by the Constitutional Court provide insufficient justification for imposing much stronger restrictions on the family life of servicemen than on that of servicewomen.”

authorities regarding the possible misuse of these powerful instruments to exert excessive political pressure.<sup>88</sup>

The *Markin* case was referred at Russia's request to the Grand Chamber of the ECtHR, and on 22 March 2012 the Chamber's judgment was upheld, but this time with no overt criticism of the Russian CC.<sup>89</sup>

On 10 January 2012 the ECtHR delivered a "pilot judgment" against Russia in the case of *Ananyev and Others v. Russia*,<sup>90</sup> requiring Russia to submit an action plan within six months. The judgment in *Ananyev* became final on 10 April 2012. On 10 October 2012 the Russian Federation submitted its action plan to the Committee of Ministers.<sup>91</sup> Russia's implementation of its action plan has been subject to monitoring by the Committee of Ministers, and, to date, there has been no adverse comment. On 13 February 2013 the Russian Federation provided to the Committee of Ministers a further action plan and report, focusing on the conditions of detention of Mr. Ananyev.<sup>92</sup>

Armed with the Grand Chamber judgment of 22 March 2012, Mr. Markin returned to the Russian courts, and on 30 January 2013 the Leningrad Okrug Military Court applied to the Russian CC to decide the issue arising from the fact that in Russian law the judgments of the Russian CC and the ECtHR appeared to be of equal status. The Russian CC gave judgment on 6 December 2013;<sup>93</sup> Judge Sergei Mavrin, a participant in the debates, was Judge Rapporteur.<sup>94</sup> The Russian

<sup>88</sup> Issaeva, Sergeeva, and Suchkova "Enforcement of the Judgments of the European Court of Human Rights in Russia," pp. 67-90, at p. 83.

<sup>89</sup> *Konstantin Markin v. Russia*, No. 30078/06, Chamber (First Section) Judgment of 7 October 2010; Grand Chamber Judgment of 22 March 2012, 56 EHRR 8.

<sup>90</sup> Applications Nos. 42525/07 and 60800/08.

<sup>91</sup> The action plan may be found at

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2173309&SecMode=1&DocId=1945466&Usage=2> (accessed on 21 July 2017)

<sup>92</sup> See Human Rights Law Journal - HRLJ - Vol. 33 No. 7-12 - 31 December 2013, and

<sup>93</sup> Published in the *Russian Gazette* on 18 December 2013, at [www.rg.ru/2013/12/18/ks-dok.html](http://www.rg.ru/2013/12/18/ks-dok.html)

<sup>94</sup> See commentary on the Website of the Russian CC, at [www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3137](http://www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3137)

CC held that if provisions of Russian law impeached by the ECtHR are found to be consistent with the RF Constitution, then the issue must be referred to the Russian CC, which will determine possible constitutional means of implementation of the judgment of the ECtHR. Outright refusal to obey the judgment of the ECtHR was ruled out. Professor Ekaterina Mishina observed:

Good for you, dear judges. You masterfully avoided an open confrontation with the ECtHR and at the same time made it clear who the boss is and who will decide whether to implement decisions of the European Court of Human Rights on Russian territory.<sup>95</sup>

In my book chapter discussing this case,<sup>96</sup> I concluded<sup>97</sup>:

Russia has not (yet) defied the Strasbourg Court. And the Russian CC has decided to pursue a path of pragmatism, while at the same time reserving the right to exercise its unique power to interpret and enforce the Russian Constitution. In my view the omens to that extent are good for Russia's continued membership of the Council of Europe, and engagement with the Strasbourg Court.

On 27 June 2013 the RF Supreme Court passed a ruling "On application of the ECHR by the courts of general jurisdiction."<sup>98</sup> This affirmed the principles contained in the 2003 Resolution and directed that the judgments of the ECtHR in cases against Russia are mandatory for Russian courts and judgments against other countries must be taken into account:

2. As follows from Article 46 of the Convention, Article 1 of [the Federal Law on Ratification], the legal positions of the European Court of Human Rights contained in the final judgments of the Court delivered in respect of the Russian Federation are obligatory for the courts.

In order to effectively protect human rights the courts take into consideration the legal positions of the European Court expressed in its final judgments taken in respect of other States which are parties to the Convention. However this legal position is to be taken into consideration by the court if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the European Court.

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<sup>95</sup> Ekaterina Mishina, "A Rubik's Cube from the Russian Constitutional Court" (30 December 2013), at [imrussia.org/en/rule-of-law/633-a-rubiks-cube-from-russias-constitutional-court](http://imrussia.org/en/rule-of-law/633-a-rubiks-cube-from-russias-constitutional-court) (accessed on 1 February 2017).

<sup>96</sup> Bill Bowring "The Russian Federation and the Strasbourg Court: The Illegitimacy of Sovereignty?" in Katja S. Ziegler, Elizabeth Wicks, and Loveday Hodson (eds.) *The UK and European Human Rights: A Strained Relationship?* (Oxford: Hart Publishing, 2015), pp. 415–37.

<sup>97</sup> *Ibid.*, p. 437.

<sup>98</sup> Ruling of the Plenary session of the RF Supreme Court 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 in English at [www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155](http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155) (accessed on 30 December 2015).



The resolution noted that any restriction of rights and freedoms (including detention) should be based on federal law, pursue a legitimate goal, and be necessary in a democratic society, that is, be proportional. It focused on Article 5(4) ECHR, providing the right to speedy judicial review of the lawfulness of detention and immediate release if the detention is not lawful and reasonable.<sup>99</sup>

However, there has been a recent souring of relations, as Leach and Donald pointed out,<sup>100</sup> as a direct result of the *Yukos* case and the unprecedented award of just satisfaction:

There is little doubt that certain ECtHR judgments have proved to be decidedly unpalatable to the Kremlin. As commentators such as Halya Coynash have observed,<sup>101</sup> the 2014 judgment in the *Yukos* case,<sup>102</sup> as a result of which €1.8 billion has to be paid to Yukos shareholders,<sup>103</sup> was particularly unpopular for the authorities in Moscow. However, there is no shortage of decisions which seem to be considered repugnant, such as the Court's attribution of Russian responsibility for human rights violations committed in Transdniestria (the separatist region of Moldova) in *Ilaşcu* and *Catan*.<sup>104</sup> Other commentators have placed in the same bracket the grand chamber judgment which the Court passed down on the same day (4 December) that the bill passed its third reading, *Roman Zakharov v Russia*, concerning the very broad powers of the FSB (the Russian secret service) to monitor telephones.<sup>105</sup> As the Court found a significant series of shortcomings in the legal framework regulating the interception of communications, its implementation will require substantial changes to the law.

I disagree with Leach and Donald, however, and with the comments made on 16 July 2016 by Anne Brasseur, the then President of the Parliamentary Assembly of the CoE (PACE),<sup>106</sup> as to the interpretation of the *Postanovleniye* (resolution) of the Russian CC of 14 July 2015, No. 21-P.<sup>107</sup> This judgment resulted from a

<sup>99</sup> Polina Levina "Links between Criminal Justice Procedure and Torture: Learning from Russia" v. 16 n. 1 (2013) *New Criminal Law Review: An International and Interdisciplinary Journal*, pp. 104–42.

<sup>100</sup> See note 14.

<sup>101</sup> Coynash (2015).

<sup>102</sup> *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application No. 14902/04, Judgment on the merits, 20 September 2011.

<sup>103</sup> Decision on just satisfaction, 31 July 2014.

<sup>104</sup> *Ilaşcu*, note 71; .

<sup>105</sup> *Roman Zakharov v. Russia*, Application No. 47143/06, Judgment of 4 December 2015.

<sup>106</sup> See "PACE President Concerned by Decision on 'Selective Implementation' of Strasbourg Rulings in Russia," at <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5720&cat=15> (accessed on 21 February 2017)

<sup>107</sup> Published in *Rossiiskaya Gazeta* 27 July 2015, Federal edition No. 6734, at

request by a group of ninety-three deputies of the State Duma as to whether a number of legislative enactments were compatible with the RF Constitution. These were Article 1 of the 1998 Law on Ratification of the ECHR; Article 32(1) and (2) of the Federal law, “On international treaties of the Russian Federation”; and provisions of the Civil Procedural Code, Arbitrazh (Commercial) Procedural Code, Code of Administrative Misdemeanors, and the Criminal Procedural Code. In the view of the deputies, these enactments were incompatible with Articles 15(1)(2) and (4) and Article 79 of the RF Constitution, since they in fact obliged Russian organs of legislative, executive, and judicial power to unconditionally implement judgments of the ECtHR, even in cases where such judgments contradicted the RF Constitution.

The Court ruled that these provisions were compatible with the RF Constitution, but laid the basis for the amending law discussed in the first section of this chapter. The judgment, for which the Judge Rapporteur was the Court’s Deputy Chairman, Sergey Mavrin confirmed the subsidiary nature of the Strasbourg system and the obligatory nature of Strasbourg judgments and paid close attention not only to the provisions of the 1969 Vienna Convention on the Law of Treaties but also to the case law of the German Constitutional Court (the *Görgülü* and *Solange-1* judgments), the Italian Constitutional Court in its judgment of 31 May 2011 in the *Maggio v. Italy* case and its 22 October 2014 judgment following the ICJ’s *Jurisdictional Immunities of the State* (2012) case; the Austrian Constitutional Court’s judgment of 14 October 1987; and of course the UK Supreme Court’s judgment of 16 October 2013 following *Hirst v. UK*. State organs could apply to the Russian CC in a concrete case to ask whether a

judgment of the ECtHR was “impossible” to implement because it contradicted the foundations of the Russian constitutional order. The Court gave as an example the judgment in *Anchugov and Gladkov v. Russia* of 14 July 2013,<sup>108</sup> the Russian *Hirst*, on prisoners’ voting rights. In the Court’s view, to implement the judgment would mean violating a series of articles of the RF Constitution (Articles 15[1], 32[3], and 79), or adopting a new Constitution.

Anna Pushkarskaya, writing on the day of the judgment in *Kommersant*, pointed out that the background to the application was the *Yukos* just satisfaction decision and expected that there would be a further application to the Court in respect of that decision.<sup>109</sup> However, the following day she published an interview with Judge Sergey Mavrin in which he stated that the Russian CC would always seek a compromise with Strasbourg and avoid a direct collision. The effect of an application to the Russian CC in a concrete case would be to provide a breathing space.<sup>110</sup>

Also on the positive side, on 11 January 2016 the Parliamentary Assembly of the CoE, assisted by the Human Rights Centre at the University of Essex, had published a report on the impact of the ECHR in various countries<sup>111</sup>. The report identified a number of instances of positive impact in Russia:

- As a result of a pilot judgment (*Burdov v. Russia*) in 2009 over non-enforcement of a domestic court judgment in favor of the applicant, Russia enacted a Federal Compensation Act, as well as a Federal Law to guarantee the effectiveness of the new remedy.

<sup>108</sup> Applications Nos. 11157/04 and 15162/05.

<sup>109</sup> <http://www.kommersant.ru/doc/2767837> (accessed on 31 December 2015).

<sup>110</sup> Ibid.

<sup>111</sup> PACE (2016) “Impact of the European Convention on Human Rights in States Parties: Selected Examples,” CoE, 8 January 2016, at <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5968&lang=2&cat=5> (accessed on 29 January 2017).

- In 2005 the RF Supreme Court followed up the 2004 Declaration of the Committee of Ministers and extended journalists' freedom of expression to criticism of public officials: public officials must accept that they will be subject to public scrutiny and criticism. In 2008 the Court closed a number of applications in view of this change.
- Following *Mikheyev v. Russia* (2006) and other similar judgments, on account of torture or inhuman and degrading treatment inflicted on persons held in police custody and a lack of effective investigations into such acts, special investigation units were created within the Investigative Committee and tasked with investigating particularly complex crimes by police and other law enforcement bodies.
- There had been progress in the implementation of the Court's 2012 pilot judgment in *Ananyev and Others v. Russia* concerning inhuman and degrading conditions in Russian remand centers and the lack of an effective remedy. Russia presented and has been implementing an action plan as a result, monitored by the Committee of Ministers.
- A number of measures had been taken to remedy numerous violations of the right to liberty, guaranteed by Article 5 of the Convention, owing to unlawful and lengthy unreasoned (or poorly reasoned) detention on remand. Legislative changes were made between 2008 and 2011. Both the Russian CC and the RF Supreme

Court had emphasized that a suspect or accused may be detained only on the basis of a valid judicial decision. This was most recently monitored by the Committee of Ministers in 2015.

This section of my chapter has, I believe, demonstrated a significantly in-depth and serious engagement between Russia and the CoE, lasting for two decades.

### **6.5 Russia's Final Break with the European Convention on Human Rights?**

Developments since the start of 2016 have thrown the optimistic prognosis of the scholars to whom I have referred, and my own evaluation, into doubt.

On 11 March 2016 the CoE's constitutional law experts, the Venice Commission, adopted an interim opinion determining that the new law, referred to at the start of this chapter, was incompatible with Russia's international legal obligations and must be amended. The Venice Commission stated that it is a duty of all state bodies to reconcile provisions of the international treaties in force in Russia with the RF Constitution, for instance, through interpretation or even modifying the Constitution. "The Russian Federation should have recourse to dialogue, instead of resorting to unilateral measures."<sup>112</sup> This was published on 15 March 2016.<sup>113</sup>

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<sup>112</sup> Press release at

<https://wcd.coe.int/ViewDoc.jsp?id=2425095&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE> (accessed on 29 January 2017).

<sup>113</sup> CDL-AD(2016)005-e: Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)005-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)005-e) (accessed on 29 January 2017).

On 13 June 2016 the Venice Commission published its Final Opinion.<sup>114</sup> The Final Opinion was made necessary by the fact that the Russian authorities had been unable to host the Commission's working group to discuss the amendments prior to the March session, so that the opinion was adopted as an interim one, and it was agreed that a final opinion would be prepared for the June session.<sup>115</sup>

Also, as the Commission noted,<sup>116</sup> on 19 April 2016 the Russian CC had rendered a judgment<sup>117</sup> in which it examined the question of the possibility of executing the judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia* in accordance with the RF Constitution.<sup>118</sup>

There were amicus curiae briefs before the Russian CC arguing that the problem could be resolved by interpreting the RF Constitution, rather than seeking to amend it, which the Russian CC cannot do. The Russian CC, with three powerful dissents, disagreed and held that in 1998, when Russia ratified the ECHR, there was no case law under Article 3 of Protocol 1 (right to democratic elections) prohibiting a "blanket ban" on prisoners' voting. Otherwise, ratification would have contradicted the RF Constitution. However, the Russian

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<sup>114</sup> Opinion No. 832/2015, CDL-AD(2016)016, Final Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10–11 June 2016), at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e) (accessed on 29 January 2017).

<sup>115</sup> Ibid., para. 4.

<sup>116</sup> Ibid., para. 5.

<sup>117</sup> No. 12- Π/2016, 19 April 2016.

<sup>118</sup> For an early analysis, see Marina Aksenova "Anchugov and Gladkov Is Not Enforceable: The Russian Constitutional Court Opines in Its First ECtHR Implementation Case," 25 April 2016, at [http://opiniojuris.org/2016/04/25/anchugov-and-gladkov-is-not-enforceable-the-russian-constitutional-court-opines-in-its-first-ecthr-implementation-case/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29](http://opiniojuris.org/2016/04/25/anchugov-and-gladkov-is-not-enforceable-the-russian-constitutional-court-opines-in-its-first-ecthr-implementation-case/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29) (accessed on 29 January 2017) – this article has very useful links.

CC suggested that by an amendment to the criminal law persons detained in Russian “open prison” correctional colonies could be reclassified so that they do not fall within Article 32(2) of the RF Constitution. If this was done, Russia would in effect implement the ECHR’s judgment. The Russian CC emphasized the priority of international law, especially the ECHR, over Russian domestic law, while insisting that it is the final judge in issues concerning the RF Constitution.

I agreed at the time with the CoE Secretary-General, Thorbjørn Jagland, that the “judgment of the Constitutional Court suggests that there is a way to resolve the issue through a change of legislation which would alleviate the existing restrictions on the right to vote.”<sup>119</sup>

In this way Russia could have avoided repeating the collision between the CoE and the United Kingdom over prisoners’ voting rights after the 2005 judgment in *Hirst v. United Kingdom*,<sup>120</sup> which the United Kingdom has simply refused, for political reasons, to implement, or that of Bosnia and Herzegovina after the 2009 judgment in *Sejdić and Finci v. Bosnia and Herzegovina*<sup>121</sup> (discrimination against Jews and Roma in presidential elections), implementation of which would mean undoing the Dayton Agreements.

The Venice Commission in its 13 June 2016 Final Opinion stressed (para. 38), “at the outset that the execution of the judgments of the European Court of Human Rights is an unequivocal, imperative legal obligation, whose respect is vital for preserving and fostering the community of principles and values of the European continent.”

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<sup>119</sup> <http://www.coe.int/en/web/secretary-general/-/secretary-general-comments-on-russian-constitutional-court-judgment-today> (accessed on 29 January 2017).

<sup>120</sup> Application No. 74025/01, Judgment (Grand Chamber) of 6 October 2005.

<sup>121</sup> Applications Nos. 27996/06 and 34836/06, Judgment (Grand Chamber) of 22 December 2009.

It welcomed (para. 33) the fact that the Russian CC had not spared its efforts to avoid a conflict with Strasbourg, but (para. 27) considered that the question of the execution of an international decision should not be delegated in its entirety to the Constitutional Court; the Commission therefore recommends that the wording of the revised Federal Law on the Constitutional Court be amended to provide that the Government Agent (or other State authority) may seek a decision of the Constitutional Court on the compatibility with the Russian constitution of a specific modality of execution which it intends to take, when it has doubts that such a modality may raise issues of constitutionality.

On 6 December 2016 it was reported that the IX Congress of Judges of the Russian Federation had been addressed by Guido Raimondi, the president of the ECtHR.<sup>122</sup> According to the report, he was careful to sidestep difficult issues, and praised the Russian authorities for the fact that they were implementing the decisions of the ECtHR. He approvingly observed that Russia was no longer the main source of complaints to the Strasbourg Court. He particularly noted the efforts that Russia made to implement the decisions of the ECtHR by way of carrying out reforms and through the practice of the Supreme and Constitutional courts. In the work of the former, the President of the ECtHR singled out the practice of reversing sentences in connection with violations of Article 6 of the ECHR on the right to a fair trial. And in the work of the Russian CC, he was attracted by the way in which it interwove the practice of the ECtHR in its decisions.

As to the problems in relations between Russia and the ECtHR, he preferred to pass them by, preferring to “look at the picture as a whole.” He did not mention, for example, that on 15 December the Russian CC was to consider the question of the possibility of implementing the judgment of the ECtHR as to paying €1.8 billion to the former shareholders of Yukos. In fact, the question of

<sup>122</sup>[https://zakon.ru/discussion/2016/12/06/predsedatel\\_espch\\_pohvalil\\_rossiyu\\_za\\_ispolnenie\\_reshenij\\_suda\\_otkrytie\\_devyatogo\\_sezda\\_sudej\\_prosh](https://zakon.ru/discussion/2016/12/06/predsedatel_espch_pohvalil_rossiyu_za_ispolnenie_reshenij_suda_otkrytie_devyatogo_sezda_sudej_prosh) (accessed on 29 January 2017).



noncompliance with this judgment was soon to be considered by the Committee of Ministers<sup>123</sup>. Also, he did not call to mind that on 16 November 2016 the RF Supreme Court had overturned the sentence in the *Kirovles* case concerning the opposition leader and fighter against corruption, Aleksei Navalny.<sup>124</sup> Mr. Navalny did not agree with the RF Supreme Court's decision that there must be a retrial, considering that the ECtHR had ruled that there was no criminal element in his activities<sup>125</sup>.

### 6.6 The *Yukos* Case – Has Russia Finally Decided against Strasbourg?

The long-awaited judgment in the *Yukos* case was delivered on 19 January 2017.<sup>126</sup> Once again, the Court was furnished with, and accepted for consideration, expert amicus curiae briefs. On 30 November 2016 Kanstantin Dzehtsiarou of Liverpool University and Maxim Timofeyev of the European Humanitarian University in Vilnius submitted their eighteen-page amicus brief,<sup>127</sup> and on 7 December 2016 the Institute for Law and Public Policy provided a closely argued thirty-three-page brief, drafted by Grigoriy Vaipan,

<sup>123</sup> <http://kommersant.ru/doc/3162703> (accessed on 30 January 2017).

<sup>124</sup> [https://zakon.ru/discussion/2016/11/16/prezidium\\_vs\\_otpravil\\_delo\\_kirovlesa\\_na\\_novoe\\_ra\\_ssmotrenie\\_posle\\_resheniya\\_espch\\_o\\_narushenii\\_prav](https://zakon.ru/discussion/2016/11/16/prezidium_vs_otpravil_delo_kirovlesa_na_novoe_ra_ssmotrenie_posle_resheniya_espch_o_narushenii_prav) (accessed on 30 January 2017).

<sup>125</sup> *Navalny and Ofitserov v. Russia*, Application Nos. 46632/13 and 28671/14, Judgment of 23 February 2016. The Russian courts had found the applicants guilty of acts indistinguishable from regular commercial activities. In other words, the criminal law had been arbitrarily construed to the applicants' detriment. The courts had failed to address Mr. Navalny's arguable allegation that the reasons for his prosecution were his political activities.

<http://hudoc.echr.coe.int/eng?i=001-161060> (accessed on 30 January 2017).

<sup>126</sup> See <https://rg.ru/2017/01/19/reg-szfo/konstitucionnyi-sud-rf-vynes-reshenie-po-delu-yukosa.html> (accessed on 29 January 2017). Text of the judgment with the two dissenting judgments at <http://doc.ksrf.ru/decision/KSRFDecision258613.pdf> (accessed on 29 January 2017).

<sup>127</sup> This is to be found on the website of the Russian CC at [http://www.ksrf.ru/ru/Sessions/Documents/Yukos\\_Zaklyucheniye\\_30\\_11\\_2016.pdf](http://www.ksrf.ru/ru/Sessions/Documents/Yukos_Zaklyucheniye_30_11_2016.pdf) (accessed on 29 January 2017).

arguing against a finding of “impossibility,” both warning of damage to the reputation and authority of the Russian CC.<sup>128</sup>

In his dissenting opinion, Judge Yaroslavtsev argued that the Russian CC’s judgment contradicted the principle of legality and by taking on the function of a legislator exceeded its competence.<sup>129</sup> Judge Aranovskiy concluded: “But taking the judgment as a whole, the court does not find a correct basis for its decision, and, shifting its coordinates, loses itself in a general series of political, administrative and financial considerations, which are not equal to legal reasoning.”

On 21 January 2017 the co-rapporteurs of the Monitoring Committee for the Russian Federation of the Parliamentary Assembly of the Council of Europe (PACE), Theodora Bakoyannis and Liliane Maury Pasquier (Switzerland, SOC), and the rapporteur of the Committee on Legal Affairs and Human Rights for the implementation of judgments of the ECtHR, Pierre-Yves Le Borgn’ expressed their deep concern at the Russian CC judgment.<sup>130</sup> They reiterated that the full implementation of the judgments of the ECtHR is a legal commitment to which the Russian Federation has subscribed under the ECHR. They added:

Unconditionally honouring the Convention is an obligation incumbent on all member States and it is therefore unacceptable that Russia would not enforce a judgment of the European Court of Human Rights. The Russian authorities should therefore consider implementing the recommendation of the Venice Commission of the Council of Europe that the authorities consider revising the constitutional provisions at odds with the implementation of the ECtHR judgment. One cannot accept a selective implementation of the ECtHR’s judgments.

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[http://ilpp.ru/netcat\\_files/userfiles/Litigation\\_Treinings/Amicus/8\\_YUKOS\\_Amicus%20Curiae%20Brief\\_07-12-2016.pdf](http://ilpp.ru/netcat_files/userfiles/Litigation_Treinings/Amicus/8_YUKOS_Amicus%20Curiae%20Brief_07-12-2016.pdf) (accessed on 29 January 2017).

<sup>129</sup> And see Anna Pushkarskaya, 24 January 2017, *Kommersant*, at <http://www.kommersant.ru/doc/3200196> (accessed on 29 January 2017).

<sup>130</sup> <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6484&lang=2&cat=9> (accessed on 30 January 2017).

As Maxim Timofeyev, the coauthor of one of the amicus briefs, commented on 26 January 2017,<sup>131</sup> this was the first time the apex court of a CoE member state concluded that it should not pay just satisfaction. He summarized three main reasons given by the Russian CC for its decision.

Firstly, the Russian CC noted that both the prosecution of the company for tax evasion and subsequent enforcement proceedings were based on legal provisions that it earlier had found in compliance with the RF Constitution. Secondly, the Russian CC relied on the historical context of the 1990s, the “economic uncertainty,” and the fact that the Russian state was seeking to take special measures to defeat the tax avoidance strategies of Yukos and to pay for social welfare. If the government had decided to apply the statutory time-bar in the Yukos case, it would have acted in contradiction with the RF Constitution, which requires the state to ensure the payment of taxes by every person as required by the principles of equality and fairness. Thirdly, the Russian CC emphasized that Yukos was acting in bad faith by using tax avoidance schemes. Yukos should have foreseen the government’s actions. Thus, payment of just compensation from the Russian budget to the shareholders of a company that was involved in vast tax avoiding activities would be contrary to the constitutional principles of equality and fairness.

On this reasoning, execution of the ECtHR judgment on just satisfaction was not possible. In Timofeyev’s view, this judgment only deepened the distance between Russia and Strasbourg and increased the chances of escalating the confrontation even farther.

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<sup>131</sup> Maxim Timofeyev “Money Makes the Court Go Round: The Russian Constitutional Court’s Yukos Judgment,” at <http://verfassungsblog.de/money-makes-the-court-go-round-the-russian-constitutional-courts-yukos-judgment/> (accessed on 29 January 2017).

The response of the ECtHR has so far been more muted. Also on 26 January 2017, Guido Raimondi addressed the annual press conference of the ECtHR and answered a question concerning the *Yukos* judgment of the Russian CC. His answer has not been published by the court but can be seen and heard on the Court's website.<sup>132</sup> Mr. Raimondi made the point that enforcement of judgments is not a matter for the ECtHR but for the Committee of Ministers, which had the *Yukos* case under review. He also said that the Russian CC judgment had not yet been translated and that it would be studied closely in the ECtHR.

His remarks were greeted with enthusiasm by Russia. The official Russian news agency TASS announced that "Strasbourg court chief says Russia fulfils 95% of court's rulings. Russia's judicial authorities generally demonstrate their full readiness for cooperation with the Strasbourg court, the ECHR president said."<sup>133</sup>

TASS quoted Mr. Raimondi as follows<sup>134</sup>:

Very much positive can be said about relations with the Russian Federation. The Court has excellent relations with the Russian judicial authorities. I made a visit to Russia in late 2016 and held quite fruitful negotiations, in particular, with Chairman of the Supreme Court Mr. Lebedev and Chairman of the Constitutional Court Mr. Zorkin. They have big willpower to cooperate with the ECHR and with the Council of Europe as a whole. We could state with Chairman Lebedev that the Supreme Court is carrying out excellent work for preparing judges and we know that Russia has a large judge corps, which depends on the Supreme Court's preparation programs. In most cases, up to 95% of our court's decisions are fulfilled duly in Russia and this is a positive aspect in Russia's relations with the ECHR.

At the time of writing, therefore, it is too soon to say what the final result will be.

But it must be noted that Russia did not seek to appeal the *Yukos* judgment of the

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<sup>132</sup> <https://vodmanager.coe.int/cedh/webcast/cedh/2017-01-26-1/lang> (accessed on 30 January 2017).

<sup>133</sup> <http://tass.com/world/927460> (accessed on 30 January 2017). For a different point of view, see <http://kommersant.ru/doc/3202083> (accessed on 30 January 2017).

<sup>134</sup> I have checked this against the Court's webcast note 132.

ECtHR to the Grand Chamber, and some years have passed. It is unlikely that the Committee of Ministers will accept that Russia should not make proper arrangements to pay the amount of just satisfaction ordered by the ECtHR.

## 6.7 Conclusion

My argument in this chapter has been that the question of Russia's relationship with the Strasbourg system and its implementation of judgments of the ECtHR is not satisfactorily answered by means of the "spiral model" of "socialization," with its tendency to ascribe to a state the characteristics of a difficult adolescent, although of course these approaches have something of value to teach us.

Instead, in my view, the history of Russia's understanding of law and rights, and its complex and contradictory approaches to international law and human rights, is better read through the matrix of the intense and often scandalous debates and battles between conservatives and reformers, positivists and natural lawyers, taking new forms in every generation. Indeed, in that respect Russia is not qualitatively different from most other countries. It is somewhat similar to that other former imperial power, Great Britain. Both have suffered, and suffer to this day, acute crises of identity, especially when international instruments and mechanisms to which they have voluntarily acceded turn out to impinge on dearly held conceptions of sovereignty and national pride.

So I conclude with a recent example in Russia. On 19 March 2015 Yelena Lukyanova, daughter of Anatoliy Lukyanov, a contemporary of Mikhail Gorbachev at Moscow State University's Law School, and last speaker of the

USSR Supreme Soviet, herself a redoubtable advocate,<sup>135</sup> and Professor of Constitutional Law at the National Research University – Higher School of Economics, published in *Novaya Gazeta* a 6,000-word forthright critique of the state of Russian law and the Russian CC in particular, on the issue of the annexation of Crimea. This was entitled “*O Prave Nalevo* (About law ‘on the side’).”<sup>136</sup>

She located the heart of the problem in legal positivism, which became deeply rooted in Russia in the last decades of the nineteenth century and up until the 1920s. It was then a new idea, with its roots in Western Europe, and at that time part of a worldwide trend. She argued that Russia’s ratification of the ECHR in 1998 was problematic for Russian law precisely because of the difficulty of translating “rule of law” into Russian, which has a distinction between *pravo*, law in the sense of right, and *zakon*, positive law. Rather than the supremacy of law as understood in the ECHR, Russia proceeds according to *verkhovenstvo bukvy zakona*, supremacy of the letter of the law. This means, she said, that Russia lives in a different dimension to most contemporary states. As a result, there are two communities of lawyers: on the one hand legal bureaucrats, judges, parliamentarians, and law enforcement officials, and on the other hand, advocates, human rights defenders, and some independent academics.

From this she turned to the *Opredeleniye* (Resolution) of the Russian CC of 19 March 2014, No. 6-P, “On the case of checking the constitutionality of the not yet in force international treaty between the Russian Federation and the

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<sup>135</sup> See her recently published *Konstitutsionniye Riski: Uchebno-Metodicheskoye Posobiye* (Constitutional Risks: Textbook) (Moscow: Kuchkovo Poe, 2015), containing her articles and her interventions in a number of leading cases.

<sup>136</sup> <http://www.novayagazeta.ru/politics/67715.html> (accessed on 2 January 2016).

Republic of Crimea on accepting into the Russian Federation of the Republic of Crimea and the inclusion into the Russian Federation of new subjects.”<sup>137</sup> At first glance, this seemed to be fine. On closer analysis, she found eight serious violations by the Russian CC of its own legislation procedure, case law, and international obligations. In her view this was a civilizational problem. She concluded her passionate article by quoting Zorkin himself:

“If the law dies, then the world will be on the edge of the abyss,” he wrote. In many ways thanks to the court led by him we already find ourselves there. The inability to give an evaluation proceeding from belief in the spirit of law (*pravo*), the spirit of civilisation built on that law – that is barbarism. But barbarism can be healed. Not in a moment, but it can be healed. Actually quite simply. Through education and culture.

Zorkin replied, explosively, with a 5,000-word riposte in the official *Rossiiskaya Gazeta* on 23 March 2015, entitled “The Law – and only the Law.”<sup>138</sup> He started with personal abuse. He accused “Mrs. Lukyanova” of constantly trying to sit on two stools, pseudo-communist and pseudo-liberal, and constantly changing her position according to the conjuncture. His theme was the claim that the *skrepy*, “buckles” holding society together, were the legitimacy of the authorities and the law. He associated Lukyanova with “criminals” such as William Browder (whose lawyer, Sergei Magnitsky, was murdered in a Russian SIZO, pretrial detention prison).<sup>139</sup> He declared:

Today we see on the side of the West and its Russian disciples falsifications, yet unseen in scale, of events in Ukraine and their context. We see that all official Western legal interpretations of these events persistently and unanimously identify Russia in the “circle of the guilty.”... For me this means that today our Russia is living through the latest invasion by Western (and their internal pro-Westerners) “civilised barbarians.”

In her measured reply in an interview in *Novaya Gazeta* on 15 June 2015, “I have always tried to see things from his point of view, and to justify him,” she

<sup>137</sup> <http://doc.ksrf.ru/decision/KSRFDecision155662.pdf> (accessed on 2 January 2016).

<sup>138</sup> <http://www.rg.ru/2015/03/23/zorkin-site.html> (accessed on 2 January 2016).

<sup>139</sup> See Bill Browder *Red Notice: How I Became Putin's No. 1 Enemy* (New York: Bantam Books, 2015).

responded to Zorkin's use of the word "buckles (*skrepy*), and while pointing out that according to the law Zorkin had no business making such personal attacks, said that Zorkin who served for a number of years on the CoE's Venice Commission for Democracy through Law<sup>140</sup> must know better, and recalled that on the many occasions she had appeared before him at the Russian CC he had always treated her with courtesy and respect.

She has now published a brochure *#KRYMNASH. Spor o prave i o skrepkakh dvukh yuristov i ikh chitatelei* (*#OURCRIMEA*<sup>141</sup>. The dispute about law and about "buckles" between two lawyers and their readers).<sup>142</sup>

Even in the present very difficult circumstances in Russia, in which civil society is subjected to unprecedented (since 1991) persecution and Zorkin is one of the leading campaigners for the primacy of Russian sovereignty and security over human rights, the passionate debate over the nature and force of rights continues unabated. However, it may be that the recent *Yukos* judgment of the Russian CC provokes a final rupture in relations between Russia and the CoE.

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<sup>140</sup> [http://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN) (accessed on 2 January 2015).

<sup>141</sup> This is the hashtag for the Kremlin's constantly repeated slogan glorifying the annexation of Crimea.

<sup>142</sup> Moscow, *Kuchkovo Pole*, 2015.