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The Taming of the Shrew: Understanding the Impact of the Council of Europe's Human Rights Standards on the State Practice of Russia

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The Taming of the Shrew: Understanding the Impact of the Council of Europe's Human Rights Standards on the State Practice of Russia

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Press

School of Law, University of Tartu, Estonia

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CONTENTS

LIST OF ABBREVATIONS

CoE	Council of Europe
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
LGBT	Lesbian, gay, bisexual, and transgender
PACE	Parliamentary Assembly of the Council of Europe
UDHR	Universal Declaration on Human Rights
UNHRC	United Nations Human Rights Council

FOREWORD

Russia has always been a fascinating country for me. When I decided to travel to Novosibirsk State University during my masters' studies in order to do some research, many of my friends and relatives considered this a rather peculiar thing to do, as not too many Estonians have travelled to Siberia voluntarily. However, my experiences were most heartwarming and inspiring.

My specific interest in the human rights situation in Russia began during the turbulent wave of protests that took place in 2011 and 2012. During this exciting period of sudden events, and following legislative changes, I found myself constantly reading news and analyses and contemplating the situation of civil and political rights in Russia. Eventually my interest grew into a PhD project, took me to learn Russian approaches to human rights law at the Faculty of Law of St Petersburg State University, enabled me to engage in heated discussions on human rights issues with renowned Russian professors as well as with a new generation of Russian lawyers, which often left me puzzled, but provided me with interesting food for thought. Living in Russia also enabled me to gain a sense of understanding of this society, which would be impossible from a distance. While standing up with all the other students when the professors entered or left the classroom; while standing in endless lines in various administrative offices to fill in a document or in a dormitory in order to collect my laundry at the specifically designated time once a week; while watching local media and having discussions with Russian people and hearing them say that they have never been outside Russia, but they are afraid of all the horrible things happening in the West, they are afraid of war and are thankful that for some time everything has been "all right" in Russia; while seeing how merrily people participate in the parades on 9 of May and other patriotic holidays and how truly proud they are of their history, I experienced how norms and values function in Russia and understood how widespread the influence of the Russian media truly is on the national mindset. My shorter and longer travels to Russia have allowed me to enjoy Russia's rich culture and the hospitality of people with highly diverse attitudes. All of these unique experiences have contributed to this study.

My personal experiences in Russia obviously have influenced me as a researcher. This inevitably raises questions about the objectivity or neutrality of my research. I acknowledge that a certain subjective element is present in my study. However, I think it is nearly impossible to erase the subjective element from any qualitative study, or maybe even from any quantitative study. Every researcher interprets the sources of research through a subjective lens and in my view this is inescapable. Thus, the subjectivity of my interpretations is one of the limitations of my research. Acknowledging the element of subjectivity, I have tried to gather the material for my research from a wide range of sources and to present the viewpoints of very different scholars and other authorities.

I was lucky to be able to do research in many wonderful places during my PhD studies and I am very grateful for this. Whereas experiences gained at St Petersburg State University were the most central, visiting Uppsala Centre for Russian and Eurasian Studies, Göttingen University Law Faculty and Tbilisi University Law Faculty also provided me with an opportunity to learn from the best experts, to broaden my horizons and to make great friends.

I am most thankful to my supervisor, Professor Lauri Mälksoo, for his patience, support and valuable feedback. I also thank Dr. Merilin Kiviorg and Capt. William (Bill) Michael Combes for carefully reading the draft of this study and offering valuable suggestions for improvement. I would like to express my sincere gratitude to Professor Bill Bowring and Dr. Anton Burkov for carefully reviewing my research and providing most useful comments. It has been an honour to learn from such distinguished colleagues.

I thank the University of Tartu, my *alma mater* that in many ways has made me the person I am. Research for this study has been supported by institutional grant IUT20-50 funded by the Estonian Research Council.

Above all I would like to express my gratitude to my family and friends, particularly to Martin whose help and support has been invaluable throughout all these years. I now promise to spend less time behind my laptop and to devote more time and attention to all my loved ones.

INTRODUCTION

Setting the scene and explaining the aim of this research[1]

Russia is a riddle, wrapped in a mystery, inside an enigma
(Winston Churchill)

This study examines the mechanisms and the limits of the CoE in facilitating compliance with international human rights treaties in its member states, focusing on Russia's interaction with the normative system of the CoE and ECHR. I scrutinize how the factors facilitating or hindering compliance are manifested in the Russian legal order, aiming to determine the major obstacles that underlie Russia's complex relationship with the CoE and its standards. In order to attain this objective, I firstly examine whether and under what conditions we can expect international frameworks such as the CoE to have an influence on state practice. On the basis of previous scholarship I determine the factors contributing to the power of international human rights law in having an effect. I then use this theoretical framework to scrutinize the construal and implementation of human rights in Russia. I explore the manifestation of the major impact factors in the context of the Russian institutional framework; the interplay of Russian domestic legislation and the ECHR; construal and the role of human rights in the Russian political and social context; and in legislation regulating implementation of the right to freedom of expression; the right to freedom of association and the right to freedom of assembly in Russia. As a result, it will be revealed how the strategy of the CoE to "tame" Russia into compliance with its norms and standards has worked in practice, what have been the main obstacles hindering compliance and what conclusions can be drawn about the future interaction of the CoE and Russia.

In this study it is argued that the CoE can have a meaningful influence on compliance with the ECHR and its other instruments only when domestic circumstances support compliance with international human rights law, otherwise the influence remains very limited. It is my view that normative theories explaining compliance with international human rights law have ignored the limits of external actors to influence the behaviour of states and the specific circumstances, especially the domestic political and social contexts that can facilitate or inhibit the implementation of human rights. Thus, "taming" Russia into compliance by external actors is unrealistic, unless certain preconditions are met. When Russian domestic institutions do not support compliance with international human rights law; when norms of international human rights law

[1] In this study I rely on my previously published articles. See: Kerttu Mäger, 'Russia's Illiberal Ideology and Its Influences on the Legislation in the Sphere of Civil and Political Rights' (2016) 15 Baltic Yearbook of International Law Online 148–168; Kerttu Mäger, 'Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court' (2016) 24 Juridica International 14–22.

are not effectively incorporated into the Russian legal order; when human rights are not valued and respected in the Russian political and social climate and when Russian legislation hinders the opportunities of Russian people to protect and demand their rights to be guaranteed under the ECHR, effective compliance with the normative system of the CoE is unrealistic.

Human rights were attributed a key role in advancing the lives of people in the post-Cold War world[2] and "globalization was welcomed as the flowering of human rights and global peace"[3]. It seemed for many that Kant's aspirations for world government and perpetual peace could truly become a model of a global civil society.[4] Francis Fukuyama predicted that humankind was witnessing the unabashed victory of liberalism, "the end point of mankind's ideological evolution and the universalisation of Western liberal democracy as the final form of human government."[5] Post-Soviet Russia was no longer perceived as a threat. Instead it was presumed that Russia's "ideological otherness" had disappeared and that Russia would learn from the West and return to Europe in terms of values and norms.[6] In keeping with the *Zeitgeist* of the era, Russia and other former Soviet republics were expected to gallop towards democracy, rule of law and protection of human rights with a little help from the Council of Europe (CoE) and other external actors.[7]

The driving idea of the CoE has been to preserve peace and unity in Europe through cooperation and integration between liberal and democratic countries sharing similar principles: rule of law, democracy and human rights.[8] The CoE became an important forum for political dialogue between the "Western world" and Soviet countries during perestroika, a period when Central-and Eastern-European countries began their transition from human rights-abusive pasts. After the turbulent collapse of the Soviet Union, a large number of newly independent countries, including Russia, started to prepare for membership in the CoE that was widely viewed as a "door to Europe". Acceding to the CoE became a crucial foreign policy goal for post-Soviet countries.[9] On 28 February 1996 the Russian Federation acceded to the Statute of CoE and on 30 March 1998 Russia

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2 Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 349.

3 M. Christian Green and John Witte, Jr., 'Religion' in Dinah Shelton (ed), *The Oxford Handbook of Human Rights Law* (Oxford University Press, Oxford and New York 2013) 100.

4 *Ibid.*

5 Francis Fukuyama, 'The End of History?' (1989) 3 The national interest 3–18.

6 Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press, USA 2015) 8.

7 Anna Jonsson Cornell, 'Processes of International and Constitutional Socialization in Russia: Misconceptions and Overestimations' (2014) 14, 16.

8 Jonsson Cornell (n 7); Mälksoo, *Russian Approaches to International Law* (n 6).

9 Jonsson Cornell (n 7); Angelika Nußberger, 'The Reception Process in Russia and Ukraine' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: the impact of the ECHR on national legal systems* (Oxford University Press, USA 2008).

ratified the European Convention on Human Rights[10] (ECHR)[11], which entered into force in Russia on 1 November 1998.

The relationship between Russia and the CoE has been "marked by a profound contradiction" since Russia's accession, as noted by Jean-Pierre Massias.[12] The accession process that started in 1992 was difficult and prolonged. At the time of accession, Russian legislation and institutions did not meet all the requirements. Russia was taken on board on the condition of twelve assurances and twenty-five commitments listed in a 1996 opinion of the PACE.[13] "Accession was deemed not to be the end, but rather the beginning of a long and difficult process" as voiced by Angelika Nußberger, a German scholar and currently a judge at the ECtHR.[14] Russia's undertakings included reforming its criminal justice system; passing a number of laws, such as the Criminal Code, the Code of Criminal Procedure, the Civil Code and the Code of Civil Procedure. Russia also undertook to abolish the death penalty; to ratify the ECHR, its protocols, and other treaties of the CoE and to recognize the right of individual application to the compulsory jurisdiction of the ECtHR.

Russia's application to the CoE in 1992 directly affected the drafting process of the Russian 1993 Constitution – resulting among other influences – in Article 46(3) of the Constitution, allowing citizens to complain to international judicial bodies for the protection of human rights and freedoms, after exhausting all domestic remedies.[15] When joining the CoE, Russia agreed to defend common values of democracy, rule of law and human rights. Most importantly, subjecting Russia to the jurisdiction of the ECtHR was a rather radical step, because Russia now allowed an international court to intervene in Russia's internal matters.[16] This step "counteracted the traditional autarky of the Russian judicial system, for the first time acknowledging the possibility of external redress for individuals and subsequently bringing jurisprudence of the European

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[10] European Convention on Human Rights, Council of Europe, CETS No. 5.

[11] Federal'nyy zakon Rossiyskoy Federatsii ot 30.03.1998 No 54-FZ "O ratifikatsii Konventsii o zashchite prav cheloveka i osnovnykh svobod i Protokolov k ney".

[12] Jean-Pierre Massias, 'Russia and the Council of Europe: Ten Years Wasted?' (2007) Understanding Russia and the New Independent States, IFRI, Paris 103–119.

[13] Bill Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?' (1997) European Human Rights Law Review; Bill Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Four Years On' (2000) European Human Rights Law Review; Anton Burkov, '*The Impact of the European Convention on Human Rights on Russian Law*' (Stuttgart: ibidemVerlag 2007); Jane Henderson, The Constitution of the Russian Federation: A Contextual Analysis (Bloomsbury Publishing 2011) 248; Pamela A Jordan, 'Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms' (2003) 11 Demokratizatsiya 281–296; Nußberger (n 9).

[14] Nußberger (n 9) 603–610.

[15] Alexei Trochev, 'All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia' (2009) 17(2) Demokratizatsiya 145–178; 147.

[16] Petr Preclik, 'Culture Re-Introduced: Contestation of Human Rights in Contemporary Russia' (2012) 37 Review of Central and East European Law 173–230; 174.

Court of Human rights directly into the Russian legal system", as opined by Jane Henderson.[17] When Russia joined the CoE, its geopolitical goal of uniting Europe in terms of territory was considered achieved and the goal of uniting Europe in terms of values was considered to be about to happen very soon. The Soviet Union had collapsed and Russia had to face bitter loss. Consequently, Russia was expected to learn Western values, to take the role of the "pupil" of its Western teachers.

Whereas a realist school of thought having little enthusiasm towards the ability of international law to have an effect on domestic processes dominated during the Cold War, attitudes since perestroika have shifted towards a value-dominated approach. In the 90s, hopes were very high about the role and ability of international law and international organisations to influence domestic practices. The idea that external actors such as the CoE can socialize states into embracing norms and values, including human rights, rule of law and democracy, became the leading approach. International relations scholars argued that transnational socialization of human rights followed the logic of appropriateness. This means that international human rights norms demonstrate appropriate behaviour in an international community of liberal states.[18] Scholars claimed that if states want to gain international approval and recognition, if they want to "belong to the club", they are motivated and influenced by international human rights norms and change their national practices because they are convinced that this is an appropriate thing to do.[19] For example, Thomas Risse, Stephen C. Ropp and Kathryn Sikkink proposed a "five-stage spiral model" to explain the human rights socialization of state actors in their 1999 classic book "The Power of Human Rights". They assumed that a group of advanced democracies committed to human rights can "legitimately socialize norm-violating regimes such as Russia towards "proper" behaviour".[20]

International rule of law was viewed as the primary basis of international order and Russia, among other post-Soviet countries, was expected to gradually come to "embrace Western-style democracy at home and liberal norms abroad".[21] Accordingly, while preparing for enlargement, the decision-makers in the CoE assumed that international frameworks such as the CoE itself were empowered to facilitate compliance with international human rights norms on the national level and the limits were rarely discussed, at least not in the public eye.

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[17] Henderson (n 13).

[18] See for one of the most influential theories in this regard: Thomas Risse-Kappen and others, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999) vol 66.

[19] Thomas Risse and Stephen C. Ropp, 'Introduction and Overview' in Thomas Risse and others (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013).

[20] *Ibid* 9.

[21] Alexander Lukin, 'What the Kremlin Is Thinking: Putin's Vision for Eurasia' (2014) 93 Foreign Aff.

The optimistic scenario of the 90s was based on the premise that international law, including international human rights law, was universal and that gradually all states would successfully implement human rights norms: reform their legal systems and change their domestic practices in accordance with international standards. Another premise was that external actors such as the CoE can socialize states into new values, can teach and motivate states to internalize new values. States to be "socialized" were considered to be in a student role, eager to learn. Moreover, this scenario also presumed that states in general are motivated to comply with international standards and want to belong to the group of states sharing similar norms and values. This study scrutinizes how the approach of the CoE to "taming" Russia has held up in reality.

The role of transactional actors such as the CoE in assisting countries emerging from authoritarian rule towards better human rights compliance, rule of law and democracy has received a considerable amount of scholarly attention.[22] However, the role of transnational actors in the implementation of human rights has been overestimated and processes on a domestic level need more attention, claims Beth Simmons, a renowned professor of international affairs at Harvard University. She argues that "presenting transnational actors as white kings that make demands for those who are not often credited with the ability to speak, strategize, litigate, and mobilise for themselves and their society" is not justified.[23] International human rights institutions are simply not capable of facilitating compliance from the top down. Domestic, not international, institutions are the "linchpin to securing human rights", argues Courtney Hillebrecht, a political scientist and an Associate Professor at the Department of Political Science at the University of Nebraska-Lincoln.[24]

It derives from the nature of human rights law that governments, not international institutions, are primarily responsible for implementing human rights. "It is through action at the national level that international human-rights obligations can be translated into reality"[25] as pointed out by Kofi Atta Annan, the seventh Secretary-General of the United Nations. Therefore, understanding "motivations, institutions, capacities, and politics at the local level"[26] is vital for understanding how countries construe and implement human rights the way

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[22] Antoine Buyse and Michael Hamilton, *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press 2011); Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, USA 2008).

[23] Simmons (n 2) 356.

[24] Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014) vol 104, 19; Courtney Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (2012) 13 Human Rights Review 279–301; 284.

[25] Kofi Atta Annan, 'In Larger Freedom: Towards Development, Security and Human Rights for All' [2005]. UN doc. A/59/2005/Add.3, para 22.

[26] Simmons (n 2) 372.

they do, and why. Whereas the main idea of international human rights law is "to bring human rights home"[27], local circumstances facilitating or hindering implementation of human rights law have not been sufficiently acknowledged in human rights research. Assuming the universality of international law, regional origins in international law and the role of cultural and civilizational factors have largely been ignored by the global discourse of international law, claims Lauri Mälksoo.[28] As a result, the linkage between international human rights norms and domestic practices has been studied insufficiently.[29] Most studies addressing compliance with international human rights treaties focus on analysing the effects of international treaties on the domestic human rights practices of certain states. However, there is a lack of research addressing other dimensions of compliance, including changes in domestic legislation, policies and other local conditions.[30] My research contributes to filling this gap by providing an in-depth analysis of Russian domestic factors that inevitably influence various aspects of compliance with international human rights law.

Russian approaches to international human rights law is a significant field of research for many reasons. It is undeniable that Russia plays an important role in determining the development or regression of human rights, democracy and rule of law in the CoE as well as globally. Notably, Russia's role in influencing the construal of human rights in the international arena has grown compared to the beginning of the 90s, when Russia was expected to occupy the role of student. It cannot be ignored that countries like Russia, but also China, India, Brazil, Japan and other non-Western countries are changing from "norm-takers to shapers of the international legal order".[31] Russia has a substantial amount of "ideological energy" to influence the future of international law, to challenge the spread of human rights and other "Western normative projects" and Russia's global bargaining power is unlikely to decline.[32] Russia's construal of human rights in the domestic arena has important implications for Russia's conduct in its surrounding region and for Russia's policies globally.[33] Despite Russia's

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[27] Kevin Boyle, 'National Implementation of Human Rights Commitments'. Lecture given at the General Seminar on International Human Rights Law, LL.M programme, University of Essex, England, 2003–2004. Cited in Burkov (n 13) 20.

[28] See, for example: Mälksoo, *Russian Approaches to International Law* (n 6) 13, 146.

[29] See, for example: Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter' (2014) 25 European Journal of International Law 205–227; Simmons (n 2) 4.

[30] Linda Camp Keith, 'Human Rights Instruments' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP Oxford 2012) 354.

[31] Anne Peters, 'After Trump: China and Russia Move from Norm-Takers to Shapers of the International Legal Order' November 2016) EJIL: Talk! <https://www.ejiltalk.org/after-trump-china-and-russia-move-from-norm-takers-to-shapers-of-the-international-legal-order/> accessed on 29 November 2017.

[32] Mälksoo, *Russian Approaches to International Law* (n 6) 11.

[33] See further: Section 1.2.3 of this study.

important role and considerable influence, there is little in-depth knowledge of Russia's domestic practices, construal of human rights and the factors underlying Russia's human rights interpretation practices. At the end of the Cold War, Western universities and research institutions lost some of their active interest towards Russia.[34] Consequently, Russia's specific circumstances gained less attention. Ignorance of conflicting normative and legal standards and approaches between Western countries and Russia surely does not help to better predict and understand Russia's conduct.[35] Whereas in recent years some valuable research has been published[36] the scholarship, especially the scholarship available in English language, is still rather scarce.

My research provides an important input into enhancing our knowledge about the construal and implementation of human rights in Russia, particularly about the underlying mechanisms explaining patterns of human rights implementation in Russia. My dissertation combines the theoretical framework of human rights compliance with Russian legal reality, focusing mainly on the period of Russia's membership in the CoE. I provide a thorough analysis based on recent legislative amendments and Russian case law, particularly in the sphere of constitutional law and in the sphere of freedom of expression, freedom of assembly and freedom of association. In addition to legislative amendments and the case law, I also extensively analyse various facets of Russian legal culture and the role of human rights in it. As a result of the detailed analysis covering various aspects of Russian legal order and legal culture that influence Russia's compliance with the ECHR, I determine the major obstacles that underlie Russia's complex relationship with the CoE and its standards, which is an original contribution to the existing scholarship.

According to a popular stereotype, Russia is a country that is difficult to make sense of rationally. Russia is described as mystical or incomprehensible; it is often idealized or demonized in the international media, in the political arena as well as in academia. *Умом Россию не понять, Аршином общим не измерить: У ней особенная стать – В Россию можно только верить* (Who would grasp Russia with the mind? /For her no yardstick was created:/Her soul is of a special kind/ By faith alone appreciated)[37] as put by Fyodor Ivanovich Tyutchev, a Russian Pan-Slavist poet and diplomat. The idea of this well-known poem is that it is impossible to grasp the "true" meaning or knowledge of

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[34] Mälksoo, Russian Approaches to International Law (n 6)7–8.

[35] See: Roy Allison, *Russia, the West, and Military Intervention* (OUP Oxford 2013); Mälksoo, *Russian Approaches to International Law* (n 6).

[36] See, for example: Lauri Mälksoo and Benedek Wolfgang (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press 2017); Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge 2013).

[37] Who would grasp Russia with the mind?/For her no yardstick was created:/Her soul is of a special kind/ By faith alone appreciated. Fyodor Tyutchev, 'Who would grasp Russia with the mind', *Selected Poems* (Brimstone Press, 2014, translated by John Dewey).

Russia through the intellect: "the only true, valuable knowledge is localized in the soul or heart, but not in the head".[38] During the past few years, Russia's conduct has been unexpected in many regards. In the 90s it was expected that Russia could be socialized into the norms and values of the CoE, including human rights. Russia has been a full member state of the CoE, the world's most advanced international human rights protection system, for twenty-one years. On the one hand, having Russia and other post-Soviet countries as members has enabled the CoE to broaden its geographical scope, to spread its underlying values and to encourage legal reforms across post-Soviet space, thus increasing the impact of the organisation in the region. However, Russia's membership is also viewed as an impediment to the development of the CoE.[39]

Russia has slid back towards authoritarianism and an increasingly hostile and unpredictable foreign policy. Instead of global respect towards the international rule of law, democracy and human rights, the dusk of these principles is on the horizon in Russia.[40] Shrinking the space for public dissent, pressure on the independent media and NGOs through censorship, prosecution, intimidation and harassment, attacks on freedom of expression on the internet – all have been identified as acute problems by the CoE, international human rights NGOs as well as members of Russian academia. Combined with increased state control over the media landscape and an overall restrictive political climate, these processes have reduced meaningful political dialogue in Russia to a minimum.[41] According to Freedom House, the press status of Russia is not free. In 2015 Russia ranked 180 out of 199 countries along with Ethiopia and Saudi Arabia.[42] Despite noticeable progress in several areas, overall the human rights record and reforms to the legal system have remained inadequate.[43] Russia has serious problems with implementation of judgments of the ECtHR. Russia is one of ten

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[38] Irina B. Levontina and Anna A. Zalizniak, 'Human emotions viewed through the Russian language' in Jean Harkins, Anna Wierzbicka (eds) *Emotions in Crosslinguistic Perspective* (Mouton de Gruyter Berlin, New York 2001) 295.

[39] Preclik (n 16) 174.

[40] See, for example a book by Andrei A. Kovalev, a former Russian diplomat and a member of the Secretariat of president M. Gorbachev and administrations of presidents B. Yeltsin and V. Putin: Andrei A Kovalev, *Russia's Dead End: An Insider's Testimony from Gorbachev to Putin* (University of Nebraska Press 2017).

[41] Gleb Bogush, 'Criminalisation of Free Speech in Russia' (2017) 69(8) Europe-Asia Studies 1242–1256; Council of Europe Parliamentary Assembly, *The Honouring of Obligations and Commitments by the Russian Federation* (Strasbourg 2012) Doc 13018 para 281 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18998&lang=en> accessed 29 November 2017; *Press Freedom in 2013: Media Freedom Hits Decade Low* (Freedom House, Washington and New York 2014); Yulia Gorbunova and Konstantin Baranov, *Laws of Attrition: Crackdown on Russia's Civil Society after Putin's Return to the Presidency* (Human Rights Watch 2013).

[42] Freedom House, *Freedom of the Press 2015: Harsh Laws and Violence Drive Global Decline* (Freedom House 2015).

[43] Nußberger (n 9) 604.

CoE member states highlighted in the report of the Parliamentary Assembly of the Council of Europe (hereinafter: PACE) with the highest number of non-implemented judgments, reflecting serious structural problems in the country's legal system.[44] As of 31 December 2016, Russia had as many as 1,573 cases pending. [45] On average it takes 7.9 years to implement a judgment of the ECtHR in Russia.[46] The number of cases not fully executed after more than five years has been continuously growing.[47] The sharpest implementation problems have been identified in cases related to poor conditions and excessive length of remand detention; torture and ill-treatment during custody; secret extraditions to the former Soviet republics of Central Asia; LGBT rights, particularly freedom of expression and assembly; and violations resulting from actions of the security forces in the North Caucasus.[48] There are some judgments whose execution raises particularly complex political issues. For example, the Constitutional Court of the Russian Federation has declared the judgment in the case of *Anchugov and Gladkov v Russia*[49] and the judgment in the case of OAO Neftyanaya Kompaniya *YUKOS v Russian Federation*[50] impossible to enforce[51], thus rejecting the binding force of ECtHR judgments. This rather bleak picture is not something that political leaders, experts and scholars expected during the "honeymoon period" of the 90s.

Scholars and experts from various disciplines have fallen under criticism for not been able to understand why Russia has strayed from the path it was expected

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[44] These countries include Italy, the Russian Federation, Turkey, Ukraine, Romania, Hungary, Greece, Bulgaria, the Republic of Moldova and Poland. See further: Council of Europe Parliamentary Assembly. Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights: 9th report (*Strasbourg 2017). <http://website-pace.net/documents/19838/3115031/AS-JUR-2017-15-EN.pdf/18891586-7d6c-4297-b5f7-4077636db28e> accessed 29 November 2017.

[45] Council of Europe Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights:10th Annual Report of the Committee of Ministers* (Strasbourg 2016). < https://rm.coe.int/prems 021117-gbr-2001-10e-rapport-annuel-2016-web-16x24/168072800b> accessed 29 November 2017.

[46] *Ibid.*

[47] Council of Europe Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 6th Annual Report of the Committee of Ministers* (Strasbourg 2012) <https://rm.coe.int/1680592ac8> accessed 29 November 2017.

[48] Parliamentary Assembly. Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights* (n 27) para 10.

[49] *Anchugov and Gladkov v Russia* (Apps 11157/04 and 15162/05) ECtHR 4 July 2013.

[50] *OAO Neftyanaya Kompaniya YUKOS v Russia* (App 14902/04) ECtHR 20 September 2011 (merits) and 31 July 2014 (just satisfaction).

[51] See: Russian Constitutional Court, No. 12-P/2016 (19 April 2016). English translation available at http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf (accessed on 29 November 2017) and Russian Constitutional Court, No 1-P/2017 (19 January 2017). English translation available:
http://doc.ksrf.ru/decision/KSRFDecision258613.pdf (accessed on 29 November 2017).

to take and for fuelling ungrounded optimism with their expert opinions. Russia is still a puzzle, mesmerizing the majority of the Western audience. Whereas Russia's inability to adhere to its obligations and the presence of widespread human rights violations is well-documented, substantially less scholarship covers the underlying mechanisms hindering Russia's compliance with international human rights law. With my research I aim to move beyond what has become customary criticism of Russia's inability to adhere to international standards. This study enables a better apprehension of how human rights are construed in Russia and to explain the underlying mechanisms of Russian patterns of compliance with and implementation of international human rights law.

Whereas the focus of this study is on Russia, I do not want to argue that Russia stands out as the worst human rights violator or that other countries do not have their problems. They surely do and their situations must be studied too, but these problems fall out of the scope of this research. However, Russia differs from many non-Western countries in one very important aspect: Russia is a member of the CoE. Russia voluntarily ratified the ECHR, establishing high standards for the protection of civil and political rights and a binding control mechanism. Russia has assumed obligations that China or Brazil have not. Thus, the level of scrutiny to be imposed on Russia would inevitably be different. It is also not my intention to argue that Russia is the black sheep of the CoE. Several countries in the CoE are struggling with timely execution of the judgments of the ECtHR and are for other reasons blameworthy for poor compliance with CoE standards. Whereas I tackle these issues briefly in Section 1.2.1 of this study, the scope of my research does not allow extensive focus on all members of the CoE. However, I find that the factors influencing compliance identified in this study are not Russia-specific and provide a useful framework that could be applicable to all CoE member states.

Research questions

Following the research aims described above, the main research questions raised in this study are the following:

1) What are the mechanisms and limits of the CoE to facilitate compliance with and implementation of human rights law in its member states?
2) How does Russia's institutional framework influence compliance with international human rights treaties?
3) How is international human rights law incorporated in the Russian legal order?
4) What features characterize construal and the role of human rights in the Russian political and social context?
5) How are core civil and political rights – particularly the right to freedom of expression, the right to freedom of assembly and the right to freedom of association – implemented in Russia and what influence do these processes have on Russian civil society?

This study consists of seven chapters and the structure of the study follows the logic of the research questions presented.

I explore my first research question in Chapter I. In order to answer the first research question, I scrutinize various theories focusing on the impact of international law on domestic practices, norms and standards. I will ascertain what mechanisms of social influence are presumed to facilitate human rights compliance and implementation and critically analyse whether the mechanisms proposed by various scholars are applicable to human rights compliance and implementation in the contemporary world. From the perspective of the current study it is important to understand how international human rights law, especially the instruments of the Council of Europe, can affect governmental human rights practices and what other factors contribute to the process of implementing human rights on a national level. Thus, it is of particular interest to establish what approaches to human rights compliance and implementation have guided the strategy deployed by the CoE to facilitate compliance with international human rights standards in its member states. I aim to explore the factors that contribute to the success or failure of compliance with and implementation of human rights law on a domestic level and explain whether and under what conditions we can expect countries to comply with international human rights norms. I place the preconditions for compliance with human rights treaties – explained in my theory chapter – in the context of Russian state practice in forthcoming chapters.

I will then deal with the second research question, focusing on the Russian institutional framework (Chapter II). I begin with analysing the concept of rule of law, with the aim of determining whether the Russian Constitution provides the necessary framework for developing a law-bound state and whether the provisions of the Constitution are adhered to in practice. The principle of the rule of law is intimately connected to the separation of powers and the independence of the judiciary, the latter being a crucial component of the separation of powers and of vital importance for implementing the rights and freedoms enacted in the ECHR and enforcing the judgments of the ECtHR. Accordingly, I will analyse the issue of separation of powers in Russia with particular focus on the independence of the Russian judiciary. Finally, I will contemplate the consequences of the characteristics of the Russian constitutional institutional framework on compliance with and implementation of human rights law in Russia. I rely in my analysis mostly on relevant Russian legislation, on the academic works of both Russian and international scholars and reports and studies published by the Council of Europe and other authoritative institutions.

Chapter III of this study focuses on the third research question. In this chapter I examine how international human rights law is incorporated into the Russian legal order. I scrutinize Russian state practice and analyse the construal and domestic treatment of human rights – in legislation, in the practice of the Constitutional Court and in Russian legal scholarship. I analyse the position of international law in the Russian legal system, particularly focusing on the interplay between international human rights law and the Russian Constitution,

relying on relevant legislation and the case law of the Constitutional Court as well as the interpretations of Russian constitutional-law scholars. I will mainly focus on the issue of how the ECHR and the judgments of ECtHR are situated within the larger rights context of Russia. I will scrutinize the role of fundamental rights and freedoms in the Russian Constitution and explain how the interpretation of fundamental rights and freedoms has changed in post-Soviet Russia.

I will then continue with explaining the features characterizing the construal and the role of human rights in the Russian socio-political context (Chapter IV). Overall this chapter deals with the conceptual understanding of human rights in Russia. In order to make sense of state practice in the field of human rights, it is pertinent to understand the domestic context that has tailored the human rights agenda in Russia. It is impossible to reduce human rights practices to a single factor and "multiple social, cultural, political and transnational influences" must be taken into account, as highlighted by Beth Simmons.[52] International human rights law is built on the principles of human dignity, equality and non-discrimination. All human beings are born free and equal in dignity and rights, as enshrined in Article I of the Universal Declaration of Human Rights (UDHR) and everyone is entitled to all the rights and freedoms set forth in the UDHR without distinction of any kind, as established in Article II of the Declaration. Inevitably, human rights can thrive and develop in societies that accept the ideological underpinnings of human rights. Ideas and ideology shape the decisions and actions of governments in both the domestic and international arenas as well as shaping the decisions and actions of citizens. Hence, it is pertinent to focus on the domestic context, the social milieu where human rights are actually implemented.

The last three chapters deal with the fifth research question, investigating how civil and political rights – respectively the right to freedom of expression, the right to freedom of association and the right to freedom of assembly – are implemented in Russia. Civil society can flourish and demand rights only when fundamental civil and political rights are guaranteed in a country. Thus, basic guarantees for exercising civil and political rights are an essential prerequisite for the development of civil society. An intensely dynamic interaction occurs between the development of civil society and the ECHR. Civil society representatives such as NGOs and individual activists play a crucial role in the implementation and development of human rights law in Europe.[53] Each of the last three chapters of this study focuses on the implementation of one central right guaranteed under the ECHR. While determining whether implementation of human rights has been successful or not, the defining factor is whether and to

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[52] Simmons (n 2) 5.

[53] Rachel A. Cichowski, 'Civil Society and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, Oxford 2011) 78–79.

what extent international standards of human rights law are or are not incorporated into domestic regulations and implemented in practice. In order to understand the true approach to human rights in a certain country, it is vital to understand the "reality on the ground", because official rhetoric can be unreliable, deceptive or misleading.[54] Thus, in Chapters V, VI and VII, focusing on civil and political rights, I rely on legal material derived from relevant Russian legislation and court practice, mostly focusing on the case law of the Constitutional Court. For comparative purposes I also use the case law of the ECtHR and analyses and reports conducted by various bodies of the CoE.

At the very end I wrap up the whole study and set out the main conclusions.

Discussion of methods

Compliance with international treaties can mean many different things: complying with procedural obligations such as conducting effective investigations or guaranteeing adequate domestic remedies; complying with substantive obligations enacted in the treaty; or complying with the overall "spirit of the treaty".[55] In this study I mostly focus on the substantive obligations that Russia has undertaken with the ECHR. I examine how the rights and freedoms enacted in the ECHR are implemented in Russia and whether the basic measures needed for full enjoyment of the rights guaranteed have been adopted. For this purpose I focus on the Russian institutional framework, the role of international human rights law in the Russian legal order and state practice in the field of civil and political rights. However I also scrutinize how Russia is complying with the overall spirit of the ECHR: how are the underlying values of the ECHR construed and followed in Russia. In this sense, I will look beyond compliance in individual cases of the ECtHR in the narrower sense.

This study is embedded in the field of international human rights law, but touches upon Russian constitutional law and a substantial amount of the legal material is derived from other Russian domestic law. I also draw on theories at the intersection of international law and international relations, in order to determine the mechanisms and boundaries of international law in facilitating compliance with human rights law on the domestic level. Thus, this study has links to various inter-connected disciplines, while the methods used are also interdisciplinary.

In terms of research methods, this study uses both external and internal perspectives[56] on human rights law. By external perspective, I mean first of all

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[54] Mälksoo, *Russian Approaches to International Law* (n 6) 24.

[55] Edith Brown Weiss and Harold Karan Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT press 2000) 4.

[56] Herbert Lionel Adolphus Hart focused on the distinction between external and internal perspectives on a legal system in his famous book "The Concept of Law". See: Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford University Press 2012, 3rd ed. 1st ed.

taking into account insights from the social sciences, especially political science, on how international law, in particular international human rights law, works in its political context and how compliance can be ensured (Chapter I). The usefulness of the external perspective for legal analysis seems obvious. In order to grasp the value of individual prominent cases and institutions or even to plan steps for their reform in the future, we need to take an external perspective on the law in order to see how successfully it has worked (or not). This cannot be achieved only by traditional internal legal methods of analysis, e.g. by using the legal dogmatic method in the context of human rights law. Inevitably, what is necessary in order to answer the research questions raised in this study is to study the politics of human rights law, conditions for compliance with it and circumstances of resistance to it, using the case of Russia as an illustration.

Of international relations theories, this study is perhaps most influenced by rational choice theories. Understanding what motivates states to comply with international law and to change their norms and practices is pivotal for assessing the impact of international law on the behaviour of states. I would like to clarify that as states (governments) are the primary actors in international human rights law – states ratify treaties and states are obliged to comply with obligations undertaken – the focus of this study is on the conduct of states (particularly Russia). It is not my intention to put an equal sign between "state" and "society". I acknowledge the diversity present in every society and that in many societies the people have little influence on the conduct of their governments and that in many cases the beliefs and wishes prevalent in society can be miles away from the conduct of the government. However, I am of the view that the state has various means to influence the processes and attitudes prevalent in society, particularly through its institutions and legal system, which means that these two concepts cannot be completely separated.

Major causal mechanisms of compliance have been addressed from very different viewpoints and scholars of various disciplines have increasingly been integrating the respective scholarship of international relations and international law in order to best tackle these issues. Mutual awareness and exchange between social science scholarship on human rights and legal scholarship on human rights is visible in various noteworthy studies that I deploy in my research.[57]

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published in 1961); see also: Douglas E. Litowitz, 'Internal versus External Perspectives on Law: Toward Mediation' (1998) 26(1) Florida State University Law Review 127–150.

[57] See further: Kenneth W Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' [1989]; Kenneth W Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' [1999] 93 American Journal of International Law 361; Michael Byers, *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press on Demand 2001); Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) Duke Law Journal 621–703; 621, 623; Risse and others (n 19) 4; Anne-Marie Slaughter and others, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' [1998] 92 American Journal of International Law 367.

The majority of existing scholarship explaining why governments commit to and comply with human rights treaties derives from two broad theoretical perspectives: the rational actor and the normative (ideational, socialization-based) approaches.[58] In this study, I label the two broad approaches taken by scholars as "rational choice models/theories" and "normative models/theories". Rational choice theories suggest that states make rational choices based on utility maximization: states want to gain more than they lose when participating in international frameworks and local incentives and costs related to respecting international law determine whether states comply or not. Normative models stem from the idea that states genuinely change their behaviour when they are persuaded that a certain norm or behaviour is valuable and as a result, states internalize those norms and values.[59] Whereas in Chapter I provide an overview of various theoretical approaches, this study is guided by the idea that international frameworks can have an influence on the domestic level, when certain preconditions are met. Having analysed numerous theoretical approaches, it is my view that rational choice models focusing on specific conditions of compliance explain the conduct of states in complying with international treaties in a more plausible way than normative models. I will focus on these issues in further detail in Chapter I and develop this idea throughout the text.

Nevertheless, in the framework of the dominant external perspective on human rights law, I also use classical methods of legal research in this study, which touches upon both European human rights law as well as, to a lesser extent, Russian constitutional law. In particular the analytical method is used, starting with general notions such as the understanding of rule of law in Russia and the question how international law, including international human rights law, has been implemented in the Russian constitutional system. Furthermore, relevant judgments of different courts, including the ECtHR and the Russian Constitutional Court and acts of Russian legislation are analysed and interpreted in their legal, political and ideological context. This is the law in a political context approach rather than focusing merely on legal texts or pronouncements, as they should be outside any political context. When studying the values underpinning the legal tradition in Russia (Chapter IV), the analytical method is used to examine the ideological foundations and interpretations relevant for human rights law.

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[58] J Elizabeth Stubbins Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory' [2014] 25(4) The European Journal of International Law 1169–1182; Jeffrey T Checkel, 'Why Comply? Social Learning and European Identity Change' [2001] 55 International organization 553–588; Keith (n 30); Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' [2000] 54 International Organization 217–52.

[59] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' [1998] 52 International organization 887–917; Jeffrey T Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework' [2005] 59 International organization 801–876.

The political context approach enables me to take a generalized look at how certain rights are implemented in Russia and the underlying legal policy in domestic legislation – in the context of freedom of expression (Chapter V), freedom of association (Chapter VI) and freedom of assembly (Chapter VII). Rather than approaching these rights from a legal dogmatic viewpoint, I offer a legal policy analysis on how these rights are implemented in Russia. A substantial part of the legal material I use in this study derives from Russian legislation in the field of civil and political rights adopted from 2011 to 2017 and the case law of the Russian Constitutional Court from the same time period. From December 2011 to May 2012, Russian civil society started to fiercely demand changes in the country. During this period Russia saw the biggest wave of protests since the turbulent 1990s. Demonstrations and meetings took place in Moscow and in other areas gathering tens of thousands of participants. The crowds were singing Viktor Tsoi's song "*Peremen*" (Changes), a famous perestroika anthem. Russian civil society demanded respect for their civil and political rights. People's discontent with politics sharply increased when Dmitry Medvedev refused to participate in presidential elections and supported Vladimir Putin as new president. So-called "*rokirovka*" (castling) insulted many people and disappointed hopes of change. Disappointment increased after the elections to the Duma, where massive electoral fraud took place. Protest activities continued throughout the winter and spring.[60]

I have chosen to set the focus of this study on the period starting with Vladimir Putin's third term as president and the following wave of legislative amendments, because during the period 2011 to 2017 certain patterns in law-making, judging and overall attitude towards human rights law in Russia gained prominence, patterns that are useful for explaining Russian compliance with CoE standards. Mass demonstrations calling for change were rebuffed by the authorities and were followed by adoption of a series of legislative amendments limiting the options of civil society to participate in politics, to express their position and to put forward demands. Quickly after re-gaining the position of president, Vladimir Putin initiated a series of changes in laws regulating freedom of assembly. A series of legislative amendments restricting freedom of expression, freedom of assembly and freedom of association followed. I decided to focus on the implementation of those three central civil and political rights, because during my chosen time period the legislative amendments and the court practice in these areas have been particularly plentiful, controversial and influential. The Constitutional Court and also the Supreme Court have hade an active role in providing their interpretations and assessments to the laws, which in many cases have directly contradicted their previous positions. Freedom of expression, freedom of association and freedom of assembly are of central

[60] See for a comprehensive overview: Denis Volkov 'Protestnoe Dvizhenie v Rossii v Kontse 2011–2012 Gg' (Levada Center, Moscow 2012) <http://www levada ru/print/02–10–2012/protestnoe-dvizhenie-v-rossii-v-kontse-2011–2012-gg> accessed on 29 November 2017.

importance in the ECHR. They are intimately connected to democracy, rule of law and many other rights and freedoms and they are also a prerequisite for the development and the adequate functioning of the civil society.

It could be argued that the steps taken by the government since 2012 do not represent a radical departure from Russia's past behaviour. Control over the media has been increasing and civil society has long been under duress, with an escalation in the wake of the "colour revolutions" in Georgia (2003) and Ukraine (2004). Besides, anti-Western rhetoric was deployed to divert attention from problems in Russian society and to foster patriotism prior to this period.[61] However, as I demonstrate in the last three chapters of this research, since 2011 substantial changes occurred in the Russian domestic legal order in a relatively short period of time and these changes extensively influence the interplay between Russia and the CoE.

Since Russia has already been under the jurisdiction of the ECtHR for twenty years, covering this period inevitably means dealing with international legal and constitutional history as well. Thus the legal historical method is also relevant for this study. However, this study does not employ specific methods of legal historical research, such as archival materials or discovering previously unknown sources. The history of human rights law and constitutional law employed here focuses mostly on legal texts in their historical-political context. There is also a certain minor role for the comparative method of legal research in this study, at least in the background. I deploy the comparative method to compare Russia's state practice to the standards of the CoE and occasionally draw comparisons with other countries. However, this has not been the aim in itself, as the focus of the study is Russia's interplay with the CoE.

Bringing together social science, policy and legal perspectives on Russia and European human rights law and institutions allows the generalization that neither of these perspectives taken alone will be able to deliver. The literature contains a multitude of theories and historical or empirical studies on how international human rights law works in different contexts. However, perhaps for linguistic reasons and because Russia remains distant for the Westerners who dominate in global scholarship, Russia is not a major example used in the theoretical literature on human rights socialization. In my view it is worthwhile to bring the case of Russia closer to this literature. But the other way around, too: the relatively small legal scholarly community that closely follows the interaction between Russia and Strasbourg can probably still benefit from further insights from theoretical perspectives and attempts to critically interpret the "big picture" of the evolution of human rights law in Russia. This is what the combination of various research methods, legal and non-legal, in this study can ideally accomplish.

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[61] See further: Freedom House, 'Contending with Putin's Russia: A Call for American Leadership' [2013] <https://freedomhouse.org/sites/default/files/Contending%20with%20Putin%27s%20Russia.pdf> accessed on 29 November 2017.

I MECHANISMS AND LIMITS OF INTERNATIONAL FRAMEWORKS FACILITATING COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

And will you, nill you, I will marry you
(William Shakespeare, "The Taming of the Shrew")

This chapter discusses different theoretical approaches to explaining compliance with international human rights law. I begin with normative approaches, discuss their underlying premises and assess how successfully they have been able to explain compliance with international human rights law. I then move on to rational choice models and focus on the conditions underlying successful compliance with human rights treaties on the domestic level. Having determined the main preconditions for compliance, I use this theoretical framework in the forthcoming chapters to explain Russia's compliance with the ECHR.

1.1. Normative theories: the Council of Europe's approach to facilitating compliance with international human rights law

In the second half of the 20th century, revolutionary developments in the sphere of human rights took place. After the horrors of the Second World War, "human rights had seeped into the consciousness of governments and individuals around the world as one of the most pressing issues of the new international order", as voiced by Beth Simmons.[62] Since the 1950s, human rights have been presumed to be universal for all. Belief in the universality of human rights and overall optimism towards spreading rule of law, democracy and human rights was characteristic of the period following the end of the Cold War. In this period, normative socialization theories claiming that membership in international organisations would guide political behaviour and gradually change the values of the countries joining them enjoyed popular support. It was widely expected that integrating post-Soviet countries, including Russia, into international organisations with liberal values would eventually make these countries become liberal.[63]

The framework of the CoE also aims to set universal standards of human rights in all of its member states. The major function of the ECtHR is to ensure

[62] See Simmons (n 2) 3, 41. However, it must be remembered that seven countries abstained: the USSR along with Ukraine, Belarus, Yugoslavia, Poland, South Africa and Saudi Arabia.

[63] Jonsson Cornell (n 7) 6; Henderson (n 13) 249.

uniform interpretation of the ECHR assess state compliance with it.[64] The CoE has undeniably been a key player in advancing protection of human rights in Europe. During the past sixty years its institutions, most notably the European Court of Human Rights (ECtHR) have incrementally transformed human rights in Europe.[65] The ECtHR has been praised as the strongest and most efficient oversight system in international human rights law[66], "a crown jewel" for protecting civil and political liberties.[67]

The CoE has always aimed to integrate Europe in terms of geography and values. The CoE quickly moved beyond "traditional geography" in defining Europe, being the first European intergovernmental organization to expand towards Eastern Europe and the former Soviet republics. Since its establishment in the aftermath of the Second World War, the Coe's central objectives have been to unite Europe (the geopolitical goal) and protect the central pillars of the CoE: rule of law, democracy and human rights (the value-driven goal).[68] "There can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law", as emphasized by the Committee of Ministers.[69] These three concepts are inevitably interdependent. Government under law, the core of rule of law, is a fundamental precondition for democracy as well as for implementing human rights. If human rights are not protected, rule of law is a mere empty shell and on the other hand, human rights can be realized in practice only when the rule of law is respected.[70]

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64 Cichowski (n 53) 84.

65 *Ibid* 78.

66 Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 Global Constitutionalism 53–90.

67 Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' [2009] 9 Human Rights Law Review 397–453; 400.

68 See: Pamela A Jordan, 'Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms' (2003) 25 Human Rights Quarterly 660–688; 661; Jonsson Cornell (n 7) 12; 'Declaration of the Council of Europe's First Summit (Vienna, 9 October 1993)' <https://www.cvce.eu/en/obj/declaration_of_the_council_of_europe_s_first_summit_vienna_9_october_1993-en-d7c530b5-a7c9-43f9-95af-c28b3c8b50d3.html> accessed 28 November 2017.

69 Council of Europe Committee of Ministers, *The Council of Europe and the Rule of Law: an Overview* (21 November 2008) CM (2008)170; para 27.

70 Jeffrey Kahn, *Federalism, Democratization, and the Rule of Law in Russia* (OUP Oxford 2002); Jeffrey Kahn, 'Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia' (2001) 35 U Mich JL Reform 641–694.

When Russia joined the CoE, the geopolitical goal of uniting Europe was considered accomplished. The CoE became a "pan-European organization"[71] In line with the *Zeitgeist* of the 1990s, the enlargement process of the CoE was based on an inclusive strategy aiming at triggering political, legislative and constitutional reforms in member states through various political and legal means such as political dialogue, monitoring, assistance and exchange of best practices. The organization is built on the assumption that all member states are committed to its constituent values and reform their institutions and legal system accordingly. This is the precondition for accession to the CoE, as established in the Vienna Declaration (1993). Member states are obliged to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" highlights the Statute of the CoE.[72]

Instead of expecting Russia and other Central and Eastern European countries to adhere to the basic values and standards of the CoE at the time of admission, it was expected that the new members could be "socialized" into European institutions and values through a strategy of "dialogue, engagement and inclusion".[73] It was assumed that countries would be motivated to follow human rights standards out of mutual interest in developing liberal democracy and out of a common understanding of an expanded European identity.[74] The idea was that "integration is better than isolation; cooperation is better than confrontation."[75] The leadership of the CoE: Secretary Generals Catherine Lamulière (1989–1994) and Daniel Tarschys (1994–1999) were strongly convinced that "it was better to include than exclude".[76] It was expected to be easier to persuade new members to adhere to human rights standards when they belonged to CoE than to leave them with the status of potential pariah states and tackle human rights issues from the outside.[77] Hence, the main justifications for accepting Russia, despite that country's shortcomings, were geopolitical pragmatism and democratic hope: "Russia was admitted in the name of an "up-and-coming"

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[71] Jonsson Cornell (n 7).

[72] See Article 3(1) the Statute of the CoE (Statute of the Council of Europe. ETS 1, London, 5.V.1949). In the Strasbourg Final Declaration and Action Plan (1997) and in the Warsaw Declaration (2005) member states reaffirmed their attachment to these basic principles of the Council of Europe. In the Warsaw Declaration the states expressed their commitment to "strengthening the rule of law throughout the continent, building on the standard-setting potential of the Council of Europe and on its contribution to the development of international law." See further: Council of Europe Committee of Ministers, *The Council of Europe and the Rule of Law: an Overview* paras 8–13.

[73] Jonsson Cornell (n 7) 14, 17, 20–21.

[74] Jordan (n 68) 665, 686.

[75] Ernst Muehlemann, 'Report on Russia's Request for Membership of the Council of Europe' [1996] 17 Human Rights Law Journal 3.

[76] Jonsson Cornell (n 7).

[77] Jordan (n 68) 688.

democracy and the risks entailed in its possible isolation, even if the decision was made without any real enthusiasm".[78] It was expected that even if many post-Soviet countries that became members of the CoE were not already liberal and democratic, then surely they were "on their way". It was rarely questioned what happens when some member states do not "get there" and fail to become liberal and democratic.[79]

Thus, normative models provided inspiration for enlargement of the CoE. All normative approaches emphasize the "transformative power of normative moral discourse".[80] They view persuasion,[81] repeated interactions, argumentation, and exposure to norms[82] as the most important factors facilitating compliance with international norms. They argue that transnational socialization of human rights follows "the logic of appropriateness": international human rights norms demonstrate appropriate behaviour among the international community of liberal states. States wanting international approval and recognition are motivated and influenced by these norms and change their national practices not out of an obligation to comply, but because they are convinced that this is an appropriate thing to do and it is in their self-interest to comply.[83] True compliance is the result of "internally felt norms" rather than "externally imposed sanctions", as put by Harold Hongju Koh.[84] Socialization: "a process of inducting actors into the norms and rules of a given community"[85] is expected to lead to compliance through internalization of new norms and values into the domestic value system and legal framework when domestic actors adopt new roles, interests and identities.[86]

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[78] Massias (n 12) 109.

[79] See: Jordan (n 68) 661; Jonsson Cornell (n 7) 12, 15, 24.

[80] Moravcsik (n 58). 222–223.

[81] On theories of persuasion see, for example: Sarah H Cleveland, 'Norm Internalization and US Economic Sanctions' (2001) 26 Yale Journal of International Law 1–56; Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press on Demand 1990); Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 The Yale Law Yournal 273–393; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106(8) The Yale Law Yournal 2599–2659; Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 Virginia Journal of International Law 1–93.

[82] Bates (n 58); Goodman and Jinks (n 55).

[83] Risse and others (n 19); Slaughter and others (n 57).

[84] Koh (n 70).

[85] Checkel, 'International institutions and socialization in Europe: Introduction and framework' (n 57).

[86] Michael Zürn and Jeffrey T Checkel, 'Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State' (2005) 59 International Organization 1045–1079; Checkel, 'International institutions and socialization in Europe: Introduction and framework' (n 57).

Normative models underline the importance of ideas and norms and their influence on state behaviour. However "how and why ideas matter… remains a source of disagreement."[87] Normative theories have proposed two main causal mechanisms for changing norms and preferences and influencing compliance with human rights: one of them is based on educating, empowering and mobilizing local communities, especially NGOs, to pressurize their governments[88] and the other mechanism relies on social learning and persuasion that leads to internalizing new norms and redefining interests.[89] This approach presumes active assessment of norms, values and practices by decision-makers who can "change their minds" during this process.[90] However, some normative scholars admit that domestic politics, institutional and historical factors can delimit the impact of persuasion and social learning.[91]

1.2. Limits of the Council of Europe in facilitating compliance with international human rights law

1.2.1. Misconstrued assumptions and need for alternative approaches to human rights compliance

After former Soviet-bloc states joined the CoE, the organisation became more diverse and heterogeneous than ever. The CoE was built on like-mindedness, and a common heritage of political traditions and values of its members, as also highlighted in the preamble of the ECHR. On that basis, the CoE was founded in 1949 by ten countries: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.[92] At that time it truly was a club of relatively like-minded countries sharing a similar value-system and political culture. However, as a result of the enlargement process the CoE grew to forty-seven members extending to more than 800 million people "stretching… from Azerbaijan to Iceland and from Gibraltar to

[87] Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' [2002] 111 The Yale Law Journal 1995.

[88] See, for example: Koh (n 81); Harold Hongju Koh, 'How is International Human Rights Law Enforced' [1998] 74 Indiana Law Journal 1397.

[89] See, for example: Goodman and Jinks (n 57) 635; Jeffrey T Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe' [1999] 43 International Studies Quarterly 84–114.

[90] Goodman and Jinks (n 57) 626.

[91] Checkel, 'Why comply? Social learning and European identity change' (n 58) 553.

[92] For an overview of the Council of Europe see, for example: Dinah Shelton and Paolo G Carozza, *Regional Protection of Human Rights* (Oxford University Press 2013).

Vladivostok".[93] The character of the CoE changed from a club of democratic states to a "school of democracy", rule of law and human rights, aiming to solve systemic deficiencies within the legal systems of newcomers.[94]

In spite of initial hopes and aspirations, it soon became clear that not all of the new member states were committed to the constituent values of the CoE.[95] Russia is certainly not the only black sheep in the CoE. For example, Turkey, a country that ratified the ECHR as long ago as 1954[96] declared a derogation from the ECHR on 21 July 2016, six days after an attempted coup d'état. Increased torture and ill-treatment in police detention, dismissals and prosecutions in connection with the coup have followed.[97] Poland has adopted legislation that significantly weakens the checks and balances on the executive, obstructs the work and the independence of the Constitutional Tribunal and the judiciary in general, gives excessive powers to the security service and curbs freedom of expression and freedom of assembly. Hungary has extended the use of anti-terror legislation, curbed the powers of the Constitutional Court, shut down independent media outlets, harassed NGOs and educational institutions and severely restricted exercise of the right to freedom of assembly.[98] The premise that all states behave in a largely similar way when they become members of the CoE: that they gradually come to share the same values and respect for human rights has been proven erroneous. Liberal democracy has not become the universal and final form of human government, as Francis Fukuyama[99] famously suggested. It is increasingly questionable whether, to what extent and for how long the ECtHR will remain the "crown jewel" of human rights protection.

International human rights law can have a great influence on constitutions and other domestic law, on institutions, the judiciary and in some cases on people's values and expectations. On the one hand, formal commitment to

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[93] Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' [2008] 19 European Journal of International Law 125–126.

[94] See: Heinrich Klebes, *The Quest for Democratic Security. The role of the Council of Europe and US foreign policy Washington* (United States Institute for Peace 1999) 15; Jonsson Cornell (n 7) 20–21.

[95] Jonsson Cornell (n 7) 12, 24.

[96] The Council of Europe, *Country profile: Turkey* (The Council of Europe 2017) <http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf> accessed on 7 December 2017.

[97] Human Rights Watch, *Turkey: events of 2016* (Human Rights Watch 2016) <https://www.hrw.org/world-report/2017/country-chapters/turkey> accessed on 7 December 2017.

[98] Amnesty International, *Hungary 2016–2017* (Amnesty International 2017) <https://www.amnesty.org/en/countries/europe-and-central-asia/hungary/report-hungary/> accessed 7 December 2017.

[99] See Fukuyama (n 5).

major international human rights instruments is nearly universal.[100] Nevertheless, a wide discrepancy stands between ratification of treaties and implementing those treaties in practice. Whereas the idea of universality of human rights is a powerful one, the claim of universality of human rights is essentially meaningless when human rights are not implemented effectively on the local level, when human rights law does not "matter" close to home, as acknowledged by Eleanor Roosevelt, the first chair of the United Nations Commission on Human Rights, which played an instrumental role in drafting the Universal Declaration of Human Rights:

> Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[101]

The level of protection granted to individuals under international human rights treaties diverges largely among states. Italy, Russia, Turkey, Ukraine, Romania, Hungary, Greece, Bulgaria, the Republic of Moldova and Poland are all struggling with implementing the judgments of the ECtHR.[102] Turkey, as well as Poland and Hungary, has recently adopted legislation that significantly harms the rule of law and endangers protection of the rights and freedoms established in the ECHR.

Thus, human rights are still not universally upheld close to home in many countries either globally or regionally in the member states of the CoE. The CoE has not been able to motivate all of its member states to respect its underlying values and to comply with obligations undertaken, as initially expected, relying on normative approaches to human rights compliance. The ability of international law to influence domestic legal developments is obviously limited.[103] Several distinctive features that pose undeniably great challenges to implementing international human rights treaties characterize the field of human

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[100] For example, the International Covenant on Civil and Political Rights has 169 state parties, the Convention on the Elimination of All Forms of Discrimination against Women has 189 and the Convention on the Rights of the Child has 196 state parties. See further: http://indicators.ohchr.org/ (accessed on 7 December 2017).

[101] Eleanor Roosevelt, 'Remarks at the United Nations' (New York, March 27, 1958).

[102] See further: Council of Europe Parliamentary Assembly. Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights: 9th report* (Strasbourg 2017). <http://website-pace.net/documents/19838/3115031/AS-JUR-2017-15-EN.pdf/18891586-7d6c-4297-b5f7-4077636db28e> accessed 29 November 2017.

[103] See, for example: Simmons (n 2) 350–351.

rights. Often scholars and practitioners alike have overlooked these challenges, maybe partly because they do not fit with the much-praised narrative of universality. However, this "mantra of universalism" can be counterproductive, as it does not enable a realistic analysis and understanding of the differences that inevitably exist in different countries. The idea that international law is universally applicable everywhere "has blurred our sense of reality" of how international human rights law operates outside the West. Besides, international human rights law is not implemented in an abstract vacuum but in concrete circumstances shaped by various domestic factors.[104] Thus, it is important to refocus attention on the limits of international (human rights) law if the aim is to understand what obstacles have impeded compliance with international human rights in many countries globally.

1.2.2. Are human rights universal globally "appropriate" standards as presumed by normative theories?

The normative approaches that guided the decisions of the CoE in the 90s presume that the idea of human rights is a universal and globally "appropriate" idea, so that states are motivated to ratify human rights treaties, reform their legal systems and change their human rights practices. Global and regional human rights protection frameworks have for more than seventy years aimed at ensuring universal protection of human rights in all corners of the world. Human rights protection has been an inalienable part of the value system and world vision of democratic countries. As explained by Onuma Yasuaki, Professor Emeritus of the University of Tokyo: "postwar international human rights law developed with the aim of overcoming the limitations of domestic human rights protection".[105]

Whereas some norms are indeed widely approved by different cultures, nevertheless judgments concerning what is moral and what is just diverge to a great extent. Human rights as a field is highly normative and deeply interconnected to debates on morality, dignity and justice. Roy Allison explains that norms are "inter-subjective standards of appropriate behaviour".[106] Norms define what is appropriate and what is not; they form shared assessments on a wide range of issues, while many norms are not shared on a global level. Issues of normativity and legitimacy, including with regard to human rights law, are interpreted in every country in the context of the specific circumstances of that country. As explained by Onuma Yasuaki:

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[104] Mälksoo, *Russian Approaches to International Law* (n 6) 160, 193.

[105] Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 367.

[106] Allison (n 35) 18.

> The interpretation of international law is thus influenced by various cultural and civilizational factors. They include understandings of the self and others, a sense and perception of history and the world, memories of past experiences such as those of military victories over neighbours, being under colonial rule, victimization in terms of wars and massive suppressions, racial or gender discrimination, and many others.[107]

Roy Allison emphasizes the existence of a strong regional component in interpreting norms, including human rights law, and key players in defining and enforcing norms are regional hegemons. Regional norms are "promoted, defined, and interpreted for that region by a regionally preponderant or hegemonic power", argues Allison.[108] He claims that hegemonic states define the "rules of the game" in their regional realm and enforce their specific construal of norms. Hegemons socialize other countries within their sphere of influence to view their interpretation of norms as legitimate.[109] In similar vein, Lauri Mälksoo emphasizes that "civilizational centres" construe their own "subjective truths".[110] These subjective truths might not make sense at all or be considered false in regions that are not in the sphere of influence of a certain civilizational centre.

In Mälksoo's view, understanding Russia's civilizational distinctiveness from the West is of crucial importance for understanding Russia's approaches to international law, human rights law and geopolitics. He posits that Russia's "Byzantine" views such as pursuing a unique "Russian idea" that is used to legitimize Russia's role as a guardian of its neighbourhood and refusal to "bow to the West" influence the present and the future of international law and Russia's geopolitics.[111] Whether one agrees with the claim of Russia's civilizational distinctiveness or not, it is inevitable that Russia as a regional hegemon has a substantial impact on the countries in its sphere of influence, including on issues related to human rights. Despite earlier hopes that all members of the CoE would adopt similar standards, regional hegemonic states such as Russia still aim to enforce their construal of human rights norms and attempt to socialize countries within their sphere of influence to consider their interpretation as legitimate and to consider other interpretations as illegitimate.

Although all major international human rights frameworks have been spreading the idea of the universality of human rights since the 1950s, it remains a reality that almost seventy years later human rights norms are still not accepted and implemented universally in all corners of the world. In every country, human rights are interpreted in the context of cultural and historical characteristics and narratives that are highly diverse. It must be acknowledged that whereas most national constitutions and fundamental laws echo international

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[107] Yasuaki (n 105) 21.

[108] Allison (n 35).

[109] *Ibid* 20.

[110] Mälksoo, *Russian Approaches to International Law* (n 6).

[111] *Ibid* 190, 192, 195.

human rights documents, in practice the premise of the global "appropriateness" of human rights is still not universally accepted. Not even the right to life enjoys universal recognition and protection, whereas some rights, especially certain civil and political rights, raise culturally highly sensitive questions concerning appropriate relationships between the individual, society and the state.[112] Although most constitutions enshrine civil and political rights or establish similar principles, the role of civil and political rights in national human rights agendas and factual implementation of civil and political rights deviate substantially. After World War II, the "West", led by the USA, and the "East", led by the Soviet Union, sparred over the role of civil and political rights and on the other hand, of the role of social and cultural rights. Even today, civil and human rights are often dismissed as "Western" by non-Western states.[113] Thus, although some rights and freedoms enjoy more support in the global arena – for example, prohibition of torture and genocide or the rights of the child – other rights, such as civil and political rights or rights and freedoms related to questions like abortion or sexual self-determination, which are closely connected to the issue of morals, do not enjoy widespread support in many countries. This applies both on the level of governments as well as societies and is the case in some Western countries as well as non-Western countries.

In some cases, governments – particularly when implementing some rights and freedoms is particularly costly for them – use the idea of cultural specifics to consciously avoid implementing international human rights standards and instead use arguments based on cultural or religious specifics to implement violent or discriminatory practices that their people might not approve. It is my view that arguments based on cultural specifics are rarely convincing when they are used to justify infringements of basic human rights. However, it is inevitable that as international human rights law imposes obligations on governments to act in certain ways or to refrain from certain actions in order to protect human rights in their countries, the attitude of governments towards international human rights standards is of key importance. Otherwise, implementation of rights and freedoms would not be possible. Thus, when governments do not acknowledge the idea of certain human rights and freedoms as universal globally "appropriate" standards, it is difficult for international frameworks to influence them to comply with such standards.

Moreover, not all regional or cultural influences should be considered *per se* wrong or harmful. As suggested by Onuma Yasuaki:

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[112] Simmons (n 2), 163.

[113] *Ibid.*

> Learning from different cultures and civilizations is key to producing ideas that may be widely learned by others and become universal. Hybridity is inevitable for any culture; society or civilization… one should deliberately take advantage of such hybridity in intellectual undertakings, including the study of international law.[114]

It is my view that international human rights law cannot be claimed to be a purely Western concept: for example the UDHR, the most universally accepted human rights document, was created as a result of collective work by many countries, both Western and non-Western. Mutual cooperation on human rights matters is ongoing in various global and regional human rights frameworks. However, the UDHR as well as the ECHR are to a great extent based on the constitutions and legal traditions of Western states and reflect the attitudes and beliefs that developed in the West more than it reflects the attitudes and beliefs of Arab, Asian or African countries. I am of the position that the claim of universal acceptance of the idea of human rights can only become true once it encompasses more diverse ideas and interpretations from different cultures and civilizations. Inevitably, many states as well as cultures struggle to accept the premise of universality, at least as it has been construed so far.

1.2.3. Norm-takers and norm-shapers: changing roles

The United States and Europe, with their liberal democratic systems, have been the leaders and rule-makers of the international legal system since the end of World War II. However, this transatlantic momentum is in decline. The role of countries such as Brazil, Russia, India, China, and South Africa (BRICS countries) included in the sphere of international law and human rights law is rising. It is widely speculated that these developments make international law move closer to its Westphalian origins, with a primary focus on sovereignty and a lesser focus on human rights.[115] Until very recently, the scholarship on international law was very West-centred. By the late 20th century, major publishing houses such as Cambridge University Press or Oxford University Press had not published a single treatise or textbook on international law written by an Asian international lawyer in Asia, whereas Asians make up more than half of humankind. In the 21st century some Asian countries are likely to catch up or supersede leading Western nations and this will inevitably have an influence on the construal of international law.[116] As a result, international law as a whole is

[114] Yasuaki (n 105) 14–15.

[115] William W Burke-White, 'Power Shifts in International Law: Structural Realignment and Substantive Pluralism' [2015] 56 Harvard International Law Journal 1–80.

[116] Yasuaki (n 105) 1.

moving from West-centric to multi-centric and multi-civilizational, argues Onuma Yasuaki.[117]

For example in 2011, the United Nations Human Rights Council (UNHRC) passed a resolution[118] calling for reinterpretation of human rights on the basis of the role of traditional values, proposed by Russia and the Organisation of the Islamic Conference. In 2014, the UNHRC passed another resolution[119] on the protection of the family tabled by a group of thirteen countries including Russia, China, Egypt and Uganda. Both resolutions marginalize the concept of equality and non-discrimination, the cornerstones of human rights. However, whether Western countries like it or not, it cannot be denied that the impact of non-Western countries on the development of international human rights is going to steadily increase.

The idea of spreading values related to Western liberal democracies – including protection of fundamental and inalienable human rights – is problematic for several other reasons. The concept of socialization of human rights pictures Western democratic states and organisations as sincere defenders of democracy and human rights. It also places efforts to socialize or coerce countries into compliance with these values into a narrative of "doing good". At the same time, the rather ugly parts of these processes are forgotten, claims Ause Zarakol.[120] The majority of international relations theories presume that established democracies and international institutions have made and are still spearheading efforts to enforce human rights and to incentivize others to join, forgetting that, for example, during the Cold War years many established democracies opposed binding human rights instruments, as indeed many still do.[121] Most of these theories stem from the idea that non-compliance is endogenously driven, whereas compliance is a result of external stimuli, thus undermining the agency of non-Western states. Non-Western states have agency only when they commit "bad" deeds, whereas "good" deeds – or which read "compliance with norms supported by the West" – are a result of Western influence, notes Zarakol. She suggests that much of what these theories consider to be endogenous to particular states can rather be explained by the effects of modernity and pressures from the international system.[122]

Zarakol posits that modern international society was built on a dynamic of stigmatization, not on friendly persuasion or the stubbornness of some countries

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[117] Yasuaki (n 105).

[118] Human Rights Council, 'Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind' (A/HRC/RES/16/3; 8 April 2011).

[119] Human Rights Council, 'Protection of the Family' (A/HRC/26/L.20/Rev.1; 25 June 2014).

[120] Ayşe Zarakol, 'What Made the Modern World Hang Together: Socialisation or Stigmatisation?' [2014] 6 International Theory 311–332; 328.

[121] Moravcsik (n 58) 225.

[122] Zarakol, 'What Made the Modern World Hang Together: Socialisation or Stigmatisation?' (n 120) 311–312, 328.

in understanding "the better, more rational, or humane course of action".[123] Non-Western people have been characterized as "backward", "atavistic"; "barbarous", "uncivilised", "hard-to-socialise", as not "modern, developed or industrialized or secular or civilized or Christian or democratic enough".[124] Zarakol's view, treating such labels as objective assessments, has led to stigmatization of non-Western countries and to dehumanizing non-Western peoples by so-called "normals" (Westerners).[125]

Zarakol considers, similarly to several scholars representing rational choice approaches, that the primary motivators in the international system are status, respect and acceptance, a wish to belong to the "same club".[126] Most communities in the world are in a "constant state of identity struggle", as living up to Western standards of modernity can be extremely difficult without feeling inauthentic, Zarakol notes.[127] Being stigmatized as an outsider involves serious costs for a country and "leaves a permanent mark on the national habitus" Zarakol suggests.[128] In order to gain international respect or acceptance, stigmatization might lead to externally forced compliance, meaning that states comply, at least to some extent, because they are forced to do so due to external pressures. However, this does not mean that new norms are internalized. Instead, stigmatization might lead to strengthening of local practices and clear rejection of human rights.

Thus, even when countries make efforts to comply with international human rights standards but are in the role of "student" and experience stigmatization, the reforms they make do not necessarily say anything about true human rights practices on the ground. In some cases the response to the identity struggle related to living up to Western standards is to strengthen certain practices that directly oppose international human rights standards. Many societies are experiencing a revival of conservative values emphasizing the role of religious traditions and morality and downgrading individual rights and freedoms in deciding how to lead one's life. The West-centric ideational power structure – implying that the ideational products of the West are more advanced and should be adopted by non-Western nations – has not been adopted by many non-Western states and instead, has caused frustration and motivated them to challenge the current international legal order, claims Onuma Yasuaki. It should

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[123] *Ibid,* 312–313.

[124] Ayse Zarakol, *After Defeat: How the East Learned to Live with the West* (Cambridge University Press 2010) vol 118, 324.

[125] Zarakol brings an example of the 19th century Standard of Civilisation, dividing nations into 'civilised', 'semi-civilised' and 'savage'. This hierarchy was used to justify colonization, which was argued to be for the benefit of states incapable of self-rule as well as justifying selective applicaton of the sovereignty principle. See further: Zarakol, 'What Made the Modern World Hang Together: Socialisation or Stigmatisation?' (n 120) 326.

[126] Zarakol, *After Defeat: How the East Learned to Live with the West* (n 124) 12–13, 24.

[127] *Ibid* 5.

[128] *Ibid* 22.

also be considered that such ideational power structure imposed on non-Western nations no longer reflects the changing power situation and the overall state of play, observes Yasuaki.[129]

The point made by Zarakol – that the concept of socialization places efforts by Western states and international frameworks to socialize or coerce countries into compliance with international human rights law into a narrative of "doing good", whereas problematic aspects related to the socialization process are downplayed – seems justified. However, in my view some of Zarakol's arguments are too black-and-white. She blames all the negative consequences on Western states and places non-Western states into a narrative of voiceless victims freed from responsibility, which seems just as unbalanced as uncritically praising the activities of Western states. Nevertheless, as pointed out by Yasuaki, construal of international human rights law has indeed been very West-centred for most of the time and Western states have been in the role of teachers of human rights law. On the one hand, this is natural, because inevitably the institutions, norms and legislation of Western countries have influenced the birth of international human rights law. However, international human rights law is increasingly multi-centric and multi-civilizational and the dynamics of roles of norm-takers and norm-shapers has changed. Many non-Western countries are no longer willing to accept Western states and international frameworks as teachers and have started to defend their own approaches to international human rights law domestically, regionally and globally. One reason for this may be stigmatization, as pointed out by Zarakol, but surely this is not the only cause. In any case it cannot be denied that such processes have changed the rules of the game, while the ability of Western states and international frameworks such as the CoE to influence compliance with international human rights law in countries that no longer accept them as authorities has decreased.

1.2.4. The arrangement of the CoE: a limited toolbox

The ECHR as an international human rights treaty is an unusual type of law. International human rights treaties are negotiated internationally and enact obligations under international law, but "create stakeholders almost exclusively domestically".[130] Whereas human rights norms enacted in the ECHR are supranational, the CoE itself as an umbrella organization is an international organization.[131] Hence, cooperation within the Council of Europe, following its goals and standards and implementing the Convention rights and the decisions of the ECtHR remain the duty and opportunity of governments operating in their

[129] Yasuaki (n 105) 4.

[130] Simmons (n 2) 126.

[131] Jordan (n 68) 661.

domestic arenas. The CoE system relies for effectiveness "ultimately on the good will of nation-states whose commitment to the ECHR system is based on traditional, international-law type of obligations".[132] It is characteristic of international human rights norms that they are not self-executing: they cannot directly address many of the root causes of rights violations and their effect on the domestic level depends on the priorities and actions of domestic governments. Inevitably, interpretation and implementation of international human rights takes place on the domestic level and can be effective only when international human rights norms are incorporated into the national legal order. [133]

Whereas the ECtHR has had a profound impact on law and practice in its member states, it can never substitute national protection of human rights. The mechanism "was always meant to play a subsidiary or "back-up" role".[134] In accordance with the principle of subsidiarity, the primary responsibility for enforcing the ECHR lies with national institutions. The CoE member states have agreed to execute the judgments of the ECtHR. Moreover, they are required to take all necessary measures to advance implementation of human rights on the domestic level.[135] However, fulfilling obligations under the ECHR does not mean an obligation to execute strict black and white orders from Strasbourg. For example, the ECtHR has worked out a concept of "margin of appreciation" referring to the space for manoeuvre available to national authorities in fulfilling their obligations under the ECHR. Considering the great diversity of cultural and legal traditions among member states and that in many areas there is even no European consensus, the concept of margin of appreciation allows member states to balance their sovereignty with their obligations under the ECHR.[136] The margin of appreciation is also necessary because inevitably local

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[132] Sadurski (n 67).

[133] Christopher McCrudden, 'The Pluralism of Human Rights Adjudication' in Liora Lazarus, Christopher Mccrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014); Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005); Katre Luhamaa, 'Universal Human Rights in National Contexts: Application of International Rights of the Child in Estonia, Finland and Russia' (Dissertationes Iuridicae Universitas Tartuensis 2015) 47; Simmons (n 2) 350–351.

[134] Marie-Louise Bemelmand-Videc. 'Guaranteeing the authority and effectiveness of the European Convention on Human Rights. Report by the Committee on Legal Affairs and Human Rights.' Doc. 12811 3 January 2012 <https://www.eerstekamer.nl/eu/documenteu/12811_report_from_marie_lousie/f=/vix6jwut9kuj.pdf> accessed on 29 November 2017.

[135] Council of Europe Parlamentary Assembly, *Implementation of judgments of the European Court of Human Rights* (Strasbourg, 9 September 2015) Doc. 13864, para. 53 <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=22005&lang=en> accessed on 29 November 2017 (hereinafter: PACE report 2015).

[136] The Lisbon Network, Council of Europe, *The margin of appreciation* (2008) <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp> accessed on 29 November 2017 2017. See also: Steven Greer, *The Margin of Appreciaton: Interpretation and Discretion Under the European Convention on Human Rights* (Human rights files No. 17, Council of Europe Publishing, July 2010).

actors are closely linked with local circumstances and should also be able to evaluate those circumstances. "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge" to interpret the content of certain concepts, such as morals, in a specific domestic context.[137]The margin of appreciation "is given both to the domestic legislator (prescribed by law) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force".[138] The importance of the principle of subsidiarity and the margin of appreciation in the CoE system clearly indicate states' primacy of place in defending human rights and acknowledge that implementation of human rights law is an inherently domestic issue.[139]

Although the CoE is the most effective international human rights protection system in the world, its mechanisms to improve implementation are mainly limited to "soft power of pressure, shaming, and the threat of expulsion"[140], notes Pamela A. Jordan. Political means or "soft power" include expert opinions of the Venice Commission and various country missions. There are also legal means, which include the ECHR and its control mechanism, most importantly the European Court of Human Rights.[141] The department for execution of ECtHR judgments advises and assists the Committee of Ministers in supervising the execution of judgments and supports the member states in their efforts to achieve full, effective and prompt execution of judgments. [142] However, the CoE does not have injunctive power to oblige member states to reform their legislation or to take specific action to improve human rights implementation. The main mechanism for punishment is "naming and shaming". A member state may theoretically be suspended or expelled. For example, when a state categorically and persistently refuses to execute an ECtHR judgment, exclusion from the CoE is one possible response under Article 8 of the Statute.[143] Whereas

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[137] *Handyside v The United Kingdom* (App 5493/72) ECtHR 7 December 1976, para 48.

[138] *Ibid*.

[139] Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 284.

[140] Jordan (n 68) 686.

[141] Jonsson Cornell (n 7) 23.

[142] Council of Europe Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 9th Annual Report of the Committee of Ministers* (Strasbourg 2015) 19. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168062fe2d> accessed on 29 November 2017.

[143] In accordance with Article 8 of the Statute "[a]ny member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine." (Statute of the Council of Europe. ETS 1, London, 5.V.1949)

several states have been temporarily suspended from the Parliamentary Assembly[144], none have been permanently excluded from the CoE in its history.

Human rights are a difficult policy area to address because so few good tools are at the disposal of the international community to influence internal practices.[145] Due to a rather weak set of enforcement mechanisms available to put human rights norms into operation at the international level "the first port of call… for effective implementation of these international norms is to be at the domestic level".[146]As the "enforcement toolbox" of the ECtHR is limited, implementation of ECtHR judgments is an inherently political process, depending on domestic capacity and political will, argues Courtney Hillebrecht, Associate Professor in the Department of Political Science at the University of Nebraska-Lincoln.[147] Hillebrecht firmly criticizes the perspective according to which membership in international institutions is a pathway to successful implementation of human rights. In her view, compliance with the rulings of international human rights tribunals is an inherently domestic affair and any approach to compliance that does not focus on the role of domestic institutions is simply "dummy socialization". [148] Beth Simmons also emphasizes the importance of domestic actors in shaping human rights practices. She suggests that, although transnational actors have an important influence on compliance, they are too often presented as the "white kings" that make demands for domestic actors who are credited with an inability to decide, act and affect human rights

[144] Greece withdrew from the CoE following installation of the military dictatorship in 1967, just before the Committee of Ministers planned to vote for its suspension. Greece was readmitted in 1974, after the fall of the military dictatorship. Turkey was suspended from the Parliamentary Assembly following a military coup in 1980. In 1984, after democratic elections took place in Turkey, the country regained its right to vote in the Parliamentary Assembly. Russia was suspended from voting in the Parliamentary Assembly from 2000 to 2001 due to state involvement in violent conflicts in Chechnya. Russia was suspended from voting in the Parliamentary Assembly for the second time in 2014 after the annexation of the Crimea. See further: Withdrawal, expulsion and suspension of a member state of the Council of Europe (The University of Luxembourg's CVCE.eu research infrastructure; 8 July 2016) <https://www.cvce.eu/content/publication/2006/1/9/f9b31f98-f1a1-407c-97ad-7e92363117fd/publishable_en.pdf> accessed on 29 November 2017; See also: Stefanie Schmahl and Marten Breuer (Eds.) *The Council of Europe: Its Laws and Policies* (Oxford University Press 2017) 66.

[145] Beth A Simmons, 'Money and the Law: Why Comply with the Public International Law of Money' [2000] 25 Yale Journal of International Law; 373.

[146] Christopher McCrudden, 'The Pluralism of Human Rights Adjudication' in Liora Lazarus, Christopher McCruden and Nigel Bowles (eds) *Reasoning Rights. Comparative Judicial Engagement* (Hart Publishing, Oxford and Portland, Oregon 2014) 7.

[147] Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 280.

[148] Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (n 24)3, 38.

compliance.[149] Local actors are agents capable of choosing tools and achieving their aims, not "voiceless victims to be rescued by altruistic external political actors".[150] In her view, changes in practices related to human rights depend on the nature of domestic demands, institutions, and capacities, so that it is vital to understand local circumstances and motivators.[151]

Thus, it derives from the literature analysed above that due to the arrangement of the CoE the organisation can have only a subsidiary role in influencing compliance with the ECHR. The toolbox of the CoE in influencing compliance is inevitably limited and the primary responsibility as well as the mechanisms to guarantee compliance with human rights standards rests with governments and depends on local circumstances.

The CoE's limited toolbox also has some other important implications. Whereas normative theories assume that states behave in an altruistic way and by ratifying treaties, states gradually internalize new norms and values, in reality not all countries have sincere motives for ratifying treaties such as the ECHR. International treaties create binding law (instrumental role), but they also declare and express the positions of ratifying countries (expressive role), notes Oona Hathaway, Professor of International Law at Yale Law School.[152] When a country genuinely intends to comply with a treaty it has ratified, the instrumental and expressive functions of the treaty "work in tandem". However, states may view ratification as an expressive tool and have no true intention to abide by the treaty. Ratification provides quick reputational benefits and can offset pressure by other countries. Membership in international organisations, ratification of human rights treaties or making some reforms such as including human rights norms in constitutions can suffice for gaining reputational benefits. Ratification itself is also not very costly for governments, whereas compliance is.[153] Thus, especially when effective monitoring and enforcement is weak, when serious sanctioning for failure to comply is unlikely or otherwise the costs related to non-compliance are low, a country can enjoy the benefits related to expressing commitment to human rights even when it fails to comply with the treaty.[154] Oona Hathaway claims: "There is arguably no area of

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[149] Simmons (n 2) 358.

[150] *Ibid* 126.

[151] *Ibid* 372–373.

[152] See: Hathaway (n 87) 2020. The expressive role of law focuses on the statement the law makes and its social meaning. Under the expressive approach, law plays an important role in management of social norms and influencing the behaviour of various actors. See also: Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania law review 2021–2053.

[153] Hathaway (n 87) 2012–13.

[154] *Ibid* 2006–07, 2011. See also: Louis Henkin, *International Law: Politics, Values and Functions: General Course on Public International Law* (M Nijhoff 1989) 253.

international law in which the disjuncture between the expressive and instrumental aspects of a treaty is more evident than human rights".[155]

Developing Hathaway's approach, Beth Simmons differentiates between "sincere" and "strategic" ratifiers. In the case of sincere ratifiers, the political goals of governments and the obligations undertaken with an international treaty do not diverge diametrically, whereas strategic ratifiers lack strong value commitment and their primary incentive for ratification is avoiding the costs related to social and political pressures, e.g. avoiding being an "outsider".[156] Strategic ratifiers unwilling to align domestic political goals with obligations undertaken can easily abuse human rights treaties.

Hence, it is my view that, considering that the primary responsibility for ensuring compliance with the ECHR rests with governments – as is also reflected in the arrangement of the CoE based on the principle of subsidiarity – and considering that the enforcement and control mechanisms of the ECHR are not very strong, when a country has been a strategic, rather than a sincere ratifier, the CoE has very limited means to influence the country into compliance.

1.3. Rational choice approaches to human rights: costs and benefits of compliance

Scholars representing the rationalist school of thought and scholars mixing rational choice and normative approaches have criticized purely normative models for over-emphasizing the altruistic motives of countries in implementing human rights as well as the role and ability of international actors in creating changes on the domestic level. Moravcsik argues:

> Surely some domestic support for democratic governance may be ideological, even idealistic, in origin. But if we can learn a single lesson from the formation of the world's most successful formal arrangement for international human rights enforcement, it is that in world politics pure idealism begets pure idealism in the form of parliamentary assemblies and international declarations.[157]

Frank Schimmelfennig warns that the role of international institutions in creating changes in human rights practices should not be overestimated as in many cases they only reinforce previously existing domestic consensus.[158]

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[155] Hathaway (n 87) 2007.

[156] Simmons (n 2) 12–13, 58, 113.

[157] Moravcsik (n 58) 248–49.

[158] Frank Schimmelfennig, 'Strategic Calculation and International Socialization: Membership Incentives, Party Constellations, and Sustained Compliance in Central and Eastern Europe' (2005) 59 International Organization 827–860; 856.

Rational choice models stem from the idea that states are rational actors motivated by self-interest. When states decide whether to ratify or to comply with international treaties such as the ECHR, they calculate the costs and benefits of various alternatives. Countries comply with human rights treaties when this is in line with domestic interests: when it helps to achieve strategic goals, to gain material or social benefits or to avoid costs such as sanctions or loss of reputation. Compliance is realistic when incentives outbalance the costs of compliance.[159] Rational choice theories explain compliance with international treaties mainly by coercion (influencing the behaviour of states by rewarding conformity and avoiding non-conformity through material rewards and punishments),[160] hegemony, sanctions, incentives, material self-interest and reputational concerns.[161] Rational choice scholars take institutions seriously and analyse how international institutions and power relations influence the pursuit of fixed interests.[162] Rational theories stress the role of law in creating institutions enabling domestic audiences to hold their governments accountable through indirect pathways such as providing domestic actors with relevant information and legitimizing their rights demands.[163]

Andrew Moravcsik views enforcement of human rights norms and rule of law as a self-interested tactical step for governments to "lock in" democratic rule and provide safeguards against threatening undemocratic political alternatives such as military officers, communists, fascists, or religious fundamentalists. In Moravcsik's view, implementation of human rights and rule of law helps to constrain such nondemocratic groups.[164] He suggests that voluntarily joining and complying with human rights treaties is of greatest use for new democracies, because their interest in stabilizing the political situation against non-democratic threats is the highest. In non-democratic countries and in established

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[159] See: Hathaway (n 87) 1950–51, 2002; Keith (n 30) 354–357; Checkel, 'Why comply? Social learning and European identity change' (n 58) 559; Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 International Security 5–44; 5,13 .

[160] Goodman and Jinks (n 57) 633; See further on coercion-based theories: Jack L Goldsmith and Eric A Posner, 'A Theory of Customary International Law' (1999) The University of Chicago Law Review 1113–1177; Jack Goldsmith, 'Sovereignty, International Relations Theory, and International Law' (2000) 52(4) Stanford Law Review 959–986; Jack L Goldsmith and Eric A Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective' (2002) 31 The Journal of Legal Studies 115–139; Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) California Law Review 1823–1887.

[161] Bates (n 58) 1170; Goodman and Jinks (n 57) 625.

[162] Hathaway (n 87) 1947–48; Slaughter and others (n 57) 381.

[163] Simmons (n 2) 10; Xinyuan Dai, 'Why Comply? The Domestic Constituency Mechanism' [2005] 59 International Organization 363–398; 387–88.

[164] Moravcsik (n 58) 220, 228–29.

democracies the treaties are not able to provide enough benefits to outweigh the high sovereignty costs such as changing domestic legislation and adjudication.[165]

In line with Moravcsik, Frank Schimmelfennig suggests that compliance with international treaties and successful socialization[166] can be expected when benefits related to socialization are higher than costs for governments. He stresses that target states must receive tangible incentives that motivate the country to make changes.[167] Requirements of international organisations such as free and fair elections, division of powers, protecting civil and political rights and rights of the opposition and minorities entail various costs for governments. Costs need to be balanced by positive incentives such as international legitimacy, political power and reputation, economic assistance, the security and welfare of the country, and the like.[168]

However, in some cases the costs related to implementing human rights law are too high for states. Especially when the legitimacy of governments is based on anti-liberal, nationalist, populist, or communist ideologies and the ruling elite is using authoritarian practices for preserving its power, the costs for the government are usually higher than benefits. Whereas some "cosmetic changes or tactical concessions" can be made in order to gain some political benefits, true adaptation to liberal norms is unlikely, as this would undermine the government's rule. Besides, for some countries, none of the incentives provided by international frameworks is high enough. Schimmelfennig stresses that when a country is very powerful, incentives such as political legitimacy or economic assistance are not high enough motivators, so that socialization of human rights in these countries is unlikely.[169]

In the context of her domestic politics theory of treaty compliance, Beth Simmons argues that governments engage in cost-benefit analyses in the context of their values, region, national institutions, and time horizons and are willing to undertake treaty commitments when they expect the costs related to compliance to be reasonable. She claims that the key to compliance is a

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[165] *Ibid* 119–220, 229.

[166] According to Schimmelfennig, socialization can be successful when international norms are institutionalized into the domestic decision-making processes and their protection is sanctioned by domestic mechanisms. See: Frank Schimmelfennig, 'International Socialization in the New Europe: Rational Action in an Institutional Environment' (2000) 6 European Journal of International Relations 109–131; 112.

[167] Schimmelfennig argues that only the EU and NATO have used reinforcement by tangible punishments and rewards e.g. high material and political rewards. Such rewards have been able to motivate longstanding domestic change regarding democracy, rule of law and respect for human rights and fulfillment of several other political conditions that are necessary conditions for admission. See: Schimmelfennig, 'Strategic calculation and international socialization: Membership incentives, party constellations, and sustained compliance in Central and Eastern Europe' (n 158) 828, 832–833.

[168] *Ibid* 828, 830, 834–835.

[169] Simmons (n 2*)* 289, 837.

combination of domestic demands, democratic institutions supporting rights demands and domestic context favourable to human rights. [170] She suggests: "The more a treaty addresses issues clearly related to the ability of the government to achieve its central political goals, the weaker we should expect the treaty's effect to be".[171] Governments are often motivated to abuse civil and political rights rather than rights of children, because the costs are higher in the case of civil and political rights. Exercising them might be potentially dangerous for the ruling elite. Simmons found in her study that nondemocratic governments are especially reluctant to commit themselves to treaties focusing on civil and political rights.[172]

It is noteworthy to point out that, in the case of human rights law, other countries often have low incentives to "police non-compliance". Whereas in some areas of international law, such as trade agreements, "competitive market forces" exist that motivate compliance[173], such incentives simply do not work in the case of human rights law.[174] For human rights law, the costs of non-compliance on behalf of one country tend to be low for other countries, because what a government does with its own citizens in its own territory does not usually pose a direct threat of harm to other states.[175]

So, what costs are related to compliance with the ECHR? Human rights law is a specific branch of international law in the sense that it focuses on the vertical relationship between states and citizens instead of the classic horizontal relationship between states, as is the case with other branches of international law.[176] It is a distinctive feature of international human rights treaties that they empower individuals to go *vis-à-vis* their governments.[177] Human rights law is designed "to hold governments accountable for purely internal activities".[178] Thus, international human rights treaties can "have a potentially dramatic impact on the relationship between citizens and their own government".[179] Costs related to losing sovereignty – in the shape of "the right of each state to determine its own domestic, social, legal and political arrangements free from

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[170] *Ibid* 67, 111.

[171] *Ibid* 16.

[172] *Ibid* 109.

[173] Simmons (n 145) 323–24.

[174] Louis Henkin and others, *How Nations Behave: Law and Foreign Policy* (2d ed, New York : Published for the Council on Foreign Relations by Columbia University Press 1979) 235.

[175] Hathaway (n 87) 1938.

[176] Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (n 24) 3.

[177] Moravcsik (n 58) 217; Simmons (n 2) 3.

[178] Moravcsik (n 58) 217.

[179] Simmons (n 2) 126.

outside interference"[180] – and costs related to bringing national legal systems into accordance with treaties have a significant impact on the decision to ratify and/or to comply with international human rights treaties.[181] The ECHR has a strong impact on the sovereignty of its member states, which in turn has an influence on compliance with the ECHR. The primary focus of the ECtHR is on the relationship, on disputes between the citizen and the state. The supranational enforcement mechanism, which enables citizens to enforce their rights at the international level, is regarded as a major strength of the ECHR. Surely, from the perspective of human rights protection the supranational enforcement mechanism of the ECHR is a major strength as it enables "bridging the gap" between human rights as enshrined in human rights treaties and imperfect execution on the domestic level.[182] However, enabling individual constituents to sue their governments and obliging governments to execute judgments clearly has an impact on exercising sovereignty.[183]

However, in my view it cannot be argued that the framework of the CoE inherently threatens the sovereignty of its member states. First of all, all member states have voluntarily joined the CoE and have voluntarily undertaken the obligations that this step involves. Entering into international agreements is also part of exercising sovereignty. Moreover, the framework of the CoE is built on the principle of subsidiarity and the concept of margin of appreciation is aimed at balancing the right to sovereignty and the need to ensure a uniform level of protection of the rights guaranteed by the ECHR in different member states.[184] Nevertheless, for some states these mechanisms built into the CoE system do not provide enough comfort. This is especially evident in cases where member states are reluctant to enforce ECtHR judgments due to conflict with their national constitutions and thus, in essence, their national sovereignty. According to Alec Stone Sweet, Leitner Professor of Law, Politics, and International Studies at Yale Law School, the ECHR has evolved into a transnational constitutional regime[185] and not all members are happy with such developments. It is well documented that countries are less motivated to comply with obligations that interfere more with their national sovereignty. For example, data concerning compliance with judgments of the ECtHR reveal that countries are more willing to comply with financial reparations than general measures or any of the other

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[180] *Ibid* 3.

[181] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' [2000]54 International organization 421–456; 455; Simmons (n 2) 3.

[182] Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 285.

[183] Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (n 24) 3.

[184] See also Section 1.2.4 of this study.

[185] Alec Stone Sweet, 'The European Convention on Human Rights and National Constitutional Reordering' (2012) Yale Law School Legal Scholarship Repository, paper 4495; 1859–1868.

types of obligation. According to Hillebrecht, this tendency refers to a reluctance to address structural problems, thus resulting in continual violations of the ECHR.[186]

The requirements of human rights treaties can be quite "uncomfortable" for many states. They require reforms that might have widespread implications on the internal arrangements of the country. The obligation to hold free and fair elections, to respect the rule of law, to protect civil and political rights of all the people regardless of their political views, religion, race, sex or sexual orientation entails costs that are simply too high for some governments. This is particularly the case when the government promotes anti-liberal, nationalist, populist, or communist ideologies and the ruling elite remains in power due to authoritarian practices. Making true changes towards better implementation of human rights would undermine the government's rule. Accordingly, such governments tend to engage in cosmetic amendments, but largely refuse to change the *status quo.* Although the CoE does respect the sovereignty of its member states and the principle of subsidiarity, and although the concept of margin of appreciation should provide enough comfort for member states, in some cases the costs for sovereignty are still too high and states choose not to comply.

1.4. Preconditions of compliance with human rights treaties: making a difference when domestic opportunities present themselves

In my view, the normative socialization theories introduced in Section 1.1 of this study have not turned enough attention to specific domestic circumstances that can facilitate or inhibit implementation of human rights. I agree with Frank Schimmelfennig that it is naïve to think that international organisations can "create and consolidate democratic systems on their own… however, they are able to make a difference when domestic opportunities present themselves."[187] Thus, international institutions, including the CoE, can have an influence on domestic practices when certain preconditions are met. Subsequently I introduce the conditions underlying successful implementation of human rights treaties on the domestic level, as identified by scholars influenced by the rational choice approach to compliance with international human rights law.

[186] Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 285.

[187] Frank Schimmelfennig, 'European Regional Organizations, Political Conditionality, and Democratic Transformation in Eastern Europe' (2007) 21 East European politics and societies 126–141; 137.

1.4.1. Well-functioning domestic institutions and constitutional framework

Various scholars scrutinizing the preconditions for successful compliance with international human rights law emphasize the pivotal role of domestic institutions. Beth Simmons argues that the effects greatly depend on the domestic political context into which the treaties are inserted: "Treaties alter politics; they do not cause miracles. They supplement and interact with domestic political and legal institutions; they do not replace them".[188]

A functioning constitutional framework, in the shape of "an enforceable constitution, courts and other institutions with the power and legitimacy to ensure that the constitution is respected and adhered to, in combination with a social and political context respecting the constitution and the values expressed therein",[189] is a crucial factor underlying successful implementation of international norms in the socialization process, argues Anna Jonsson Cornell, Associate Professor and senior lecturer in comparative constitutional law at Uppsala University. Constitutional socialization (reforming constitutional rules in order to foster a liberal society) is an important factor in determining whether compliance with international human rights can be expected or not.[190]

Tonya Putnam, a lawyer and Associate Professor of Political Science at Colombia University, highlights that in the long run "domestic institutions and domestic arrangements will determine the degree of protection afforded to the fundamental human rights and freedoms".[191] Underlining the role of constitutions, she stresses that these domestic institutions and arrangements are formally expressed "first and foremost in constitutions."[192]

The role of domestic institutions as well as the practices and values prevalent in those institutions as key factors for influencing change in human rights practices is also of key importance in the theory of Oona Hathaway. She emphasizes that, in order to improve implementation of human rights in domestic contexts, it is vital to reform domestic institutions: to develop institutional capacity and to overcome "the institutional inertia" that largely contributes to slow transformation of human rights practices in countries with authoritarian pasts.[193] When a majority of government officials used to repressive means and other human rights violations remain in their posts, this considerably hinders effective reforms. In Hathaway's view, "repressive behaviour lingers long after the initial

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[188] Simmons (n 2*)* 16.

[189] *Ibid* 6.

[190] Jonsson Cornell (n 7) 4.

[191] Tonya L. Putnam, 'Human rights and sustanable peace' in Stephen John Stedman and others (eds), *Ending Civil Wars: The Implementation of Peace Agreements* (Lynne Rienner Publishers 2002) 246.

[192] *Ibid.*

[193] Hathaway (n 87) 2003, 2025.

impetus for it disappears… governments and the individuals who make decisions within them become habituated to engaging in human rights violations, and this behaviour takes time and continued conscious effort to change".[194] Hathaway also highlights the need to increase costs related to human rights violations. She proposes that in order to stop countries from using ratification "as a symbolic substitute for real improvements" more effort is needed to improve the monitoring and enforcement of treaty obligations.[195]

Pro-compliance partnerships – including executives, judges, legislatures, and civil society actors – take responsibility for the compliance process and can hold governments accountable. Overall, domestic institutions are the main facilitators of human rights compliance, claims Courtney Hillebrecht.[196] Hillebrecht emphasizes, "The stronger the domestic institutional constraints, the more likely governments are to comply with the rulings".[197] When executive power is strong and other institutions are weak, countries tend to engage in "*à la carte* compliance": they comply partially, select what suits them and what does not.[198]

Pamela A. Jordan, Assistant Professor of Politics and Global Affairs at Southern New Hampshire University and at the Davis Center for Russian and Eurasian Studies, Harvard University, stresses the central role of domestic institutions. Her research has demonstrated that in former Soviet bloc countries executive agencies and law enforcement officials play a great role in implementing international human rights standards and determining whether these standards are complied with. She also emphasizes the role of civil society, especially the impact of NGOs on human rights implementation, as NGOs can pressurize leaders to internalize international standards.[199]

The characteristics of human rights implementation structures that influence the state's capacity to implement human rights law are also of key importance, according to Dia Anagnosto and Alina Mungiu-Pippidi. Human rights protection has a crosscutting nature, in that it "permeates nearly the entirety of state policies and spheres of action, and therefore implicates a broad range of institutions and actors with distinct competences".[200] Domestic arrangements for implementing the case law of the ECtHR "are closely linked to the broader policy-making processes in the legislative, administrative, and executive spheres. Therefore they both reflect and in turn reinforce the quality of legal infrastructure

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[194] *Ibid* 2003.

[195] *Ibid* 2003, 2025.

[196] Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (n 24) 3.

[197] *Ibid* 58.

[198] *Ibid* 60, 64, 121.

[199] Jordan (n 68) 665. See further: Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (TPB 2004); Susan Burgerman, *Moral Victories: How Activists Provoke Multilateral Action* (Cornell University Press 2001).

[200] Anagnostou and Mungiu-Pippidi (n 29) 200.

capacity of the state more broadly, namely, the capacity to enact and enforce laws and policies predictably and impartially."[201]

The overall ability to enact laws and deliver policies is closely linked to pursuing necessary reforms and to effective human rights implementation in general. Legal infrastructure capacity and the government effectiveness of a state are closely tied to effective implementation of human rights in the CoE, as demonstrated by Dia Anagnostou and Alina Mungiu-Pippidi. "When such capacity and effectiveness are high and diffused, the adverse judgments of the Strasbourg Court are unlikely to be obstructed or ignored, even when the government, political elites, or other actors are reluctant and not in favour of substantive remedies" they note.[202]. Besides, specific domestic execution arrangements developed by CoE countries considered to be successful implementers are markedly different from those of weak performers, as research has demonstrated. In the former case, implementation structures are capable of influencing legislative and policy processes as they are empowered with both legal capacity and political weight. However, institutions in weak implementers "lack the political clout and resources to influence policy formulation and enforcement." [203] Successful implementers also have efficient review and control mechanisms in place regarding all branches of powers that weak implementers tend to lack. Weak implementation arrangements also result in lengthy implementation periods and failure to tackle the root causes of violations.[204]

From the perspective of the CoE, the status of the ECHR in the domestic legal hierarchy matters greatly: whether other legislation is in accordance with it and whether the courts interpret fundamental rights and freedoms in the light of the case law of the ECtHR. Moreover, it is of crucial importance how well international human rights provisions and judgments of international courts are situated within the larger rights context of the state. Countries with a more advanced rights policy are also more successful implementers, as derives from research by Hillebrecht.[205] The mechanisms for individual complaints and enforceability of the judgments of the ECtHR depend on relevant domestic legislation and the work of domestic institutions. When countries fail to enforce judgments on the domestic level, it makes it *de facto* impossible to grant citizens the protection of the Convention. [206]

Implementation of human rights requires efficient work by various institutions such as courts, legislatures, governments, and civil society actors; however, the process of implementation predominantly relies on the govern-

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[201] *Ibid* 220

[202] *Ibid* 205.

[203] *Ibid* 224.

[204] *Ibid*

[205] Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 279, 284, 298.

[206] Jordan (n 68) 686.

ment.[207] Whereas the primary responsibility for executing judgments of the ECtHR lies with governments, parliaments may have to adopt changes in legislation; moreover, they can pressure governments to implement, hold them accountable for failure to do so and ensure compliance of domestic legislation with the judgments of the ECtHR.[208] National courts also have a pivotal role in improving the embeddedness of the ECHR on the domestic level through remedying violations and participating in dialogue with the ECtHR.[209] Besides, free media and civil society organizations can constrain the executive branch and facilitate implementation of ECtHR judgments.[210] The Brighton Declaration of 2012 emphasized three measures for improving execution of judgments: developing domestic capacities and mechanisms to ensure prompt execution of judgments; improving the accessibility of action plans for the execution of judgments; and facilitating role of national parliaments in improving implementation.[211]

It has been found that democratic governments tend to commit themselves more to external scrutiny than nondemocratic governments and also tend to comply better. An important factor is that their institutions are based on rule of law, which limits the arbitrary will of the government. Additionally, free elections and freedom of the press enable citizens to hold their governments accountable for their actions, thus contributing to better compliance.[212]

Accordingly, the role of domestic institutions as well as practices and values prevalent in those institutions as key factors is of key importance for facilitating compliance with international human rights law. Enforceable constitutions and independent courts having the power and legitimacy to ensure that the constitution as well as obligations deriving from international human rights instruments are adhered to play a crucial role in successful compliance with international human rights standards. Moreover, as the CoE occupies only a subsidiary role, it is of key importance how well the ECHR is incorporated into the national legal order.

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[207] Anagnostou and Mungiu-Pippidi (n 29) 210.

[208] Andrew Drzemczewski, 'The Parliamentary Assembly's Involvement in the Supervision of the Judgments of the Strasbourg Court' [2010] 28 Netherlands Quarterly of Human Rights 164–178; 178; Déborah Forst, 'The Execution of Judgments of the European Court of Human Rights. Limits and Ways Ahead' [2013]7 Vienna Journal on International Constitutional Law, 30, 42.

[209] Forst (n 208) 25.

[210] Anagnostou and Mungiu-Pippidi (n 29) 224–25; Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (University of Pennsylvania Press 2010); Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 288.

[211] Brighton Declaration, 'High Level Conference on the Future of the European Court of Human Rights' [2012] para 29. <http://www.echr.coe.int/Documents/2012_Brighton_Final Declaration_ENG.pdf> accessed on 29 November 2017.

[212] Simmons (n 2) 16, 24, 109.

1.4.2. Construal and the role of human rights in a country's socio-political context

Another key factor influencing compliance that emerges from studies is the value system prevalent in a country. The role of human rights in a given society matters greatly, as does whether the overall political and social context of a country is supportive towards human rights.

In their elaborated five-stage "spiral model" presented in "The Persistent Power of Human Rights", Thomas Risse, Stephen C. Ropp and Kathryn Sikkink propose that states comply with human rights when respect towards human rights is institutionalized in domestic processes.[213] The more a state cares about its social reputation and wants to be an accepted member of a community, the more it is motivated to avoid naming and shaming and is more likely to be influenced by the logics of arguing and of appropriateness. Thus, social vulnerability is an important factor influencing implementation of human rights.[214] When a value system prevalent in a country is supportive towards human rights, when the citizens demand that their governments also support human rights in the international arena, when a country's international reputation is connected to human rights, then that country is likely to be influenced by normative mechanisms such as persuasion, naming, and shaming. Mostly these mechanisms are effective in stable democratic regimes, as "respect for human rights constitutes an institutionalized logic of appropriateness in such systems" claim Risse, Ropp and Sikkink.[215] However, in the case of autocratic regimes the logic of appropriateness is not institutionally embedded, human rights are not respected and protected and consequently these countries are difficult to persuade or shame into compliance by external actors.

To critically consider the theory of Risse, Ropp and Sikkink, it should be recalled that not all democratic countries want to base their international reputation on protection of human rights and not all democratic countries are influenced by mechanisms such as naming and shaming. For example, the USA has not ratified the majority of international human rights treaties and is not susceptible to naming and shaming. Additionally, Risse, Ropp and Sikkink admit that powerful states with vast economic and/or military resources are less vulnerable to all kinds of external pressure.[216] Countries or regions with enough international legitimacy have been able to present powerful counter-discourses to classic human rights discourse based on universality – and have done so

[213] Risse and others (n 19).

[214] Thomas Risse and Tanja A Börzel, 'Human Rights: The New Agenda' (2012) 7 Transworld. The Transatlantic Relationship and the Future Global Governance.

[215] Risse and others (n 19) 17.

[216] *Ibid* 9.

without becoming socially vulnerable.[217] This is reflected in the rising popularity of the "Asian values" debate or the "traditional values" debate initiated by Russia. "Even if China or Russia were to be exposed to material sanctions by Western states or the international community as a whole, such sanctions alone would probably not be able to move their governments from commitment to compliance", claim Thomas Risse and Tanja A. Börzel. [218]

According to Schimmelfennig's approach, a wish to belong to the same "club" with the socializing agent, such as the CoE, is a key incentive for changing human rights practices. This also presumes high legitimacy of the CoE in the eyes of member states and structural asymmetry between the CoE and the member states socialized into its value system.[219] Supporting Schimmelfennig's line of argumentation, Michael Zürn, Director at WZB and Professor of International Relations, Free University Berlin and Jeffrey T. Checkel, Professor of International Studies at the Simon Fraser University in Vancouver suggest that only when a country "sees itself as a student in a teacher-student relationship" and when there is weak opposition to change, can we expect changes in human rights implementation.[220]

The incentive of the socialized state to belong to the "club" is also of key importance in the approach of Ryan Goodman, Professor of Law at New York University and Derek Jinks, Professor of Law at the University of Texas. They argue that acculturation, expressed as "the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture",[221] is the mechanism that best explains the influence of international law on state behaviour. Acculturation highlights the relationship of the actor (e.g. a state) to a reference group or wider cultural environment. When states want to identify with a certain group or community, they are incentivized to behave in accordance with the social rules and expectations of that group or community, to maintain an "in-group" with a shared identity, claim Goodman and Jinks.[222] Thus, ideological, normative, cultural and other characteristics of the reference group (a region, a regional or international organization) vastly influence the outcomes of the acculturation. The acculturation process on the international level involving converging human-rights practices between countries is related to domestic political struggles and can empower domestic actors to demand changes from their government.[223] In the context of the CoE, this mechanism suggests

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[217] Anja Jetschke and Andrea Liese, 'The Power of Human Rights a Decade After: From Euphoria to Contestation?", in Risse and others (n 19).

[218] Risse and Börzel (n 214) 6.

[219] Jonsson Cornell (n 7) 9.

[220] Zürn and Checkel (n 86) 1056.

[221] Goodman and Jinks (n 57) 626.

[222] Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press 2013) 22, 27.

[223] *Ibid* 187–88.

that, in order to facilitate compliance with the ECHR and other instruments, the CoE should have a high reputation and that new member states would be incentivized to learn and to behave in accordance with the rules and to make changes in their national institutions and practices.

Good implementers are characterized by a "diffused embeddedness of human rights awareness" – a substantial mainstreaming of human rights awareness, monitoring, and related expertise across the state administration, the legislature, and branches of the government – whereas worse-performing countries demonstrate a deep lack of such awareness and expertise, as shown by Dia Anagnostou and Alina Mungiu-Pippidi.[224] At the same time, weak implementers are characterized by the "absence of diffused human rights awareness and the limited involvement of parliamentary and civil society actors in the process of defining and instituting appropriate and effective remedies in response to ECtHR rulings."[225]

Snyder and Vinjamuri explain that norms can shape behaviour and outcomes only when they are supported by the dominant political coalition in the specific social milieu where these norms are applied. When there is such a political coalition, the next step consists in establishing and sustaining institutions for monitoring and sanctioning compliance with norms. They claim that "strategies that underrate the logic of consequences – and thus hinder the creation of effective coalitions and institutions – undermine normative change".[226]

Apart from a value system supported by the state and its institutions, the attitude towards human rights in society at large is also of key importance. "Freedom is never granted; it is won. Justice is never given; it is exacted", as put by A. Philip Randolph, a leader of the civil rights movement in the USA.[227]

The presence of a strong civil society capable and willing to demand and realize human rights and compliance with international human rights norms are interrelated to a great extent. Citizens must play a central role in the process of spreading and defending the values underlying human rights, because human rights treaties fundamentally influence their welfare, suggests Beth Simmons. No external or transnational actor has as much incentive to demand compliance from governments, as do local people.[228] Local people are the ones who "carry the ball and take the risks"; know local culture and other domestic factors.[229]

Simmons suggests that ratifying international human rights treaties contributes to better compliance mainly via enhanced political mobilization because it stimulates membership in NGOs and other civil society organisations, allowing

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[224] Anagnostou and Mungiu-Pippidi (n 29) 221, 223–224.

[225] *Ibid* 224.

[226] Snyder and Vinjamuri (n 159) 13.

[227] As cited by Amnesty International. < https://www.amnesty.org/en/latest/campaigns/2015/10/inspiring-human-rights-quotes/> 14 December 2017.

[228] Simmons (n 2) 138–139, 362.

[229] *Ibid* 371

civil society to draw more attention to violations by governments in the area of civil and political rights and to demand compliance from their governments. Empowering political mobilization works through changed values and beliefs of local people.[230] However, empowerment does not work in every country and it greatly depends on "state-society relations". Whether people become empowered in a particular country depends on the perceived value of the rights in question as well as on the probability of being successful in their demands: domestic actors must have a strong motive and effective means. [231]

Accordingly, people are likely to mobilize when a wide "rights gap" exists: potentially there is much to be gained and at the same time the political and social environment is relatively tolerant and the government respects civil and political rights and freedoms. In contrast, people are not likely to mobilize and demand rights when the perceived value of the right is low or/and civil and the environment is not supportive, especially when political rights are denied, repressed and delegitimized. In such circumstances, people are afraid of the consequences of rights demands and the probability of successful demands is very low. This is the case with authoritarian governments, where usually citizens are identified rather as "subjects of the state than as individuals with an autonomous right to participate in the political and social life of the country".[232] Simmons argues that treaty effects tend to be higher in less stable, transitional societies than in stable democracies or autocracies, especially regarding civil and political rights. In these countries, people "have the motive and the means realistically to press their governments to take international human rights treaties seriously".[233]

Simmons proposes that international human rights treaties can help to mobilize people in two ways. Firstly, they can increase the perceived value of human rights: offer persuasive information, raise rights consciousness and change the values and beliefs of society. Treaties can empower local people to identify themselves as rights bearers and change how they relate to their government and to each other.[234] For example, some groups, such as gay or disabled people, are often stigmatized in countries that do not have a long history of human rights protection. International legal standards can help to break such stigmas, as they offer oppressed people useful alternative frameworks to gain a sense of political identity, legitimacy, and efficacy.[235] Secondly, international treaty law can increase the likelihood of success in realizing rights demands. International treaties offer new political, legal and social resources to local groups and individuals to pressurize domestic governments and demand compliance with human

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[230] *Ibid* 15, 127–154, 159–201.

[231] *Ibid* 16, 126, 136; see also Moravcsik (n 58).

[232] Simmons (n 2) 136, 151–152.

[233] *Ibid* 153.

[234] *Ibid* 139,141

[235] *Ibid* 141, 143.

rights. It helps local actors to bargain from a position of strength.[236] However, it matters whether domestic actors have enough means and motivation: "In stable autocracies, citizens have the motive to mobilize, but not the means. In stable democracies, they have the means but generally lack a motive. Where institutions are most fluid, however, the expected value of importing external political rights agreements is quite high", explains Simmons.[237] In stable democracies the human rights situation might already be so satisfactory that international treaties do not provide enough extra. However, in stable autocracies the legal and political institutions do not support demands for rights – the risks can be too high for local people – and thus the power of international treaties remains limited.

Frank Schimmelfennig argues that mechanisms of political mobilization can be efficient only when civil society is strong and able to influence the government and when the potential gains related to pressurizing the government are higher than the costs for civil society.[238] When civil society is weak and when the government is so repressive that the cost of pressurizing the government is very high, the mechanism of transnational mobilization is unlikely to have a great impact on implementation of human rights treaties.

In the context of the CoE, it can be concluded that in order to facilitate compliance with the ECHR and other instruments the prevalent value system in the country should share the value system of the CoE, while the CoE and the idea of human rights should have a high reputation in the country; the political elite as well as society as a whole should be reform-minded and willing to make changes in their national institutions and practices. Such conditions are mostly present in democratic states, because in most democratic states respect for human rights is embedded in domestic systems (e.g. government institutions, the legal and educational systems), whereas such conditions are mostly lacking in authoritarian states, where respect for human rights is not embedded in domestic systems and people generally have little contact with human rights.

International agreements are not a magic tool. International law can influence domestic rights policies and practices when law can be used as a "legitimizing political resource'" to make rights demands on the domestic level.[239] As explained by Simmons: "International law matters most where domestic institutions raise the expected value of mobilization, that is, where domestic groups have the motive and the means to demand the protection of their rights as reflected in ratified treaties".[240] When domestic actors have little incentive to

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[236] *Ibid* 15, 127–154.

[237] *Ibid* 16; see also Moravcsik (n 58).

[238] Schimmelfennig, 'Strategic calculation and international socialization: Membership incentives, party constellations, and sustained compliance in Central and Eastern Europe' (n 158) 832, 856.

[239] Simmons (n 2) 26.

[240] *Ibid* 17.

organize, when they do not "take up the torch for themselves", international law has little effect on domestic practices.[241]

1.5. Analysis and concluding remarks on the mechanisms and limits of international frameworks in facilitating compliance

During the period of human rights enthusiasm in the 1990s, scholars and politicians alike believed in the ability of international frameworks to influence the behaviour of states. In line with the *Zeitgeist* of the 1990s, the CoE chose an inclusive strategy based on political dialogue, monitoring, assistance and exchange of best practices for integrating new members into its value system. The CoE built its enlargement strategy on normative approaches and accordingly, it was expected that new member states were soon to become liberal and democratic and comply with obligations undertaken while acceding to the CoE. This has not been the case with several member states, it can be concluded now, when more than twenty years have passed since Russia and the majority of Central-and Eastern European countries joined the CoE.

The strategy chosen by the CoE should be critically examined because although the CoE has contributed to establishing uniform standards of human rights protection in its many member states, several member states seem to be moving in the opposite direction. It has become evident that normative theories have overlooked various pertinent factors influencing compliance with human rights law, particularly the limits of international frameworks to influence the behaviour of states, and have not paid enough attention to the reality on the ground in new member states. Beth Simmons argues that the logic of appropriateness underlying normative theories fails to take into account the role of domestic political and social contexts and "privileges the global in ways that may not be fully justified".[242] The logic of appropriateness emphasizes the homogenizing influence of dominant Western values, assumes that countries are embedded in the structures of international society and want to identify themselves as "members in good standing of the modern society of states."[243] Besides, the CoE is built on the assumption that all member states are committed to its constituent values: the framework of the CoE aims to set universal human rights standards in its member states. Whereas many CoE member states are indeed committed to its constituent values, this is not applicable to all members.

It should be acknowledged that the premises of normative approaches are not axioms that can be taken to be true by default. In my view the presumptions of normative theories – that human rights are universally accepted normative

[241] *Ibid* 373.

[242] Simmons (n 2) 64.

[243] *Ibid* 62.

standards; that external actors can teach and motivate states to comply with international human rights and to internalize these norms; that new members want to belong to the "club" of liberal democratic states and are eager to learn and to change their legislation and human rights practices – have not proven to work well in practice.

Due to the nature of international human rights law, it is inevitable that the norms of the ECHR as well as other international human rights treaties are not self-enforcing; they need to be implemented on the national level. Implementation and interpretation of international human rights takes place on the domestic level and can be effective only when international human rights norms are incorporated into the national legal order. Thus, the citizens of CoE member states can rely on the mechanisms provided in the ECHR when their governments are incentivized to effectively implement the Convention and to enforce the judgments of the ECtHR. The primary responsibility for enforcing the ECHR and the mechanisms that guarantee compliance with human rights standards rest with governments, so that success or failure depends on local circumstances. The CoE can only play a subsidiary, a back-up, role.

However, normative theories have overestimated the role of external actors and underestimated the agency of domestic actors.[244] Normative theories mostly present international human rights frameworks as "white kings" making demands on domestic actors, whereas domestic actors are construed as "voiceless victims", claims Beth Simmons.[245] Normative approaches tend to attribute changes in human rights compliance to elites and transnational actors rather than to domestic actors and civil society[246] which seems highly counterproductive, considering the pivotal role of civil society in demanding compliance with international human rights standards. The overall idea – that external actors can legitimately socialize norm-violating countries into proper behaviour – raises many doubts and is increasingly contested within the CoE as well as globally.

Although the CoE is the most effective international human rights protection system in the world, its toolbox for influencing implementation of human rights in its member states is limited. When governments are not motivated to comply with obligations undertaken and when they do not want to address the root causes of rights violations, the CoE does not have effective mechanisms to influence states into compliance. The CoE has no injunctive power to oblige

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[244] See Section 1.2.3 of this study.

[245] Simmons (n 2) 126; 358.

[246] See, for example: Jon Pevehouse's theory of democratization from the outside Jon C Pevehouse, 'Democracy from the Outside-in? International Organizations and Democratization' [2002] 56 International organization 515–549; see also for Martha Finnemore's work focusing on international organizations as the normative teachers of state: Martha Finnemore, 'International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cutural Organization and Science Policy' [1993] 47 International Organization 565–597; see also Harold Koh's theory of transnational judicial processes: Koh, 'How is International Human Rights Law Enforced' (n 81).

member states to take specific action. Whereas theoretically member states could be suspended or expelled, the CoE's main mechanism for punishing member states who fail to comply with obligations undertaken is "naming and shaming": this is not the most effective tool, particularly when states do not aim to be perceived and respected as human rights-abiding countries.

The idea of universality of human rights is constantly under question in international for a, while culture-specific approaches to human rights are being raised in the CoE as well as the UN. Several non-Western countries have transformed from norm-takers to norm-shapers. As explained by Roy Allison,[247] all norms have a strong local and regional component and local hegemons can have substantial impact on the normative standards in their sphere of influence. Whereas advocating a culture-specific approach to human rights might be problematic for several reasons, it undoubtedly demonstrates that the idea of human rights as universal appropriate norms has not been accepted by all states. It follows that when governments do not acknowledge the idea of certain human rights and freedoms as universal globally "appropriate" standards, they also have little incentive to comply with such standards.

Human rights law is very much a normative field and deeply interconnected to how concepts like morality, equality, dignity and justice are interpreted in a given society. Whereas initially the CoE was relatively homogeneous, now the organisation encompasses culturally, historically and geographically extremely diverse countries. That same diversity inevitably influences the construal and implementation of human rights in different member states. The enlargement process changed the character of the CoE from a club of democratic states to a "school" of democracy, rule of law and human rights aiming to solve systemic deficiencies within the legal systems of newcomers.

An educational process is usually successful when students are motivated to learn and when the teacher has good means and enough authority in the eyes of the student. However, several member states of the CoE have not been eager students. Not all states want to take the role of the student and perceive the CoE as a teacher of human rights. Several member states have been reluctant to make necessary reforms and to implement the judgments of the ECtHR. As discussed in the introduction to this study, countries such as Italy, the Russian Federation, Turkey, Ukraine, Romania, Hungary, Greece, Bulgaria, the Republic of Moldova and Poland have the highest number of non-implemented judgments, reflecting serious structural problems in their legal systems.

In my view, normative theories have not been able to explain why some countries have successfully integrated into the CoE and comply with its standards, whereas others do not. I suggest that some useful explanations derive from the arrangement of the CoE itself and its encoded limitations to facilitating human rights compliance, particularly when states are not eager to incorporate international human rights law into their national legal orders; when states do

[247] Allison (n 35).

not accept the CoE's underlying values and are not motivated to cooperate with the organisation.

Rational choice theories provide an alternative approach to explaining compliance with international human rights law. Rational models stress that the role of international institutions in ensuring compliance should not be overestimated, as often compliance is the result of previously existing domestic consensus, not the result of external influence. Rational choice approaches stem from the idea that compliance with international human rights treaties is likely to be successful when domestic actors expect to win more than they lose from the process. Compliance with international human rights treaties entails various costs for governments. Those costs must be balanced by incentives; otherwise countries are reluctant to comply.

Another feature of the CoE is that it requires member states to make reforms towards better implementation of human rights law. These reforms can have widespread implications on the internal arrangements of member states and they can be politically very costly for governments, particularly when the government's ideology is not in line with human rights protection. When a government promotes anti-liberal ideologies and the ruling elite remains in power due to authoritarian practices, reforms ensuring compliance with international human rights law would undermine the government's rule. Thus, in these cases governments are reluctant to comply with obligations undertaken broadly and refuse to change the *status quo* but instead engage in some cosmetic amendments. Besides, when countries are very powerful, they are less vulnerable to external pressures and can more easily choose non-compliance, notes Schimmelfennig.[248] Overall, the incentives at the disposal of the CoE include mostly intangible (social or symbolic) rewards and punishments based on persuasion and social influence. As these incentives are often not high enough, compared to the costs, the role of the CoE in fostering implementation of the ECHR and other norms and values on a national level is rather low, predicts Schimmelfennig.[249]

It is quite easy to gain reputational benefits by ratifying international human rights treaties, at least in the short run. Ratification is viewed as a statement about the norms and values a country advocates. Whereas treaties such as the ECHR also have an instrumental role, in that treaties create binding law, overall there is not enough knowledge of the "reality on the ground". It is difficult to check whether countries truly comply with their obligations, so that it is quite easy for countries to "cheat".[250] Not all countries are "sincere ratifiers": they can ratify a treaty, but refuse to comply with obligations undertaken. The risk of

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[248] *Ibid* 289, 837.

[249] Schimmelfennig, 'Strategic calculation and international socialization: Membership incentives, party constellations, and sustained compliance in Central and Eastern Europe' (n 158) 828. However, as emphasized by Anna Jonsson Cornell, the CoE also uses tangible incentives such as legal sanctions by the ECtHR, and oversight by the Venice Commission. See further: Jonsson Cornell (n 7) 8.

[250] See: Hathaway (n 87).

insincere ratifiers is especially high for human rights treaties, as at least at the beginning it is quite easy to convince others of one's sincere intentions. Moreover, the toolbox of the CoE is rather limited and widespread problems with compliance remain an important issue. Thus, the hands of the CoE are tied when some member states turn out to be insincere ratifiers.[251] The CoE is built on the premise that countries are motivated to respect human rights and that such logic of appropriateness is embedded into domestic institutions. When this is not the case, the CoE is in a difficult situation, because it has very limited means to influence its member states to comply.

The majority of modern theories explaining compliance with international human rights law are rather pessimistic about the role and impact of international frameworks to influence compliance on the domestic level. However, they agree that when certain "domestic opportunities" present themselves, human rights treaties are able to make a difference. Based on the theories and studies presented in this chapter, I found that three main preconditions underlie successful implementation of human rights treaties on the domestic level.

Firstly, domestic institutions – dedicated, endowed with power, able and willing to implement human rights on the domestic level predictably and impartially – are of key importance for human rights implementation, as several authors have demonstrated.[252] Robust institutions "that can predictably enforce the law" are a vital precondition for a norm-governed political order.[253] Institutional capacity is inevitably closely related to the principle of rule of law. In order to prevail as a law-based state, the government must establish "meaningful mechanisms designed to ensure that no branch of government – executive, legislative, or judicial – can act arbitrarily and at will".[254] Essentially, a balanced constitution and its enforcement on the national level is a prerequisite for functional institutions facilitating and safeguarding implementation of human rights. Anna Jonsson Cornell argues that the failure of international socialization of human rights can in part be explained by "misconceptions and overestimations regarding processes of constitutional socialization."[255]

Secondly, it is of crucial importance whether international human rights norms are effectively incorporated into the national legal order. It matters how international human rights norms and judgments of international courts are situated within the larger rights context of a particular state. The mechanism for individual complaints and enforceability of the judgments of the ECtHR completely

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[251] See: Simmons (n 2) 12–13, 58, 113.

[252] See Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 288; Anagnostou and Mungiu-Pippidi (n 29) 217.

[253] Snyder and Vinjamuri (n 159) 6.

[254] Molly Warner Lien, 'Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion' [1994] 30 Stanford Journal of International Law 41–82; 44–45.

[255] Jonsson Cornell (n 7) 4.

depend on relevant domestic legislation and the work of domestic institutions. When countries fail to enforce judgments on the domestic level, this makes it *de facto* impossible to grant citizens the protection of the Convention.

The third important factor is construal of human rights and their place in the social and political context of a country. International human rights law can shape actions and outcomes in the domestic arena only when human rights are supported by a dominant political coalition in the specific social milieu where those norms are applied. When such a political coalition exists, it is possible to establish and sustain institutions for monitoring and sanctioning compliance with norms, as explained by Snyder and Vinjamuri.[256] Successful compliance with international human rights treaties is realistic when a country wants to belong to the "same club" as other member states. Only then is the country motivated to identify itself with the values of the organization, to learn and to make necessary reforms on the national level. However, when protection of human rights is not institutionally embedded in a country, when human rights are not respected on the level of the state and particularly when the official rhetoric is anti-liberal and anti-human rights, it is difficult for external actors to persuade or shame a country into compliance.

Apart from the official political context, the broader social context is also of key importance. It matters how a society perceives human rights and whether the underlying values of human rights are in accordance with the prevalent values in that society. As suggested by Beth Simmons: citizens are the ones whose welfare is at stake, they must have the central role in demanding compliance with international human rights treaties from their governments. However, when civil society is weak and when the government is so repressive that it is very costly for civil society to pressurize the government, its role in compliance with international treaties is minimal. [257] International agreements are not magic tools. However, international law can influence domestic rights policies and practices when domestic groups have the motive and the means to demand protection of rights as reflected in ratified treaties. In contrast, when people do not have the means and the motives to exercise their rights, when people are not willing to "take up the torch for themselves"; the effect of international treaties remains rather small.

In subsequent chapters I will examine the preconditions for compliance identified in this chapter in the context of Russia. Firstly I will focus on the issue whether Russian institutions are dedicated, endowed with the power, able and willing to implement human rights on the domestic level in a predictable and impartial manner. Subsequently I will scrutinize how norms of international law – and in particular international human rights provisions and judgments of the ECtHR – are situated within Russia's legal system. I will analyse the position of international law in the Russian Constitution and in other legislation

[256] Snyder and Vinjamuri (n 159) 13.

[257] Simmons (n 2).

as well as focusing on the practice of the Constitutional Court in interpreting those norms. I will continue by examining construal of human rights and their role in the social and political context of Russia. Finally I will focus on the issue of civil society and examine implementation of three central civil and political rights: the right to freedom of expression, the right to freedom of assembly and the right to freedom of association in Russia. In conducting this analysis, I will mainly focus on legislation in the sphere of civil and political rights and on the case law of the Constitutional Court.

II RUSSIA'S INSTITUTIONAL FRAMEWORK AND ITS INFLUENCE ON COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS TREATIES

Wherever law ends, tyranny begins (John Locke)

As demonstrated in the previous chapter, compliance with human rights treaties and successful implementation of human rights on the local level is likely when certain domestic opportunities present themselves. International human rights treaties supplement and interact with domestic political and legal institutions but they cannot replace them, as stressed by Beth Simmons.[258] As argued in Section 1.4.1 of this study, essentially, a balanced constitution and its enforcement on a national level is a prerequisite for functional institutions for facilitating and safeguarding implementation of human rights. It is impossible to achieve proper compliance with international human rights instruments and implementation of the rights and freedoms enacted therein without a functioning constitutional framework: an enforceable constitution along with courts and other institutions having the power and legitimacy to ensure that the Constitution is adhered to.[259] Domestic institutions are of crucial importance because domestic institutions determine the degree of protection granted to fundamental human rights and freedoms on the domestic level, as highlighted by Tonya Putnam.[260]

Thus, the focus of the present chapter is Russia's constitutional framework. I begin by analysing the concept of rule of law. It will be determined whether the Russian Constitution provides the necessary framework for developing a law-bound state and whether the provisions of the constitution are adhered to in practice. The principle of rule of law is intimately connected to the separation of powers and the independence of the judiciary. The independence of the judiciary is a crucial component of the separation of powers and is of vital importance for implementing the rights and freedoms enacted in the ECHR and for enforcing the judgments of the ECtHR. Accordingly, I will analyse the issue of separation of powers in Russia, with particular focus on the independence of the Russian judiciary. Finally I will contemplate the consequences of the characteristics of the Russian constitutional institutional framework on compliance with and implementation of human rights law in Russia. The focus of this chapter is rule of law and the Russian domestic institutional framework. My analysis relies primarily on academic works by both Russian and international scholars and reports and studies published by the CoE.

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[258] Simmons (n 2) 16.

[259] Jonsson Cornell (n 7) 6.

[260] Putnam (n 191) 246.

In the next chapter I will specifically examine how international human rights law is incorporated into the Russian legal order. I focus on Russian state practice and analyse domestic construal and treatment of human rights both in legislation and in the practice of the Constitutional Court. I will particularly focus on the issue of how the ECHR and judgments of the ECtHR are situated within the overall context of human rights protection in Russia.

2.1. The concept of rule of law in the Russian legal landscape

"The real struggle for us is for the citizen to cease to be the property of the state"
(Adam Michnik)[261]

Andrew Moravcsik has emphasized that the willingness of states to accept and enforce human rights norms depends on the pre-existing level and legacy of domestic democracy.[262] It matters whether countries have "an overarching sense of responsibility…for respecting human rights and the rule of law", as voiced by Anna Jonsson Cornell.[263] The law-based state will prevail only when meaningful mechanisms exist to ensure the balance of executive, legislative and judicial powers, notes Courtney Hillebrecht.[264] The rule of law and an institutional framework that guarantees that the rule-of-law principle is adhered to are both important premises for the development and implementation of human rights in any country.

In many Western countries, the rule of law and an institutional framework based on it have deep historical roots. The rule of law, together with individual freedoms and political liberty, are "principles which form the basis of all genuine democracy", as stated in the preamble to the Statute of the CoE[265]. The rule of law is an essential part of the common European heritage. As explained by the ECtHR in its landmark judgment *Golder v. UK,*[266] a profound belief in the rule of law was one of the reasons why the signatory governments decided to build the system of the CoE and to collectively enforce certain rights enacted in the UDHR. Thus, in Western legal culture the fundamental principle of a

[261] Adam Michnik (born 17 October 1946) is a Polish historian, essayist and one of the leaders of the Solidarity movement.

[262] Andrew Moravcsik, 'Liberal Theories of International Law', in Jeffrey L. Dunoff and Mark A. Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, New York 2013) 90.

[263] Jonsson Cornell (n 7).

[264] Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 279.

[265] Statute of the Council of Europe. ETS 1. London, 5.V.1949.

[266] *Golder v. UK* (1975) 1 EHRR 524, para 34.

law-based state is a basic concept. However, the concept of a law-based state has historically not been entrenched in Russian legal doctrine.[267]

The Western model of rule of law assumes that governments are law-based – that they respect their own laws. In contrast, the notion that the sovereign could be bound by law was not established in Russian or Soviet law.[268] As assessed by several scholars, problems with rule of law and institutional reforms related to it are major obstacles underlying Russia's agonizingly slow progress in advancing its human rights situation. Various difficulties related to transitioning from Soviet doctrine to a new constitutional democracy based on the rule of law and human rights have characterized Russia's participation in the CoE.[269] Russia has "a strong tradition of the rulers feeling themselves above the law, and very little tradition of the State working under law", as argued by Jane Henderson.[270] The Russian political structure has from the outset been based on the absolute power of the ruler, assuming that "all power was vested in the sovereign". Russian legal-political doctrine has rejected the idea that the sovereign could be bound by law. The absolute power of the ruler included dictating privileges and their conditions and law was mostly "a matter of convenience to the sovereign … utilized or ignored according to the sovereign's needs".[271] Individual rights and freedoms were strictly limited under the tsars, not to mention Communist rule and during Russia's post-Soviet leadership. Russia was not influenced by the spread of fundamental rights and freedoms in the 19th and 20th centuries and "free expression failed to establish any meaningful foothold in Tsarist Russia or the Soviet Union."[272]

Reforms in Tsarist Russia never extended to Western democratic thought; indeed, authoritarianism flourished throughout the Tsarist era.[273] The Marquis de Custine, a French aristocrat and travel writer, noted in his classic book "*La Russie en 1839*": "This Empire…is just a prison, the key to which is located with the emperor".[274] Richard Pipes, in his classic book "Russia under the Old

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[267] See, for example: Kathryn Hendley, 'Rule of Law, Russian-Style' (2009) 108 Current History 339–340; Lien (n 254).

[268] Lien (n 254) 45–46, 48.

[269] See: Kahn, 'Russian compliance with Articles Five and Six of the European Convention of Human Rights as a barometer of legal reform and human rights in Russia' (n 70); Anton Burkov, 'Konventsiia o zashcite prav cheloveka v sudah Rossii' (Wolters Kluwer Moskva 2010) .

[270] Henderson (n 13) 259.

[271] Lien (n 254) 48, 51.

[272] Robert B Ahdieh and H Forrest Flemming, 'Toward A Jurisprudence of Free Expression in Russia: The European Court of Human Rights, Sub-National Courts, and Intersystemic Adjudication' (2013) 18 The UCLA Journal of International Law and Foreign Affairs 18–31; 32, 35.

[273] Lien (n 254) 52–53.

[274] As quoted in: Felix Michailovich Rudinsky, *Civil Human Rights in Russia: Modern Problems of Theory and Practice* (Transaction Publishers 2011) 13.

Regime", noted that the absence of a large and vigorous bourgeoisie in Russia has been an important factor contributing to Russia's deviation from the political patterns of Western Europe.[275] Liberal ideas have significantly influenced political institutions and practices in Western Europe largely because a strong middle class has fought for those liberal ideas. The Western middle class stood for their business interests, their property rights and for public order respecting their rights. Pipes argues that "[I]t is reasonable to assume a more than casual connection between the notorious underdevelopment in Russia of legality and personal freedom and the impotence or apathy of its middle class".[276]

In the 20th century the Bolsheviks substituted the totalitarian ideology of the Russian tsars with their own totalitarianism,[277] continuing "the arbitrary and oligarchical rule over a land they took from the tsars".[278] The position that the leaders alone knew what was good for society was characteristic of Soviet leaders. All restrictions on power were rejected in order to secure their personal rule. [279] Although the Bolsheviks asserted they established a law-based state and Soviet Russia formally acknowledged constitutionalism, in reality these principles were not followed.[280] Jane Henderson explains: "In the Soviet system, rights were presented as something awarded to the citizen in return for the duties that the citizen performed for the state. There were no inherent "human rights", only dependent "individual rights".[281]" On the one hand, the 1936 "Stalin" Constitution, written in beautiful Russian, presents an idyllic picture of a well-ordered state with citizens' rights and duties set out for the first time at the USSR level. Freedom of speech, freedom of the press and freedom of assembly were all enacted in Article 125 of the 1936 Constitution. However, additional legislation was needed to invoke any of the rights presented in the Constitution.[282]

This recalls Newton Minow's famous speech to the Association of American Law Schools:

> After 35 years, I have finished a comprehensive study of European comparative law. In Germany, under the law, everything is prohibited, except that which is permitted. In France, under the law, everything is permitted, except that which is prohibited. In the Soviet Union, under the law, everything is prohibited,

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[275] Richard Pipes, *Russia under the Old Regime: Second Edition* (Subsequent edition, Penguin Books 1997) 191.

[276] *Ibid.*

[277] Andrei Kozyrev, 'Russia: A Chance for Survival' (1992) 71 Foreign Affairs 1–16.

[278] Lien (n 254) 65.

[279] X (George F Kennan), 'The Sources of Soviet Conduct' [1946] 25 Foreign Affairs <https://www.foreignaffairs.com/articles/russian-federation/1947-07-01/sources-soviet-conduct> accessed 2 December 2017.

[280] Lien (n 254) 48, 65.

[281] Henderson (n 13) 228.

[282] *Ibid* 41, 44–45.

> including that which is permitted. And in Italy, under the law, everything is permitted, especially that which is prohibited.[283]

Another feature of Soviet constitutions was that social and political rights contained very clear words of limitation. The freedoms of speech, the press, assembly and meetings, street processions and demonstrations were guaranteed if exercised "in conformity with the interests of the people and in order to strengthen and develop the socialist system". Activities that did not appear (to the state) to serve these lofty purposes were criminalized.[284] As concluded by Angelika Nußberger: "There was no separation of powers, no open discussion of political issues and no civil society independent from the State. Changes were initiated only in the late 80's when Gorbachev used the *perestroika* and *glasnost* slogans"[285]. In the second half of the 1980s under the rule of Gorbachev, "the Soviet peoples first experienced basic human freedoms and a law-based state"[286] and Russia was starting to go through a period of rethinking fundamental values, one of those values being the supremacy of law.[287]

Article 1 of the 1993 Russian Constitution establishes that Russia is a democratic federal law-bound state with a republican form of government. As argued by Gennady Danilenko, the new Russian Constitution "signifies a complete departure from the Communist dictatorship and a passage to democratic government. As a new basic law for a "democratic federal legal state," the Constitution became an important step toward the establishment of a *Rechtsstaat* in Russia."[288]

Although the Constitution provides the necessary framework for developing a law-bound state, however, "almost as soon as the Constitution was adopted, it began to be undermined," argues Jane Henderson.[289] Henderson notes that the Constitution, although a landmark document, "the first in Russia to be taken seriously as a legal document", was nevertheless created "during a time of trouble and is not a balanced document" and its provisions have been heavily in favour of presidential powers from the start.[290] "Since the Russian Constitution came into force, there has been no real institutional, political or legal opposition force to counterweight the presidential authority", claims Jean-Pierre Massias.[291]

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[283] Donald Ball and Wendell H. McCulloch, Jr., *International Business: Introduction and Essentials* (Homewood, Richard Irwin, 5th ed, 1993) 368.

[284] Henderson (n 13) 228.

[285] Nußberger (n 9) 666.

[286] Lien (n 255) 42–43.

[287] Mikhail Sergeyevich Gorbachev, 'The rule of law' (1992 fall) Stanford Lawyer 5.

[288] Gennady Danilenko, 'The New Russian Constitution and International Law' (1994) 88:3 American Journal of International Law 451–470; 451.

[289] Henderson (n 13) 256.

[290] *Ibid* 1–2.

[291] Massias (n 12) 115.

The president's powers in the 1993 Constitution have been characterized as "impressive". Already at the beginning there was a concern that such powers "set up the possibility of a presidential dictatorship."[292] However, at least formally the Constitution stipulates separation of powers. Structures of separate institutions do exist in Russia: a federal legislature, courts, an elected executive and a structure of federal-regional divisions. Nevertheless, all institutions are dominated by the presidential administration and Russia has no effective check-and-balance system. [293] "Oversight by the Legislature of the executive branch is at best weak and at worst a diversionary sham," declares Jane Henderson.[294] The president nominates individuals to the upper chamber of the Legislature, the Federation Council; proposes candidates for appointment to the higher courts, including judges for the Constitutional Court and the Supreme Court, as well as Court Chairs. The president may cancel central government decrees and regulations, which he regards as inconsistent with the Constitution, federal laws and his own edicts.[295] At the Constitutional Court, a presidential representative is supposed to ensure that the president's perspective is borne in mind, and that that views of the Constitutional Court can be reported back directly to the president.[296] Corrupt schemes are widespread and appointments to posts such as the post of presidential representative to the Constitutional Court are often "a reward" for exemplary service.[297]

In addition to already extensive express powers enacted in the Constitution, the Constitutional Court has developed a doctrine of implied powers extending presidential powers by implication. The doctrine of implied powers extends the president's authority further from powers expressly delegated to him, when the authority "fits within the overall spirit of the constitutional provisions" defining the role of the president (Article 80 of the Constitution). For example, in 1995 the Constitutional Court held that the president had by implication a power to amend the Constitution.[298]

Moreover, executive power has developed and favoured various informal institutions. During the 1990s, President Yeltsin used a system of exclusivity,

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[292] Henderson (n 13) 130.

[293] *Ibid* 1–2; Jeffrey Kahn, 'Freedom of Expression in Post-Soviet Russia (Contribution to the Symposium Building BRICS: Human Rights in Today's Emerging Economic Powers)' (2013) 15–16.

[294] Henderson (n 13) 191.

[295] *Ibid* 119.

[296] *Ibid*.

[297] For example, as noted by Jane Henderson, President Yel'tsin wished to get his supporter Valerii Savitskii appointed as a Constitutional Court judge, but failed. Subsequently Yel'tsin assigned Savitskii as his Constitutional Court representative, arguably in return for the support that Savitskii had given Yel'tsin during the summer of 1993. See: Henderson (n 13) 119.

[298] See: Marina Lomovtseva and Jane Henderson, 'Constitutional Justice in Russia' [2009] 34 Review of Central and East European Law 37–69; Henderson (n 13) 129–130.

political favouritism and personal bargaining to win allies and gain support. Informal institutions and rules began either to replace formal ones or to fill the institutional vacuum not regulated formally.[299] President Vladimir Putin continued to develop various institutions that were not established in the Constitution. In Russia various "paraconstitutional" innovations marginalising the Constitution and increasing the informal power of the president were created: namely, presidential representatives in federal districts, the State Council and the Public Chamber. The Public Chamber was established to express informed public opinion; The State Council is an advisory body to the president consisting of Federation Council members, former governors and other members appointed by the president. The State Council discusses policy matters and is a purely consultative body. It has no firm basis in law, as it was created by presidential edict: it could be "dissolved at the stroke of a presidential pen". This body allows members to have regular personal contact with the president and engage in lobbying.[300] Jane Henderson claims that as a result, "[t]he federal balance, already imprecisely defined in the Constitution, has been shifted towards central control through the Presidential Federal Representatives and other paraconstitutional innovations, marginalising the Constitution". [301]

Russia has a presidentialist constitution signalling a concentration of executive authority. Whereas presidentialist constitutions do not have to involve *de facto* diminishing the powers of other institutions, in many cases this still happens, especially in (semi) authoritarian systems. Constitutional arrangements inevitably influence the expectations of society and signal power relations. Henry E. Hale has suggested that in highly paternalistic societies individuals might comprehend politics "as an arena of personal wealth redistribution and targeted coercion" and reproduce these practices due to such misconceptions and related fears. A presidentialist constitution generates expectations in society that the presidential network is more powerful and thus allows the president to accumulate even greater *informal* power.[302]

As a result, the "president can construct a system in which s/he dominates the political system by virtue of *both* formal and informal authority (usually in tight combination). In this case the informal power structure might be characterized as a kind of single pyramid in which the president administers society through an ever-broadening conglomeration of vertical networks of subpatrons and clients".[303] In highly paternalistic societies, constitutions have an effect

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[299] Henderson (n 13) 256.

[300] *Ibid* 141, 145, 148, 256.

[301] *Ibid* 256.

[302] Henry E. Hale 'The Informal Politics of Formal Constitution: Rethinking the Effects of "Presidentialism" and "Parliamentarism" in the Cases of Kyrgyzstan, Moldova, and Ukraine' in Tom Ginsburg and Alberto Simpser (eds) *Constitutions in Authoritarian Regimes* (Cambridge University Press 2013) 221–222.

[303] *Ibid*

mainly because they signal that the network capturing presidential office is the most powerful network in the country. This signalling effect of the Constitution "enables the president to set informal rules and practices and to selectively give life to formal rules that other networks must acknowledge or risk political or economic isolation, creating a strong tendency to single-pyramid politics" argues Henry E. Hale.[304]

Sarah Whitmore has described Russia as a neopatrimonial country "where formal liberal democratic institutions are infused with informal, patrimonial practices such as clientelism, patronage and rent-seeking".[305] Personal relationships, and what is said rather than what is written, have traditionally occupied an important role in Russia's polity. Alena Ledeneva explains:

> As it tended to be in the Soviet Union, the party boss's word was most conclusive when it was spoken, not written. If the two ever deviated, the verbal held… The primacy of the informal oral commands and handshake agreements reflected the weakness of the law, insidious secrecy and mistrust, and the need for authority figures to cut through the thicker of often-conflicting administrative requirements.[306]

In Ledeneva's view, similar patterns also characterize contemporary Russia. Jane Henderson has noted that, as a result of various reforms and extra-constitutional practices, the already fragile balance of powers has been further diminished in Russia. Reforms and practices such as restructuring political parties and the electoral law, increasing the central power and diminishing the power of regions, making legislative amendments obstructing the work of NGOs, and tightening control of the media have further increased the concentration of power and strengthened the role of the president. These tendencies demonstrate that since the beginning of the 21st century the "power vertical", which existed both during the Soviet Union and imperial Russia, has become increasingly stronger.[307]

Contemporary Russia "lacks political and judicial institutions with the autonomy, strength, and authority to defend (or at least fight over) the pie-crust promises that are made in its Constitution" as put by Jeffrey Kahn.[308] Due to lack of experience with rule of law, democracy and human rights, legal, political and cultural practices undermining the provisions of the Constitution have not been obliterated in Russia. On the contrary, informal networks and paraconstitutional

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[304] *Ibid* 239.

[305] Sarah Whitmore, 'Parliamentary Oversight in Putin's Neo-Patrimonial State. Watchdogs or Show-Dogs?' (2010) 62 Europe-Asia Studies 999–1025; 99; Henderson (n 13).

[306] Alena Ledeneva, 'Telephone Justice in Russia' (2008) 24 Post-Soviet Affairs 324–350; Henderson (n 13) 145.

[307] Henderson (n 13) 142; Jane Henderson, 'Redefining Russia's Federal Structure' [2000] 6 European Public Law 496. See further: Massias (n 12) 116.

[308] Kahn, 'Freedom of Expression in Post-Soviet Russia (Contribution to the Symposium Building BRICS: Human Rights in Today's Emerging Economic Powers)' (n 293) 10.

institutions continue to dominate. The majority of Russians do not understand the necessity for separation of powers and the role of institutions such as the Federal Assembly. They continue to express a wish to be led by a strong ruler,[309] as also evidenced by polls demonstrating the skyrocketing popularity of President Putin. As derives from polls by the authoritative Levada Center, in the period between the spring of 2014 and the autumn of 2017 the approval rating of Vladimir Putin rose from 80 to 90 %.[310]

Failure to adhere to the principles of rule of law reflected *inter alia* in a lack of separation of powers in Russia has far-reaching consequences and is inevitably related to implementation of human rights in Russia. Systematically repressing fundamental freedoms in Russia is symptomatic of a wider structural problem: it is in essence a separation of powers problem, argues Jeffrey Kahn.[311]

However, the picture with rule of law in Russia is not as black and white, as often pictured, claims Kathryn Hendley. Criticizing Russia for lack of rule of law is a "simplistic approach" which "has contributed to the monolithic narrative of law in Russia" [312] observes Hendley in her monograph "Everyday Law in Russia". She claims that "given that the rule of law is an ideal type that exists nowhere in its pure form, it stands to reason that perfect illustrations of the absence of the rule of law are likewise unlikely." [313] Based on her research, she argues that Russia has dualistic law:

> A legal system characterised by two basic realities. On one hand, ordinary Russians are able to access their legal system with relative ease. Though not perfect, the courts resolve most disputes efficiently and, in doing so, judges are guided by written law, both procedural and substantive. If assessed in terms of these mundane disputes, the Russian legal system would receive respectable scores on many elements of the rule of law. On the other hand, these routine cases, though representing the vast majority of cases brought to the courts, to not capture the full story of Russian law. Those who bring nonroutine disputes into the legal system (or have such cases brought against them) risk being swept into the shadowy world of the telephone law. In such cases, the written law takes back a seat to brute power and any pretense of justice is absent. The more powerful party is able to dictate the outcome of the case.[314]

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[309] Henderson (n 13) 255.

[310] See further: Levada-Center, 'Putin's approval raiting' (Levada-Center 2017) <https://www.levada.ru/en/ratings/> Accessed on 14 December 2017. The Levada Analytical Center (Levada-Center) is a Russian non-governmental research organization which is also included in the list of independent analytical centers of Europe published by Freedom House. See further: <https://www.levada.ru/en/> accessed on 14 December 2017.

[311] Kahn, 'Freedom of Expression in Post-Soviet Russia (Contribution to the Symposium Building BRICS: Human Rights in Today's Emerging Economic Powers)' (n 293) 10.

[312] Hendley, *Everyday Law in Russia* (n 312) 226.

[313] *Ibid* 227.

[314] *Ibid* 231.

Hendley maintains that "though the ultimate conclusion might be substantially the same, this more nuanced approach, which requires us to unpack the "rule of law" concept, yields key insights as to the relative functionality of key aspects of Russian legal system. It also gives voice to the multitude of Russians who have been able to mobilize the law to good effect." [315] She claims "though not disputing the challenge to the rule of law posed by telephone law, I argue that this zero-sum analysis has caused us to neglect the relevance of law to the everyday lives of Russians… As we aggregate the experiences of Russians, damning the entire legal system because a small number of cases are plucked out for special treatment seems unwarranted." [316] In Hendley's view "instead of treating the rule of law as an all-or-nothing concept" we should recognize it as the sum of its parts existing along a spectrum.[317] Hendley does not provide a clear answer how to assess the presence or absence of rule of law in Russia, but claims, "maybe the time has come to step back from indexes and to encourage the sorts of thick descriptions that better capture the everyday role of law." [318]

Undoubtedly, none of the countries can claim to have "ideal rule of law" and it has not been my intention to argue that Russia is the "perfect illustration of the absence of rule of law". Such analysis indeed would tell nothing about the role of law in a particular country. However, I do not agree with Hendley that scholars have damned the entire Russian legal system "because of small number of cases plucked out for special treatment". Whereas the problem of independence of the Russian judiciary is grave and I will focus on this issue in the following subchapter of my dissertation, the problems with rule of law are more diverse. Whereas there is no comprehensive definition or a list of criteria, for example according to World Justice Project Rule of Law Index,[319] rule of law consists of constraints on government powers; absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. The core of rule of law is the understanding that law should govern, that all people and all institutions should be subject to the law. In Russia the president dominates the political system by virtue of formal authority deriving from the extensive powers provided in the Constitution and informal authority deriving from various reforms and practices

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[315] *Ibid* 227.

[316] *Ibid* 226.

[317] *Ibid* 226–227.

[318] *Ibid* 231.

[319] See: World Justice Project Rule of Law Index, available at: <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018> accessed 16 March 2018. World Justice Project® (WJP) is an independent, multidisciplinary organization working to advance the rule of law around the world. Performance is assessed using 44 indicators across 8 categories, each of which is scored and ranked globally and against regional and income peers: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice.

diminishing the already fragile balance of powers in the Constitution. This has widespread implications on the work of the Russian legislative power and the quality of laws they produce as well as on the work of the Russian judiciary, which in turn influence the protection of rights and freedoms of Russian people.

2.2. Independence of the Russian judiciary

"Before the law stands the gatekeeper"
(Franz Kafka, "The Trial")

An independent judiciary is a key institution in order to enable people to realize their rights. Independence of the judiciary is a crucial component of the separation of powers and is of vital importance for implementing the rights and freedoms enacted in the ECHR and enforcing the judgments of the ECtHR. Developments in Russia's court system from the *perestroika* era to contemporary Russia have been a roller-coaster ride.[320] Reform of the judicial system aiming at increasing trust in the courts and enhancing judicial prestige has been a key challenge in modern Russia.[321] In the 1990s, development of an independent judiciary began and judges were granted security of tenure and greater self-regulation.[322] The role of judges, their special status and independence are protected by the Russian Constitution as well as federal laws. Article 120 of the Constitution establishes that judges shall be independent and subject only to the Constitution and federal law. Judges are irremovable and the powers of a judge can be ceased or suspended only on the grounds and according to the rules fixed by federal law under Article 121 of the Constitution.

According to the assessment of Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, legislation protects judges relatively well from undue influence or pressure.[323] However, similar legal guarantees for judges that also existed in the USSR Constitutions of 1977 and 1936 failed to protect the judiciary from undue pressure. According to legal academic Valerii Savitskii, "not a single constitutional provision proclaiming the independence of the courts was applied in practice. The norms of the Constitution merely served as a fig leaf covering the spineless obsequiousness and grovelling obedience of the so-called judicial power, which from day one, was under the thumb of the party apparatus".[324] Although Soviet constitutions declared that judges were

[320] Henderson (n 13) 193.

[321] *Ibid* 194.

[322] *Ibid* 193.

[323] Nils Muižnieks (Commissioner for Human Rights of the Council of Europe), *Report Following his visit to the Russian Federation from 3 to 12 April 2013' 21 CommDH* (2013); 15.

[324] Valerii Savitskii, 'Judicial Power in Russia: First Steps' (1996) 22 Review of Central and Eastern European Law 417–423; Henderson (n 13) 220.

independent and subordinate only to the law, the Communist Party used the so-called *nomenklatura* system to vet candidates for judicial office before any name was put forward.[325] In a similar vein, the legal guarantees established under the 1993 Constitution have not been realized in practice. Unfortunately, for many reasons, judges have been in "a pivotal position as prime targets for bribery or other untoward pressure".[326] In 2004 Constitutional Court Chair Zorkin claimed that Russia's judicial system was in many aspects worse than it was in the Soviet era[327] and emphasized the problem of corruption: "our courts are mired in corrupt relations with business. Bribe-taking in courts has become one of the most corrupt markets in Russia…built on various corrupt networks operating at various levels of the power structure" .[328]

Professor Yelena Lukyanova from the National Research University Higher School of Economics argues that the Russian judge knows that any of his acquittals will be called into question, repeatedly verified and appealed. This makes Russian judges to manipulate procedural norms and limits of judicial discretion to make the "safest" decision from their own perspective. To prevent this, the Russian judge needs additional guarantees that any of his decisions based on law will not affect his status. Russian judge should instead understand that he bears responsibility for a knowingly unlawful decision, Lukyanova claims.[329]

The Commissioner for Human Rights of the Council of Europe has referred to widespread problems with independence of the Russian judiciary, such as manipulating the judicial system and using it for political purposes, neutralizing political opponents, undermining business competitors and settling personal conflicts.[330] It is widely believed that "telephone justice"–familiar from the Soviet era–is still carried out in Russian courts.[331] There exist so-called "*zakaznye dela*" (prosecutions to order). A new term "*Basmannoe pravosudie*" (Basmannyi justice) has been invented, referring to justice serving the needs of the authorities or powerful persons named after the Basmannyi court where in some high-profile cases this kind of approach was adopted.[332] For example, the sentencing of Mikhail Khodorkovsky, in December 2010, to six more years of

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[325] Richard Sakwa, *The Quality of Freedom: Putin, Khodorkovsky and the Yukos Affair* (Oxford University Press 2009) 14; Hendeson (n 13) 197, 219.

[326] Henderson (n 13) 194.

[327] Cited in Peter H Solomon Jr, 'Threats of Judicial Counterreform in Putin's Russia' (2005) 13 Demokratizatsiya 325–345, 325. See Henderson (n 13) 224.

[328] *Ibid*

[329] Yelena Lukyanova, 'O prave nalevo' (19 March 2015) Novaya Gazeta. <https://www.novayagazeta.ru/articles/2015/03/19/63473-o-prave-nalevo> accessed on 10 March 2018.

[330] Muižnieks (n 323) 15.

[331] *Ibid.*

[332] Henderson (n 13) 224; Sakwa (n 325) 260.

imprisonment and that of the members of the punk band Pussy Riot, in August 2012, were largely perceived as a sign that the judiciary in Russia remains subject to political pressure and the influence of the executive. [333]

Reforms reducing the autonomy of the judiciary started when Vladimir Putin first became president of Russia. One of the motives for reform was that judicial independence created "too much autonomy for individual federal judges, with the risk that they would be "independent of the law"".[334] Appointments for judicial positions are administered by qualification commissions composed of legal professionals, but since 2001 the role of the president in the appointment procedure has increased. The president can refuse to appoint a candidate to the position without an obligation to provide reasons for this decision. The president also appoints the Court chairs for a six-year term, renewable once. Court chairs, being notoriously powerful, are of vital importance in guaranteeing the independence of the judiciary. In Russia, court chairs play an important role in hiring, promotion and remuneration and disciplinary responsibility of judges; they also enjoy a wide discretion in allocation of court cases among judges.[335] Disciplinary measures can be taken in case of violation of the Law on the Status of Judges or the Code of Judicial Ethics. [336] The Federal Constitutional Law on Disciplinary Judicial Presence was adopted in 2009 and in March 2010 the Disciplinary Judicial Presence[337] was established.[338]

The Constitutional Court has held that disciplinary measures should be applied only in those cases where infringement by a judge is completely incompatible with the honour and dignity of judges.[339] However, lack of clear criteria regarding the grounds for disciplinary procedures have been assessed as "one of the main factors undermining the independence of judges".[340] Vague grounds, such as a requirement to avoid anything which can undermine the authority of the judiciary enacted in Article 3 of the Law on the Status of Judges can be used to put pressure on judges and to "justify abusive dismissals, thus jeopardizing the independence and impartiality of judges".[341]

In practice, disciplinary proceedings against judges are common, and there are cases when judges have been pressured to resign under the threat of disciplinary

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[333] See, for example Council of Europe Parliamentary Assembly, *The Honouring of Obligations and Commitments by the Russian Federation* (n 41) para 12.

[334] Henderson (n 13) 211.

[335] *Ibid*; Muižnieks (n 323) 16–17.

[336] Muižnieks (n 323) 18.

[337] This is a specialised federal court serving as a second instance for decisions of qualification commissions on disciplinary measures against judges. It consists of six judges. See further: Muižnieks (n 323) 18.

[338] *Ibid.*

[339] Russian Constitutional Court, No. 3–P (28 February 2008).

[340] Muižnieks (n 323) 18.

[341] *Ibid.*

proceedings.[342] For example, when Judge Olga Yegorova was appointed as the Chair of the Moscow City Court, eighteen judges resigned and four were dismissed only in the course of her first two years as Chair.[343] Some cases have also reached the ECtHR. One notorious case, *Kudeshkina v. Russia*[344], concerned Moscow judge Olga Kudeshkina, dismissed for degrading the authority of the judiciary and undermining the prestige of the judicial profession. As a judge in a high-profile criminal case, she refused to follow the instructions given to her by Prosecutor Dmitri Shokhin and the Chair of Moscow City Court, Olga Yegorova, to reach a favourable decision regarding highly-placed officials and to falsify the Court's records. Kudeshkina was removed from the case. She publicly criticized the pressure applied on her and drew attention to the lack of independence of the Russian judiciary in general. "Years of working in the Moscow City Court have led me to doubt the existence of independent courts in Moscow. Instances of a court being put under pressure to take a certain decision are not that rare, not only in cases of great public interest but also in cases encroaching on the interests of certain individuals of consequence or of particular groups", she argued.[345]

Judge Kudeshkina also turned to the High Judiciary Qualification Panel with a request to charge Chair Yegorova with a disciplinary offence for exerting unlawful pressure on her. However, no grounds for charging Chair Yegorova with a disciplinary offence were found. Subsequently, the president of the Moscow Judicial Council requested that Judge Kudeskina be dismissed from the Judiciary Qualification Board of Moscow as she had insulted the Russian court system and "behaved in a manner inconsistent with the authority and standing of a judge".[346] The Judiciary Qualification Board of Moscow held that Kudeshkina had committed a disciplinary offence and dismissed her for deliberately disseminating deceptive and insulting perceptions of the judges and judicial system of Russia, degrading the authority of the judiciary and undermining the prestige of the judicial profession.[347] Eventually Kudeshkina turned to the ECtHR. The Court held that there had been a breach of Article 10 (freedom of expression) as Russia had failed to strike a fair balance between freedom of expression and protecting the authority of the judiciary. Punishing judges for raising questions of public interest such as judicial independence has a chilling

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[342] *Ibid.*

[343] Masha Karp, 'The Case of Judge Kudeshkina' (13 September 2010) Rights in Russia <http://www.rightsinrussia.info/blogs/mashakarpthecaseofjudgekudeshkina> accessed 1 December 2017.

[344] *Kudeshina v Russia* (App 29492/05) ECtHR 26 February 2009.

[345] *Ibid* para 19.

[346] *Ibid* para 32.

[347] *Ibid* para 34.

effect on public debate on the effectiveness of judicial institutions, the ECtHR stressed.[348]

Several other cases in the ECtHR have concerned the independence of the judiciary in Russia. The case of *Baturlova v. Russia*[349] concerned a letter sent by the president of the regional court to the first-instance court, in which the latter was explicitly instructed to re-examine a final binding decision on the ground of newly-discovered circumstances.[350] The ECtHR found a violation of Article 6(1) due to lack of independence of the first instance court. Again, in the case of *Igor Kabanov v. Russia*,[351] the Court found a violation of Article 6(1) as lack of impartiality of the judges concerned led to termination of the applicant's membership in the Bar Association of Russia.[352] Besides, the general public in Russia does not perceive judges as independent and impartial, a factor greatly contributing to continuing legal nihilism in Russia.[353]

The institution of the Constitutional Court has been regarded as the most important change in the Russian legal landscape after the collapse of the Soviet Union.[354] Leading Russian justices such as Vladimir Tumanov, previous Chair of the Constitutional Court, and Valerii Zorkin, the incumbent Chair of the Constitutional Court, have both emphasized the Court's role in giving "living voice" to the Constitution and as a safeguard against abuses of power.[355]

However, the role and independence of the Constitutional Court has also been retrenched in the course of various reforms. Until 2009 the Constitutional Court judges themselves elected the chair of the Constitutional Court for a three-year term. However, since 2009 the regulation changed and now the Council of the Federation upon the recommendation of the president appoints the chair for a term of six years.[356] Retired Constitutional Court judge Morshchakova has criticized the new arrangements as they significantly reduce the Court's independence.[357] Concern about the loss of judicial independence was also highlighted following the recusal of two independent-minded judges of the Constitutional Court. In 2009, after Constitutional Court Judge Vladimir

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[348] *Ibid* para 100–101.

[349] *Baturlova v Russia* (App 33188/08) ECtHR 19 April 2011.

[350] See also *Khrykin v Russia* (App 33186/08) ECtHR 19 April 2011.

[351] *Igor Kabanov v Russia (*App 8921/05) ECtHR 3 February 2011.

[352] Muižnieks (n 323) 17.

[353] *Ibid* 15.

[354] The Constitutional Court has jurisdiction to decide on the constitutionality of legislation and to give authoritative interpretations of constitutional provisions according to Article 125(5) of the Constitution. See Henderson (n 13) 200; see further: Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press 2008).

[355] Henderson (n 13) 200–201. See also: Lomovtseva and Henderson (n 298) 49.

[356] Henderson (n 13) 211; Muižnieks (n 323) 16.

[357] Henderson (n 13) 212.

Yaroslavtsev expressed outspoken views in the international media regarding the reforms and argued that the judiciary has been subjected to pressure from the executive power and the Russian security services, colleagues from the Constitutional Court accused Yaroslavtsev of undermining the authority of the judiciary. A formal warning was not issued, but he was advised to resign from his post as the Constitutional Court's representative on the Council of Judges. Yaroslavstev complied and resigned from the Council of Judges, but remained a judge in the Constitutional Court. Another judge of the Constitutional Court, Anatoli Kononov supported Yaroslavtsev publicly and criticized the conduct of their fellow judges. He also on several occasions referred to lack of independence in the Russian judiciary and assessed the amendments regarding appointment of the chair of the Constitutional Court as undemocratic and disrespectful.[358] Anatoli Kononov resigned his tenure due to criticism by fellow judges; no formal disciplinary proceedings were carried out.[359]

Interestingly, both of them had previously dissented in high-profile cases, including one concerning presidential appointments of governors in 2006.[360] Jane Henderson has argued that these two cases "indicate an increased level of subservience at the Constitutional Court, which is the court most appropriately placed to keep balance between the different branches of the State."[361] Upheavals at the Constitutional Court, the most powerful of Russia's courts, demonstrate a period of subservience and undermine the efforts of the Constitutional Court in building a coherent legal system and an independent judiciary in Russia.[362]

The Commissioner for Human Rights of the Council of Europe assessed in his 2013 report that in Russia procedures for the selection, appointment and promotion of judges "lack transparency, clear criteria and rules for selection and accountability"[363] and that the system "does not ensure full and unequivocal protection for judges from possible abuse".[364]The Commissioner has advised that in order to ensure independence, the procedures and criteria related to the

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[358] Henderson (n 13) 212; see further: Nikolaus von Twickel, '2 Senior Judges Quit After Criticism' (3 December 2009) The Moscow Times <http://www.themoscowtimes.com/sitemap/free/2009/12/article/2-senior-judges-quit-after-criticism/390815.html/> accessed on 1 December 2017.

[359] Henderson (n 13) 212; see further Anna Pushkarskaia, 'Konstitutsionnyi sud teriaet osobye mneniia' (2 December 2009) Kommersant < https://www.kommersant.ru/doc/1284828> accessed on 1 December 2017.

[360] Henderson (n 13) 227; see further: William E Pomeranz, 'President Medvedev and the Contested Constitutional Underpinnings of Russia's Power Vertical' (2009) 17 Demokratizatsiya 179–192; 184.

[361] Henderson (n 13) 212.

[362] *Ibid* 214.

[363] Muižnieks (n 323) 17.

[364] For instance, the power to assign cases could be abused to create a situation where a judge is overburdened with cases and, therefore, may be subject to disciplinary proceedings for delay. See further: Muižnieks (n 323) 16.

appointment and dismissal of judges and the application of disciplinary measures should be clarified[365] and that selecting chairs of courts should be the prerogative of the judiciary.[366]

Apart from reforms hindering the judiciary, it has been observed that one systemic factor characteristic of the Russian court system is that many Russian judges are recruited from the ranks of prosecutors, the police or court clerks, making them used to the hierarchical system. Approximately one third of Russian judges have previously worked in law enforcement institutions, 17% of judges have been employed as prosecutors and 16% as investigators or policemen. In contrast, for example in England the majority of judges are former barristers having practical trial experience and used to individual autonomy.[367]

The background related to enforcement institutions obviously has implications on the mind-set of judges, which in turn inevitably influences their work. Another characteristic of Russian judges, especially in higher courts, is that many of them have close ties to Vladimir Putin and Dmitri Medvedev. In 2010 President Medvedev had an opportunity to nominate three new Constitutional Court judges within five months. He appointed two former constitutional law professors, Aleksandr Kokotov and Konstantin Aranovskii, and criminal law specialist Aleksandr Boitsov. Aranovskii was a fellow graduate student of Medvedev in the Law Department of St Petersburg State University and Boitsov was a fellow lecturer when Medvedev lectured there from 1991–99. Besides, several other Constitutional Court judges are connected to St Petersburg State University, the *alma mater* of both Medvedev and Putin.[368]

Another factor to bear in mind is that the majority of current judges started their career in the Soviet system, which clearly has its implications on their mentality. All the first judges in the RSFSR Constitutional Court, with the exception of Tamara Moshchakova, had been members of the Communist Party.[369] In the Soviet system judges were not expected to be independent from other branches of the state: "Marxist theory denied the validity of the bourgeois "separation of powers", and judges were expected to play their part in transforming people into the ideal new socialist man or woman".[370] "Telephone law" – receiving instructions from above by phone – was a widespread practice in politically sensitive court cases. Even when there were no direct instructions, the background and education of the judges contributed to a belief in the mentality of judges that in any case the wellbeing of society has to be set above the rights of individuals.[371]

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365 *Ibid* 3.

366 *Ibid* 16.

367 Henderson (n 13) 227.

368 *Ibid* 212–213.

369 *Ibid* 220.

370 *Ibid* 219.

371 Savitskii (n 324); Henderson (n 13) 220.

Since to a great extent these same individuals still serve as judges, the attitudes and the mind-set of a judiciary that trained and practised in the Soviet system does not support changes towards more autonomy and independence. Nils Muižnieks argues that due to the prevalent mind-set, the role of the judge is seen as defending "the best interests of the state, rather than individual human rights."[372] Several "traditional" elements such as reliance on "contacts" and informal networks still remain in the Russian court system. These continue to undermine the independence of the judiciary. [373]Attempts to reform the judicial system have been met with resistance on the part of judges, chairs and other lawyers "brought up in Soviet times, without any understanding of what a law-based society actually means".[374]

The Committee of Civil Initiatives, headed by former Minister of Finance Alexei Kudrin, concluded in a recent study that in order to increase the independence of Russian courts it is necessary to introduce mandatory rotation of heads of courts with a prohibition on re-running for the same office. Electing chairs by judges themselves is supported.[375] However, reforms increasing the independence of the courts are not supported on the political level. Besides, Vladimir Zorkin, the most powerful Russian judge and the Chair of the Constitutional Court, has recently conveyed that in the conditions of terrorism and other factors hindering national security, the Russian legal system should be transformed to correspond to the security situation.[376] His message can been interpreted as a signal for law enforcement agencies that the Constitutional Court will not interfere with expanding their powers and also a signal for fellow-judges not to cause problems for power structures.

A strong and independent judiciary is of crucial importance in order to allow citizens to defend their rights and freedoms. The Russian judiciary is an institution that could slow Russia's backward slide regarding fundamental rights and freedoms. "In particular, systematically engaged and empowered sub-national courts have the capacity to shape a renewed jurisprudence of free expression in Russia – precisely where the rubber hits the road".[377] However, the judiciary in

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[372] Muižnieks (n 323) 15.

[373] Henderson (n 13) 228.

[374] Masha Karp (n 343).

[375] 'Retsept Nezavisimost'i dla sudei – izbavit'sa ot davlenia predsedatel'ia (26 November 2011) Legal Report <https://legal.report/article/26052016/recept-nezavisimosti-dlya-sudej-izbavitsya-ot-davleniya-predsedatelya> accessed on 1 December 2017.

[376] Kommersant, 'Valery Zorkin gotov k uzestocheniu Rossisskih zakonov' (25 November 2015) <.http://www.kommersant.ru/doc/2861672> accessed on 3 December 2017.
However, there is evidence of similar tendencies in the West as well, where the police and other organs have wide powers to treat criminal matters as security issues, thus removing human rights protections from suspects. See e.g. Massimo Fichera, 'Security Issues as Existential Threat to the Community' in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe – Reconsidering the Security Constitution* (Intersentia 2013).

[377] Ahdieh and Flemming (n 272) 33.

contemporary Russia is not independent. Legislative amendments to the laws on the Constitutional Court have been widely viewed as a step backwards in terms of democracy and are indicative of a growing lack of judicial independence in Russia. Still, it cannot be argued that all Russian courts and judges are flawed in all cases. Kathryn Hendley argues that whereas "Russian courts operate fairly normally when it comes to mundane cases", they are not perfect. However, "courts everywhere are flawed", she notes.[378] Nevertheless, "the dual legal system that has evolved in Russia – in which the courts can be relied on to handle mundane cases, but are likely to bow to the will of the powerful in touchier cases – is a far cry from the rule-of-law–based state that was the initial goal".[379]

2.3. Consequences of the characteristics of Russia's institutional framework on compliance with international human rights treaties

One of the central ideas of this study is that that the CoE can have a meaningful influence on compliance with the ECHR and its other instruments only when domestic circumstances support compliance with international human rights law. One of such pivotal domestic circumstances is a functioning institutional framework, particularly an enforceable constitution, independent courts and other institutions having the power and legitimacy to ensure that the constitution is adhered to, as I identified in Section 1.4.1 of this study. In this chapter I have focused on the Russian institutional framework and found that true institutional reform has not taken place in Russia and that Russia has not become a law-bound state. I argue that absence of the rule of law and independent institutions, particularly the absence of independent courts, is one of the major obstacles impeding Russia's compliance with international human rights treaties.

A law-based state will prevail only when meaningful mechanisms exist that ensure the balance of executive, legislative and judicial powers, as put by Courtney Hillebrecht.[380] Rule of law and an institutional framework that guarantees that the principle of rule of law is adhered to are important premises for the development of human rights in any country. Enforceable constitutions and independent and well-functioning institutions can facilitate compliance with international human rights law and ensure that the obligations undertaken by the government are adhered to. Although the Russian Constitution establishes a formal framework for a liberal rule of law state in Russia, in practice Russian executive power is almost unlimited and other institutions lack the power, capability and willingness to implement human rights predictably and impartially.

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[378] Hendley, *Everyday Law in Russia* (n 312) 223.

[379] Hendley, 'Rule of Law, Russian-Style' (n 267).

[380] Lien (n 254) 45.

As pointed out by Schimmelfennig, the socialization of norms can be measured by assessing to what extent an institutional norm has been established in a country's domestic political institutions and culture.[381] In the case of Russia, it can be concluded that formal constitutional norms have not led to constitutional socialization towards a liberal rule of law state. Problems with rule of law clearly already existed when Russia was preparing to become a member of the CoE and remained when Russia acceded to the CoE. "The long list of inadequacies and demands indicated that the gap between the legal order existing at the time of accession and a legal order based on the rule of law was enormous", as argued by prof. Angelika Nußberger, a distinguished public international law scholar and ECtHR judge.[382] Various indexes of rule of law comparing countries worldwide still place Russia near the bottom. In 2014 only 26.4% of countries worldwide ranked lower than Russia on the World Bank's rule of law indicator.[383] The World Justice Project ranks Russia in 75th place out of 102 countries analysed in their rule of law index.[384]

The rule of law situation has important implications on whether and how Russia complies with the ECHR and other international law. Domestic legislation and domestic institutions are of pivotal importance for effectively complying with obligations deriving from the ECHR. In accordance with the principle of subsidiarity, the primary responsibilities as well as the mechanisms for enforcing the ECHR lie with national institutions, as highlighted in Section 1.1.4 of this study. The enforceability of the ECHR depends to a great extent on the constitutional framework of the country, as highlighted by Pamela Jordan.[385] It has been demonstrated that weak domestic institutional constraints on the executive facilitate *à la carte* compliance with the judgments of the ECtHR and further exacerbate the implementation crisis in the CoE.[386] Strong executive power and weak other institutions tend to predict *à la carte* compliance, meaning that countries do not enforce all judgments but rather cherry-pick. Courtney Hillebrecht has pointed out that in the CoE system the most noteworthy cases of *à la carte* compliance are Russia and Italy. They tend to comply better with obligations to pay compensation and other expenses, but fail to implement

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[381] Frank Schimmelfennig, 'Introduction: The Impact of International Organizations on the Central and Eastern European States – Conceptual and Theoretical Issues' in Ronald Haly Linden (ed), *Norms and Nannies: The Impact of International Organizations on the Central and East European States* (Rowman & Littlefield 2002) 10; Jonsson Cornell (n 7) 31.

[382] Nußberger (n 9) 604.

[383] See: The World Bank, 'Country Data Report for Russian Federation, 1996–2014' (15 September 2015).

[384] Rule of law index of the World Justice Project <http://worldjusticeproject.org/rule-law-around-world> accessed on 3 December 2017.

[385] Jordan (n 68) 686.

[386] Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 285–287.

remedies requiring structural changes due to the political costs related to these reforms.[387]

The pre-existing level and legacy of domestic democracy is an important factor determining the willingness of states to accept and enforce human rights norms on a domestic level, argues Moravcsik.[388] It matters whether countries have "an overarching sense of responsibility for respecting human rights and the rule of law", as vocalized by Anna Jonsson Cornell.[389] Russia indeed lacks a legacy of domestic democracy, as well as a legacy of closely-related concepts of rule of law and human rights. Molly Warner Lien predicted in the 1990s that the "future existence of a Russian law-based state cannot be assumed". [390] She pointed out that despite much optimism about the future role of law in Russia, "the content of the laws and the extent to which law is respected by government will inevitably be a product of the heritage of Russian and Soviet legal philosophy".[391]

However, lack of historical experience is not the only factor determining the future of rule of law. Various other post-Soviet countries have been able to compensate for lack of historical experience and have become law-abiding countries. It should not be forgotten that the Russian Constitution establishes a formal framework for a liberal rule of law state in Russia. On the other hand, the checks and balances existing in the Constitution are weak and have been increasingly marginalized and *de facto* deactivated, although they are formally maintained *de jure* for legitimation purposes, as explained by Sarah Whitemore.[392] Various paraconstitutional institutions and informal networks demonstrate that in Russia the president can bypass the Constitution while orchestrating important changes. "This reinforces the potential rift between "law on the books" and "law in action": a long-standing issue in Russia".[393] Moreover, Russian legislation does not provide the judiciary with proper shielding from unlawful internal and external pressure: this has important implications for the implementation of human rights in Russia. "Perhaps the greatest challenges to implementation in Russia are the lack of an independent judicial system and the political pressure judges face to bow to the Kremlin's demands" Courtney Hillebrecht has voiced .[394] "The very existence of telephone law brings the rule

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[387] Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (n 24) 60, 54, 121.

[388] Moravcsik, 'Liberal Theories of International Law' (n 262) 90.

[389] Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 279.

[390] Lien (n 254) 43–44.

[391] *Ibid*

[392] Whitmore (n 304) 1001.

[393] Henderson (n 13) 141.

[394] Hillebrecht 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (n 24) 288.

of law into question in Russia"[395] as put by Kathryn Hendley. The lack of independent courts leaves Russia's political opposition vulnerable to constant pressure from the authorities.[396]

Whereas in routine cases, the courts do not experience substantial external pressure, it is impossible to predict which cases turn out to be routine and which ones turn out to be nonroutine cases. Kathryn Hendley explains:

> Because of the fuzziness of the dividing line between the routine and non-routune, most Russians tend to overcorrect; they avoid mobilizing the law on their behalf if they perceive the slightest risk of being sucked into the shadowy world of telephone law…Several of the most prominent Putin-era examples of politicized justice serve as cautionary tales."[397]

"The fuzziness of the distinction between routine and nonroutine cases is facilitated by the persistence of vaguely worded legislation,"[398] argues Hendley. Lack of clarity of legal provisions and wide discretion for officials to interpret the meaning of law goes hand in hand with low levels of rule of law and this inevitably undermines predictability.[399] Lack of independence of the Russian judiciary also has widespread implications on the legislation of Russian Federation: "the emasculation of the Constitutional Court under Putin has left the Putin-controlled legislature free to craft statutes that provide plenty of wiggle room for authorities" stresses Hendley.[400]

Whereas Russia tried to take the path of democracy and rule of law, several obstacles appeared on the way: inability to secure free and fair elections and inability to restrict the power of the leader by law, as pointed out by Yelena Lukyanova. As a result nothing came out, because "law is a balanced multi-dimensional system. There are no trifles in it that can be safely neglected or sacrificed without threatening the existence of the system as a whole."[401] In her view the case of Crimea is a classic example of violation of the rule of law by (mis) interpreting meanings and manipulating procedures by Russian President,

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[395] Hendley, *Everyday Law in Russia* (n 312) 226.

[396] Freedom House, *Nations in Transit 2014: Democratization from Central Europe to Eurasia* (Rowman & Littlefield 2014) 528.

[397] Hendley, *Everyday Law in Russia* (312) 233.

[398] *Ibid* 234.

[399] *Ibid*. I will tackle various problems related to lack of clarity of Russian legislation in Chapters 5, 6 and 7.

[400] *Ibid* 235.

[401] Lukyanova, 'O prave nalevo' (n 329). See, for a reply to Yelena Lukyanova's critical article by Valery Zorkin: Valery Zorkin, 'Pravo – i tol'ko pravo. O vopiyushchikh pravonarusheniyakh, kotoryye uporno ne zamechayut' (2015) Rossiyskaya Gazeta. Federal'nyy vypusk N6631 (24 March 2015) <http://www.rg.ru/2015/03/23/zorkin-site.html> accessed on 3 December 2017. See also for a collection of debates held by Yelena Lukyanova and Valery Zorkin and contributions from other scholars and commentators in Yelena Lukyanova, *#KRYMNASh. Spor o prave i o skrepah dvuh yuristov (*Moscow: Kuchkovo Pole 2015).

the parliament and the Constitutional Court, including its chairman Valery Zorkin.[402]

To conclude, human rights compliance is unlikely unless true institutional change occurs in Russia. Professor Angelika Nußberger argues that many of the Russian authorities still act as they used to act during Soviet times. In her view, Russian "human rights violations are caused by a behaviour that is based on the idea of the uncontrollability of the State and the complete submission of the individual".[403] Hathaway emphasizes that in order to improve implementation of human rights in domestic contexts it is vital to reform domestic institutions: to develop institutional capacity and to overcome "the institutional inertia" that largely contributes to slow transformation of human rights practices in countries with authoritarian pasts.[404] When a majority of government officials used to repressive means and other human rights violations remain in their posts, this considerably hinders effective reforms. In Hathaway's view, "repressive behaviour lingers long after the initial impetus for it disappears… governments and the individuals who make decisions within them become habituated to engaging in human rights violations, and this behaviour takes time and continued conscious effort to change".[405]

Constitutional provisions establishing separation of power, checks and balances and providing guarantees for the judiciary simply do not function in practice when the majority of people working in those institutions are used to authoritarian practices and continue to implement them.

Even if the constitutional framework was perfectly in accordance with the principle of rule of law, legal institutions and top-down supply of law are not sufficient for the rule of law to operate in practice, as pointed out by Kathryn Hendley. She argues that rule of law can blossom only when met with bottom-up demand for law.[406] Thus the future of rule of law in Russia also depends on the development of civil society and its ability to demand that their government adheres to the Constitution and the norms of international law. These aspects are analysed in Chapters 5, 6 and 7 of this study.

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[402] Lukyanova, 'O prave nalevo' (n 329).

[403] Nußberger (n 9) 650.

[404] Hathaway (n 87) 2003, 2025.

[405] *Ibid* 2003.

[406] Kathryn Hendley, 'Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law' (1999) 8 East European Constitutional Review 89–95; 89.

III INCORPORATING INTERNATIONAL HUMAN RIGHTS LAW INTO THE RUSSIAN LEGAL ORDER

In the absence of justice, what is sovereignty but organized robbery?
(Saint Augustine)

Human rights law can be implemented on the domestic level only when the norms of international human rights law are incorporated into the national legal order – this is one of the central preconditions for compliance with international human rights law (as discussed in Section 1.4.2 of this study). In the context of the ECHR it is of utmost importance how well the provisions of the ECHR and the judgments of the ECtHR are situated within the legal order. Accordingly, in this chapter I focus on Russian state practice and analyse the construal and domestic treatment of human rights in legislation, in the practice of the Constitutional Court, and in Russian legal scholarship. I will examine the position of international law in the Russian legal order, with particular focus on the interplay between international human rights law and the Russian Constitution, relying on the relevant legislation and the case law of the Constitutional Court as well as interpretations by Russian constitutional law scholars. I will mainly focus on the issue how the ECHR and ECtHR judgments are situated within the Russian legal order.

3.1. Position of international human rights law in the Russian legal order

At the end of the 1980s and the beginning of the 1990s Russia experienced a short period of enthusiasm towards international law, including human rights law. Mikhail Gorbachev spoke of a "common European home", based on respect for human rights and the rule of law while addressing the Parliamentary Assembly on 8 July 1989.[407] Gorbachev wrote in 1992: "It seems that we are today passing through "a period of acute sensitivity to human rights, to the rights of the individual – a period in which we rethink fundamental values."[408] Mikhail Gorbachev and Russia's first president, Boris Yeltsin, both represented the Westernizing school of thought and took steps to modernize Russia through Westernization.[409]

This period was characterized by "the ideology of opening up Russia to international regimes", particularly to European human rights law. The Russian political elites realized that Western Europe had accumulated more experience

[407] Jonsson Cornell (n 7) 14, 26.

[408] Gorbachev (n 287) 5.

[409] Jonsson Cornell (n 7) 14, 26.

with human rights than Russia and Russia could learn from the West. In turn, Western Europe was hoping to "civilize" Russia and to "re-socialize" human rights into Russian domestic practices.[410] During this period, international standards of human rights were widely used to fill gaps in domestic legislation. International human rights standards, especially the framework of the Council of Europe, vastly influenced constitutional developments and construal of rights and freedoms in Russia.[411] On 5 September 1991 the USSR Congress of People's Deputies (CPD) adopted the USSR Declaration of the Rights and Freedoms of Man, which enshrined the doctrine of inherent rights in Soviet law for the first time.[412] On 22 November 1991, the Russian Soviet Federative Socialist Republic passed its own Declaration of the Rights and Freedoms of Man and Citizen. In April 1992, in newly independent Russia, the provisions of this Declaration were incorporated wholesale into the Russian Constitution, giving Russia for the first time a set of constitutional rights that matched international human rights standards.[413] In 1993 Russia adopted a very modern, rule-of-law and human-rights centred Constitution[414] highlighting that "Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State" (Article 2 of the Constitution). "In the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms" (Article 55(2)). In accordance with Article 55 (3) of the Russian Constitution, the rights and freedoms of man and the citizen may be limited by federal law only to the extent necessary for protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, to ensure the defence of the country and the security of the state. These limitations are very similar to those enacted in the ECHR.

Article 15 of the Russian Constitution gives domestic legal force to international treaties ratified by the Russian Federation. "The commonly recognized principles and norms of international law and the international treaties signed by the Russian Federation shall be a component part of its legal system", states Article 15(4) of the Russian Constitution. Pursuant to Article 15(3) any international treaty becomes part of the Russian legal system upon the official

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410 Mälksoo, *Russian Approaches to International Law* (n 6) 156.

411 Jonsson Cornell (n 7) 31; Anna Jonsson, 'Judicial Review and Individual Legal Activism: The Case of Russia in Theoretical Perspective' (Dissertation for the Degree of Doctor of Law at the Faculty of Law Uppsala University 2005); Nußberger (n 9) 606–607.

412 The legal status of the Declaration was unclear, as it did not fit within the standard Soviet hierarchy of legislation and, more importantly, clearly contradicted the Constitution then in force. See further: Henderson (n 13) 228.

413 Henderson (n 13) 228.

414 Konstitutsija Rossiiskoi Federatsii ot 25 dekabrja 1993 goda, s izmenenijami ot 30 dekabrja 2008 goda. (Constitution of the Russian Federation of 25 December 1993). See for the text of the Constitution in English: <http://www.constitution.ru/en/10003000-02.htm> accessed on 1 December 2017.

publication of a law ratifying the treaty and therefore it is not necessary to transform treaties into the domestic legal system in order for Russian courts to apply the provisions of international law.[415]

The approach of the 1993 Constitution towards international law is radically different from Soviet constitutions. In Soviet Russia international law, including human rights law, was not considered to be part of national law; therefore the new approach towards international law is truly revolutionary considering Russian standards. Legal scholars, practitioners as well as politicians initially assessed this newly-established approach towards international law very positively.[416] Article 15(4) of the Constitution demonstrates the Constitution's "friendly view on international law" that is also confirmed in Article 17(1) and article 55(1) of the Constitution, as stated by Angelika Nußberger.[417] In the 1993 Constitution the relationship between international law and the national system of laws was established in accordance with contemporary standards, as assessed by Igor Lukashuk, who was a Russian scholar of international law and a member of the United Nations International Law Commission from 1995 to 2002.[418]

Whereas according to the Constitution the ECHR forms an integral part of Russian legal system, its status in the hierarchy of norms has been a highly disputable question in academic discussions, in the practice of the Constitutional Court, as well as in political discourse.[419] Article 15 of the Constitution is located in Chapter 1, namely "The Fundamentals of the Constitutional System". The locus of Article 15 in the constitutional system signifies that no other provision of the Constitution or any other legal act may contradict its interpretation or application, as argued by Igor Lukashuk.[420]

On 5 May 1998 Russia ratified the ECHR and accepted the jurisdiction of the ECtHR. Theoretically there is no difference between the ECHR and, for example, the Russian Civil Procedural Code in terms of their implementation in national courts. Article 15(4) of the Constitution is more favourable toward the ECHR as it sets out the priority of an international treaty over national legislation, as conveyed by Anton Burkov.[421] The ECHR does not directly require states to give direct effect to the ECHR within national law; however, Russia has deliberately chosen to do so. The ECHR as well as other international treaties are "component parts" of Russia's legal system. Pursuant to Article 1 of

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[415] See, for example: Burkov (n 13) 24.

[416] *Ibid* 23.

[417] Nußberger (n 9) 615–616.

[418] Igor Lukashuk, 'Russia's Conception of International Law' (1995) 2(1) The Parker School Journal of East European Law) 1–27; 14.

[419] See, for example: Mäger, 'Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court' (n 1).

[420] Lukashuk (n 418)

[421] Burkov (n 13) 25.

the Law "On ratification of the Convention"[422], the Russian Federation recognizes the compulsory jurisdiction of the ECtHR in regard to the interpretation and application of the Convention. Therefore, national courts in Russia are obliged to invoke the ECHR on an equal footing with any national legislation. Moreover, the courts also have to rely on interpretation of international treaties by international organs, such as the ECtHR.[423]

Russia has enforced various reforms in order to render its legal order in accordance with the standards of the CoE. For example, the new Criminal Code and Criminal Procedural Code improving the conditions of detention and improving procedural rights were largely influenced by the ECHR. Moreover, human rights education improved when Russia joined the CoE. Numerous training sessions and other methods for learning and cooperation were organized for Russian officials, judges, and human rights advocates, enabling those professionals to use the knowledge gained in their everyday work.[424] Upon becoming a member of the CoE, Russia also undertook to reform the judiciary in line with its standards. [425]

As explained by Sergey Marochkin, the director of the Institute of State Law at the University of Tyumen and one of the leading Russian scholars in the sphere of constitutional law, the role of courts in clarifying the relationship of Russian law and international law and the role of international law in Russian legal system has been of pivotal importance.[426] Marochkin argues:

> The constitutional principle that makes international norms and treaties an integral part of the domestic legal order entails a wide role of courts in that order. In a country in which the political and legal order was closed for many decades and where application of international law was quite rare, the significant role of the courts consists in the increasing insertion and entrenchment of this law into different kinds of cases and legal relations. Courts resort to international law for their legal reasoning, formulation of legal positions, the

[422] Federal'nyy zakon Rossiyskoy Federatsii ot 30.03.1998 No 54-FZ "O ratifikatsii Konventsii o zashchite prav cheloveka i osnovnyh svobod i Protokolov k ney".

[423] Burkov (n 13) 20; Gennady M Danilenko, 'Implementation of International Law in CIS States: Theory and Practice' (1999) 10 European journal of international law 51–69; 68; Kirill Koroteev, 'The European Factor in Russian Justice' (26 June 2008) Open Democracy News Analysis <https://www.opendemocracy.net/Russia/article/the-European-factor-in-Russian-justice> accessed on 1 December 2017.

[424] Jordan (n 68) 680–681, 685; Koroteev (n 423); Massias (n 12) 112.

[425] See: Council of Europe Parliamentary Assembly, *Opinion 193(1996): Application by Russia for Membership of the Council of Europe* (1996) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=13932&lang=en> accessed 1 December 2017.

[426] Sergey Marochkin, 'International Law in the Russian Courts in Transitional Situations" (2012) 9 Intersentia. Series on transitional justice' 35–57.

> determination of applicable law, and the deliberation and formulation of a final decision in the case.[427]

In Marochkin's assessment:

> The courts do not treat and realize this constitutional principle in a formalistic manner (i.e. according to just its literal meaning). They have developed and enriched its content, and strengthened the domestic rule of law by resorting to international law: basing themselves not only on the legal component (generally recognized principles and norms and international treaties), but on virtually all elements of the international normative system.[428]

The Plenum of the Supreme Court of the Russian Federation has provided very authoritative and useful guidelines for the Russian courts on the application of the commonly recognised principles and norms of the international law and the international treaties of the Russian Federation. In its resolution of 10 October 2003 the Plenum of the Supreme Court explained that "[i]nternational treaties play a paramount role in the protection of human rights and basic freedoms" [429] and claimed that there is a need to "further improve the judicial activity regarding the implementation of provisions of international law on the national level".[430] For ensuring correct and uniform application of international law by the Russian courts, the Supreme Court explained that deriving from the provisions of Part 4 of Article 15, Part 1 of Article 17 and Article 18 of the Constitution

> [h]uman rights and freedoms have direct effect within the jurisdiction of the Russian Federation, in accordance with the universally recognized principles and norms of international law and the international treaties of Russian Federation. They determine the meaning, contents and the application of laws, the activities of legislative and executive branches of power [and] of the local self-government.

The Supreme Court also clarified:

> [t]he universally recognized principles of international law should be understood as the basic imperative norms of international law, accepted and recognized by the international community of states as a whole, deviation from which is inadmissible. The universally recognized principles of international law

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[427] *Ibid* 56.

[428] *Ibid* 57.

[429] The Resolution of the Plenum of the Supreme Court of the Russian Federation (10 October 2003).

[430] *Ibid*.

> include, inter alia, the principle of universal respect for human rights and the principle of fulfilment of international obligations in good faith.[431]

The Court made it clear that rules of an effective international treaty of the Russian Federation "have priority of application over the laws of the Russian Federation"[432] The Supreme Court reminded that "incorrect application of universally recognized principles and norms of international law and the international treaties…may constitute grounds for the reversal or amendment of a judicial act."[433]

In connection with the ECHR, the Supreme Court stated:

> [A]s a member state of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Russian Federation recognizes the jurisdiction of the European Court of Human Rights 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… This is why the said Convention should be applied by courts with regard to the practice of the European Court of Human Rights in order to avoid any violation of the Convention.[434]

The Court also reminded that the execution of judgments implies "the obligation of the state to take individual measures, aimed at erasing the violation 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."[435]

In 2013 the Plenum of the Supreme Court issued another authoritative resolution focusing on the application of the ECHR and its protocols by Russian courts of general jurisdiction. The Court emphasized that in compliance with the principle of subsidiarity, protection of the rights and freedoms envisaged by the ECHR "first of all is the duty of state authorities, including courts".[436]

The Supreme Court reiterated that the legal positions of the ECtHR "contained in the final judgments of the Court delivered in respect of the Russian Federation are obligatory for the courts."[437] The Court also reminded that the legal positions of the ECtHR must be taken into consideration while applying Russian law and that "the content of the rights and freedoms provided by the laws of the Russian Federation must be defined in view of the content of similar

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[431] *Ibid* para 1.

[432] *Ibid* para 8.

[433] *Ibid* para 9.

[434] *Ibid* para 10.

[435] *Ibid* para 11.

[436] The Resolution of the Plenum of the Supreme Court of the Russian Federation (27 June 2013).

[437] *Ibid* para 2.

rights and freedoms displayed by the European Court when applying the Convention and the Protocols thereto."[438] The Supreme Court explained that the legal positions of the ECtHR must be taken into consideration when applying the ECHR and its protocols, but also other international treaties that Russia has ratified.[439] The Supreme Court also noted:

> [t]he courts should always substantiate the necessity of restriction of human rights and freedoms based on the established factual circumstances…restriction of human rights and freedoms is allowed only when there exist related and sufficient grounds for such restriction, as well as if the balance between lawful interests of the person whose rights and freedoms are restricted and the lawful interests of other persons, the state and society is preserved.[440]

The 2003 resolution and 2013 resolution of the Plenum of the Supreme Court providing guiding explanations to lower courts constitute a major part of Russian legal framework. It derives from these documents that the provisions of international treaties of the Russian Federation have priority of application over the laws of the Russian Federation; that the universally recognized principles of international law include the principle of universal respect for human rights and the principle of fulfilment of international obligations in good faith; that human rights and freedoms have direct effect within the jurisdiction of the Russian Federation; that Russia acknowledges the jurisdiction of the ECtHR; that the legal positions provided in judgments of the ECtHR delivered in respect of the Russian Federation are obligatory for Russian courts and that the legal positions of the ECtHR must be taken into consideration while applying and interpreting Russian law.

Being bound by international agreements creating rights for citizens and obligations for the state has been both a novel and a challenging situation for the Russian judiciary, on whose work it has had a big impact.[441] In 2009 Alexei Trochev wrote that "the Russian legal system's adherence to the standards of the 1950 convention is a complicated work in progress that develops in fits and starts, and in which power holders wrestle with the question of their legal autonomy to limit the domestication of the European human rights standards in Russian governance." [442] The judgments of Russian courts have demonstrated that the useful guidelines provided by the Supreme Court have not been consistently followed. In Trochev's view the capacity of the Russian judicial system to deal with structural violations of the ECHR and to obey the guidelines provided by the Supreme Court is limited, because the judges have little

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[438] *Ibid* para 3.

[439] *Ibid* para 4.

[440] *Ibid* para 8.

[441] Burkov (n 13) 20; Koroteev (n 423).

[442] Trochev, 'All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia' (n 15).

incentive to "disrupt the status quo and speak the truth to power at the request of the ECtHR", as the pressure from law-enforcement personnel and other local parties is higher than the influence of Strasbourg; the judiciary does not have a high position in the "power map of Russia" compared to important government figures and private sector and the judges are so overloaded with work that they do not have time and resources to get acquainted with the case law of the ECtHR.[443]

In general, subsequent to ratification of the ECHR, the Russian courts and other institutions had a favourable approach towards the Convention. Although initially the case law of the ECtHR was rarely cited, this approach changed when the Constitutional Court and other courts began to refer to the jurisprudence of the ECtHR and to apply its standards in their argumentation on a regular basis.[444] Roughly 10 years after the ratification, Russian lower courts referred to ECHR in a growing number of cases, however pressure from the executive and also pressure from other judges reluctant to apply the ECHR were important factors hindering this. [445] Despite the government officials "tried their best to stem the flood of complaints" to the ECtHR "to avoid embarrassment at home and abroad", Russians flooded the ECtHR in great numbers.[446] "Responding to losses in Strasbourg, Russia witnessed a furry of legislative activity, as well as increased funding for the prison system and the judicial branch"[447] as noted by Trochev.

Constitutional Court also began to regularly examine and frequently refer to the case law of the ECtHR. Whereas in some cases the decisions of the Constitutional Court were in accordance with the jurisprudence with the ECtHR, in other cases the Constitutional Court referred to the case law of the ECtHR selectively or vaguely and even misinterpreted the ECtHR[448] Also Angelika Nußberger agrees that while there are cases where the positions of the ECtHR are correctly referred to and used in the Court's argumentation, there are many flaws in citation and the main role of referring to ECtHR case law seems to be to emphasize the harmony between the standards developed by the ECtHR and the Russian Constitutional Court.[449] Nußberger has assessed that in a majority of cases the references of Russian courts to the ECHR are flummery and lack meaningful analysis. They are "often not more than lip service and do not have an impact on the outcome of the cases".[450]

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[443] *Ibid* 156–157.

[444] Koroteev (n 423); Muižnieks (n 323) 9; Nußberger (n 9) 603–610, 619.

[445] Trochev, 'All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia' (n 15) 162.

[446] *Ibid* 165.

[447] *Ibid.*

[448] *Ibid* 158.

[449] Nußberger (n 9) 603–10, 619.

[450] *Ibid*

In 2007 the Constitutional Court held that the wording to be "part of its legal system" in Article 15 (4) of the Constitution conveys the message that international agreements should be "taken into account", thus undermining the role of the ECHR and other international agreements in the Russian legal system, as the Constitutional Court indicated that it is not obligatory but only recommended to implement international law.[451] In 2007 Russian legal scholar Anton Burkov assessed the impact of the ECHR on the Russian legal system in terms of its implementation by domestic courts as unsatisfactory due to a manifest and visible imbalance between normative provisions and jurisprudence.[452] Despite the difficulties related to integrating the ECHR into the Russian legal order and the mind-set of its people, it has been assessed that "the decisions of the ECtHR have had a catalysing effect on the development of legislative and judicial practices in Russia".[453]

Overall, integrating the ECHR into the Russian legal order and into the mind-set of Russian judges and Russian citizens has been easier said than done. "Initially, ratification of the Convention was barely noticed in Russia. It had no impact, for example, on the planning and implementation of military operations in the conflict in the North Caucasus. And these operations (non-judicial executions, indiscriminate bombing, torture, forced disappearance, unlawful arrests...) had nothing in common with the Convention", as argued by Russian human rights lawyer Kirill Koroteev.[454] During the Second Chechen war, PACE adopted several resolutions aimed at resolving the conflict, which Russia ignored. In April 2000 Russia's voting privileges in the Parliamentary Assembly were suspended and a threat was made to suspend Russia's membership in the CoE altogether due to grave human rights infringements in Chechnya. Due to Russia's various reassurances, the voting rights were reinstated in January 2001; however, tensions remained.[455]

Jean-Pierre Massias has argued that in terms of human rights 10 years after becoming a member of the CoE "Russia under Vladimir Putin was in a considerably regressed situation compared with its situation in 1996. Not only were commitments made when it acceded not fully met, but regulations and political practices regarding the exercise of power in 2006 were less democratic than those of 1996, even though Russia had been admitted in the hope of democratic

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[451] Koroteev (n 423); see further: Mäger, 'Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court' (n 1).

[452] Burkov (n 13) 83.

[453] Iryna Marchuk 'Flexing Muscles (Yet Again): The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case' (13 February 2017) EJIL: Talk!, <https://www.ejiltalk.org/flexing-muscles-yet-again-the-russian-constitutional-courts-defiance-of-the-authority-of-the-ecthr-in-the-yukos-case/> accessed 1 December 2017.

[454] Koroteev (n 423).

[455] Jordan (n 68) 684; Massias (n 12) 110; Nußberger (n 9) 603.

progression."[456] Whereas until 2005 the decisions of the ECtHR gained wide coverage in the media and were mostly "taken seriously by the Russian authorities", since then the trend has changed sharply and cooperation between the ECtHR and the Russian executive started to decrease and has done so increasingly.[457] In 2005 Konstantin Kosachev, Head of the Russian delegation to PACE, labelled the commitments that Russia undertook in the 1990s as "romantic expectations" aimed at political gains and achieving international legitimacy. He argued that mechanical transfer of standards and norms "from enlightened Europe to Russian soil" was not sufficient for the development of democracy in Russia.[458]

In 2006 Russia refused to ratify Protocol № 14 dealing with reform of the ECtHR as arguably the protocol contradicted the principles of Russian law.[459] However, Russia finally agreed to ratification in 2010. Russian executive power has demonstrated its unwillingness to cooperate with the European Court by refusing to present documents to the court, most notably in Chechen cases, considering them irrelevant, declaring them a state secret, or refusing on the grounds that such demands contradict the Russian Criminal Procedural Code, prohibiting the disclosure of materials from an uncompleted investigation. Several problems have also arisen with observance of the Court's instructions concerning article 39 of Court Procedure (Temporary measures), usually applied when the applicant faces extradition or deportation to countries where they may be subject to torture or brutal treatment. Ignoring decisions requiring the Russian authorities to stop extradition or deportation to Turkmenistan and Uzbekistan, several people have been sent back to these countries pursuant to rulings of local courts.[460]

The relationship with the ECtHR was a topic of considerable debate in Russia before the State Duma elections of 2011. That summer, Aleksandr Torshin, then acting chair of the Federation Council initiated a new draft law according to which judgments of the ECtHR could be implemented in Russia only if first approved by the Constitutional Court. However, this proposal was dismissed.[461] The Russian political and legal mainstream currently interprets the obligations that Russia undertook while joining the CoE as "discriminatory and excessive". The format of Russian participation in the Council of Europe was the result of a fairly brief period in Russian foreign policy that is no longer in

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[456] Massias (n 12) 115.

[457] Koroteev (n 423).

[458] Interview with Konstantin Kosachev by the *Parlamentskaya Gazeta* [Parliamentary Newspaper] (1 July 2005) <www.duma-er.ru/pubs/pubs/pubs/pubs/9909> accessed on 1 December 2017 (As referred in: Massias (n 12) 111)

[459] Koroteev (n 423).

[460] *Ibid.*

[461] Svetlana Sukhova 'V PASE Protiv Popravok Torshina' (24 June 2011) Nezavisimaya Gazeta <http://www.ng.ru/world/2011-06-24/2_pase.html> accessed 2 December 2017.

line with current realities, as argued by Konstantin Kosachev, Chair of the Federation Council Committee on international Affairs and Chair of the Russian delegation at PACE from 2004 to 2012.[462]

Alexei Pushkov, currently a senator from Perm Krai, a former Chair of the Foreign Affairs Committee in the State Duma and head of the Russian delegation at PACE from 2012 to 2016 has argued:

> Initially Russia was in an unequal position in her relation with the Council of Europe, making herself dependent on the West while allowing monitoring and evaluation, however not being able to evaluate Western countries. This has been a relationship of teacher and student. However, the role of Russia in the Council of Europe does not match its territory, its nuclear arms, nor its status as one of the leading countries of the modern world and a member of the UN Security Council. Neither the US nor China… have bound themselves with commitments before any international organizations that could harm their freedom of manoeuvre besides the UN.[463]

Thus, several Russian political leaders have vocally demonstrated Russia's reluctance to follow the standards of the CoE and to occupy the role of the student.

Nevertheless, throughout the years the ECtHR has in many ways directly strengthened the protection of human rights and fundamental freedoms in Russia. PACE in cooperation with the Human Rights Centre of the University of Essex, has prepared a valuable overview of the impact of the ECHR in State Parties, including Russia[464]. The analysis demonstrates that as a result of *Burdov v. Russia*[465] and *Burdov v. Russia* (No. 2)[466] concerning the damages to the health of the applicant when he was exposed to radioactive emissions in Chernobyl, Russia adopted the Federal Compensation Act (the Federal Law no. 68-FZ "On Compensation for a Violation of the Right to a Trial within a Reasonable Time or the Right to the Enforcement of a Judgment within a Reasonable Time"[467] accompanied by a Federal Law amending certain legislative acts of the Russian

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[462] Maria Efimova, Anna Pushkarskaya 'Vhozdenie po mukam' (15 February 2016) Kommersant Vlast' 9.

[463] *Ibid*

[464] Council of Europe Parlamentary Assembly, *Impact of the European Convention on Human Rights in States Parties: selected examples* (Strasbourg, 8 January 2016) <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5968&lang=2&cat=5> accessed on 10 March 2018.

[465] *Burdov v Russia* (App 59498/00) ECtHR 7 May 2002.

[466] *Burdov v. Russia No. 2* (App 33509/04) ECtHR 15 January 2009.

[467] Federal'nyy zakon Rossiyskoy Federatsii ot 30.04.2010 No 68-FZ "O kompenzatsii za narushenie prava na sudoproizvodstvo v razumnyi srok ili prava na ispolnenie sudebnogo akta v razumnyi srok".

Federation[468]). The regulation now enables to claim compensation for prolonged non-enforcement of a judgment. Moreover, Russia has taken various measures to remedy violations of the rights to liberty (Article 5 of the ECHR). Between 2008 and 2011 several legislative amendments were adopted to clarify the calculation of the detention period when the court decides to refer a case back to the investigation stage; to limit the time period of remand detention and to promote alternatives to remand detention. Other examples of impact of the ECHR and the case law of the ECtHR are plentiful.[469] Thus, it cannot be argued that international law, especially the ECHR has had no influence on Russian legal system and that the standards of the ECHR are not incorporated in Russian legal system. Whereas plentiful problems exist in this regard, it cannot be denied that in many spheres the ECHR has had an important influence on Russian legislation and domestic practices.

3.2. Changed interpretation of the interplay between international law and the Russian Constitution in the practice of the Constitutional Court

Undeniably the priority of international law over national law as stipulated in Article 15 of the Constitution has not become "an everyday legal reality on the ground" in Russia.[470] Although the Russian Constitution is monist, the voices demanding amendment of the constitutional provision stipulating the priority of international law over domestic law have become ever stronger.[471] Several politically sensitive cases such as *Markin v Russia*[472] concerning parental leave of Russian servicemen; *Anchugov and Gladkov v Russia*[473] concerning prisoners' right to vote and *OAO Neftyanaya Kompaniya Yukos v. Russia* [474] concerning the expropriation of Yukos oil company have triggered a fierce debate in the Russian public and legal domain concerning the role of international law in the Russian domestic legal order and have further disoriented the sensitive relationship between Russia and the ECtHR.

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[468] Federal'nyy zakon Rossiyskoy Federatsii ot 30.04.2010 No 69-FZ "O vnesenii izmenenii v otdel'nye zakonadatel'nye akty Rossiskoy Federatsii v svjazi s prinyatiem Federal'nogo zakona "O kompenzatsii za narushenie prava na sudoproizvodstvo v razumnyi srok ili prava na ispolnenie sudebnogo akta v razumnyi srok".

[469] Council of Europe Parlamentary Assembly, *Impact of the European Convention on Human Rights in States Parties: selected examples* (n 464) 32–33.

[470] Mälksoo, *Russian Approaches to International Law* (n 6) 120.

[471] *Ibid* 121.

[472] *Konstantin Markin v Russia* (App 30078/06) ECtHR 22 March 2012.

[473] *Anchugov and Gladkov v Russia* (Apps 11157/04 and 15162/05) ECtHR 4 July 2013.

[474] *OAO Neftyanaya Kompaniya YUKOS v* Russia (App 14902/04) ECtHR 20 September 2011 (merits) and 31 July 2014 (just satisfaction).

In the *Markin* case the ECtHR essentially overruled a Constitutional Court judgment, which triggered a strong backlash among the Russian legal and political elite. The ECtHR held that a provision of Russian law prohibiting the grant of parental leave to military servicemen and allowing it only for servicewomen is discriminatory as it violated Article 14 of the ECHR in combination with Article 8 of the ECHR. The Constitutional Court of Russia previously found that this provision is in accordance with the Constitution. The Constitutional Court emphasized the special role of military service in guaranteeing the defence and security of Russia, which justifies the prohibition of parental leave for servicemen as it ensures that servicemen fulfil their duty to defend the Fatherland. In its analysis, the Constitutional Court also focused on the special role of women in bringing up children that is safeguarded by Article 38(1) of the Constitution, establishing that motherhood, childhood and the family shall be protected by the state. In the interpretation of the Constitutional Court, treating men and women differently regarding parental leave is justified as traditionally women have taken care of the children and such arrangements best serve the needs of families.

In Anna Jonsson Cornell's assessment, the Constitutional Court decision in *Markin* illustrates a highly traditional view of gender roles in society and praise for unlimited sovereignty and national security. [475] *Markin* is especially noteworthy as in this case the Constitutional Court and the ECtHR "clashed directly on what fundamental rights actually mean and who has priority in expressing it", as conveyed by Lauri Mälksoo.[476] The debate following *Markin* exemplifies the extremely tense relationship between international law and constitutional law in Russia. The Chair of the Constitutional Court, Valery Zorkin, found the judgment to be "unprecedented", a threat to Russian sovereignty and warned that Russia was not willing to accept the directions of the ECtHR unconditionally.[477]

Zorkin has subsequently also denounced the ECtHR's increasingly pronounced judicial activism, its tendency to reveal structural defects of national legal systems and criticized the Court's failure to acknowledge the sociohistorical context of different member states. He argues that such failure to consider Russian society and culture that was reflected in *Markin* gave an important incentive for Russia to develop the role of the Constitutional Court in the mechanism of implementation of the ECtHR's case law.[478] The Consti-

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[475] Jonsson Cornell (n 7) 32.

[476] Lauri Mälksoo, 'Markin v. Russia' (2012) 106 The American Journal of International Law 836–842; 838.

[477] Valery Zorkin 'Predel ustupchivosti' Rossiskaia Gazeta (29 October 2010) <https://rg.ru/2010/10/29/zorkin.html> accessed on 2 December 2017.

[478] Valery Zorkin 'Challenges of Implementation of the Convention on Human Rights. Presentation at international Conference "Enhancing national mechanisms for effective implementation of the European Convention on Human Rights" held in (St Petersburg 22–23 October 2015). Written notes available at:

tutional Court, as well as Russian executive branch, took *Markin* as an invitation to a duel by the CoE.

Alexei Trochev argues in his recent analysis on the interplay of the Russian Constitutional Court and the ECtHR:

> The fact that the Markin case received so much publicity is telling. The Russian CC needs the ECtHR as 1) an intellectual conversation partner to improve its legal reasoning; 2) a target of criticism to show loyalty to an arbitrary administrative regime; and 3) an assistant in restricting abuses of rights as a constitutional regime requires and for expanding the jurisdiction of the Russian CC.[479]

In his view the Constitutional Court's interaction with the ECtHR "is highly pragmatic as both tribunals are interested in reducing the number of complaints against Russia in the Strasbourg Court."[480]However, the Constitutional Court, being "in constant yet precarious search for expanding its jurisdiction in the shadow of the memory of the 1993 suspension, has to navigate between the ever-shifting short-term priorities of Russian rulers and gradually weakening constitutional restraints on their power."[481] Trochev explains in his analysis that Russia is torn between a constitutional regime (formal constitutional rules and rules of European human rights law) and an administrative regime (arbitrary rule). The Constitutional Court pragmatically operates under both of these contradictory governance regimes, aiming to find the middle ground.[482] Thus, the Constitutional Court is not operating only under the formal constitutional framework, but is very much influenced by the expectations and interests of the administrative regime, which inevitably has an impact on the judgments they make.

Since *Markin*, the attitude toward international law has made a sharp turnaround. On 6 December 2013 the Constitutional Court held that a court of general jurisdiction, when considering implementation of a judgment of the ECtHR, must suspend the proceedings and request the Constitutional Court to assess the case from the aspect of constitutionality when it is impossible to implement the judgment without simultaneously disregarding provisions of

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https://www.google.ee/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjkw6Lxvu3LAhUSb5oKHb9xAf8QFggZMAA&url=http%3A%2F%2Fwww.ksrf.ru%2Fen%2FNews%2FDocuments%2FReport%2520for%252022%2520October.docx&usg=AFQjCNH0FiXfno94DNoebzD-ppK5_VTm0A&sig2=XiQcL0KFB2-zsddDGVk0ZA&bvm=bv.118443451,d.bGs> 2–3, 6–7. Accessed on 2 December 2017).

[479] Alexei Trochev, "The Russian Constitutional Court and the Strasbourg Court: Judicial Pragmatism in a Dual State" in Lauri Mälksoo and Wolfgang Benedek (eds), Russia and the European Court of Human Rights: The Strasbourg Effect (Cambridge University Press 2017) 149.

[480] *Ibid.*

[481] *Ibid*

[482] *Ibid* 125–149.

Russian domestic law. The Constitutional Court explained that when there is no conflict with the Constitution, the Constitutional Court determines possible constitutional means of implementing the ECtHR judgment within the limits of its competence.[483]

In this case the Constitutional Court firmly established the role of the Constitutional Court in protecting Russia's sovereignty and provided a loophole for refusing to implement ECtHR judgments in case of conflict with the Russian Constitution and the case law of the Constitutional Court. The Russian Constitutional Court sent a clear signal that it is up to the Constitutional Court to determine the fate of ECtHR judgments in Russia.

In June 2015, after Russia failed to submit an action plan for just satisfaction awarded to shareholders of Yukos, ninety-three Russian deputies of the State Duma requested the Constitutional Court to clarify the constitutionality of various Russian laws including the federal law "On Ratification of the ECHR" and the federal law "On International Treaties". In the view of the deputies, those laws unconstitutionally obliged Russian authorities to implement judgments of the ECtHR even in the case of conflict with the Russian Constitution.[484] In its judgment of 14 July 2015, the Constitutional Court held that the ECHR was an integral part of the Russian legal system, recalled that pursuant to Article 46 of the ECHR Russia "recognized *ipso facto* and without special agreement the jurisdiction of the European Court of Human Rights as obligatory"[485]and held that contested provisions in Russian legislation were in accordance with the Russian Constitution, hence not agreeing with the position of the deputies in this regard.

However, the Constitutional Court also conveyed that despite the similar value-basis of the Russian Constitution and the ECHR, conflicts between the two can exist. In these cases the Constitution should be given preference and accordingly if enforcing the judgments of the ECtHR would be in conflict with Russia's constitutional values, Russia is not obliged to "follow the judgments literally".[486] The Constitutional Court highlighted the priority of the Russian Constitution over the ECHR and the legal positions of the ECtHR as well as the importance of maintaining national sovereignty. In the court's assessment, implementation of international treaties and judgments of international organs is conditional upon these being in accordance with the Russian Constitution. Russia may in exceptional cases "withdraw from the implementation of the obligations imposed on it, when such derogation is the only possible way to avoid violations of the fundamental principles and norms of the Constitution of

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[483] Russian Constitutional Court, No 27-P (6 December 2013); see further: Mäger, 'Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court' (n 1).

[484] Russian Constitutional Court, No. 21-P/2015 (14 July 2015) Section 1 para 5.

[485] *Ibid* Section 1 para 1 and Section 2.

[486] *Ibid* Section 4, para 2.

the Russian Federation", the court stated.[487] The Constitutional Court also proposed creation of a special legal mechanism ensuring supremacy of the Constitution in the implementation of ECtHR rulings.[488]

With this judgment the Constitutional Court moved a step further from its judgment of 6 December 2013. If in 2013 views were presented subtly, now the court expressly stated that in the case of conflict between the Constitution and the ECHR, Russia is not obliged to execute judgments and recommended a change in Russian legislation, with which at this point such argumentation was not in conformity.

Therefore, although Russia has voluntarily subjected herself to the jurisdiction of the ECtHR, it no longer agrees to implement judgments when these undermine the sovereignty of the Russian Federation or are not in accordance with its constitutional norms and underlying values. Valery Zorkin has highlighted that the 2015 judgment of the Constitutional Court "reproduces and develops the legal position on the supremacy of the Constitution"[489] when executing ECtHR decisions. Emphasizing the role of the Constitution and somewhat ambiguous constitutional values at the apex of the legal hierarchy in Russia has become the new mantra of Russian judges, legal scholars and politicians. International obligations are accepted only when they fit into Russia's inner framework of constitutional norms and values.

The 2015 ruling of the Constitutional Court "clearly signifies a change in the political attitude towards implementing decisions of the European Court", as vocalized by Maria Smirnova, an expert on Russian constitutional law.[490] In its 2013 and 2015 decisions on the interplay between the Constitution and the ECHR in Russia's legal order, the Constitutional Court as the highest court in Russia has demonstrated its outright rejection of international law and standards imposed by international bodies when they do not conform to the Constitutional Court's interpretation of Russian constitutional norms and principles. It is also remarkable that the Court's most important conclusions mirrored the opinion of the president's representative to the Constitutional Court, Mikhail Krotov. Considering the principles of separation of powers and the independence of the judiciary, the presence of the president's representative at the Constitutional Court is highly questionable; however, since 1996 this has been the reality in Russia.[491]

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[487] *Ibid* Section 2.2 para 4.

[488] *Ibid* Section 1, paras 4 and 5 of the resolutive part.

[489] Zorkin, 'Challenges of Implementation of the Convention on Human Rights (n 478) 12.

[490] Maria Smirnova 'Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions' (1 July 2015) EJIL: Talk! <https://www.ejiltalk.org/russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/> accessed on 2 December 2017.

[491] *Ibid.*

Valery Zorkin has drawn attention to the double-headed issue that the Constitutional Court needs to fulfil two tasks simultaneously: to harmonize Russia's legal system with international law and to protect Russia's constitutional identity.[492] This inevitably is a task that all constitutional courts have to deal with. The necessary equilibrium for the Russian Constitutional Court is reflected in building Russia's constitutional identity on the principle of sovereignty, leaning away from international standards and, as such, inevitably violating previously undertaken international obligations as well as its own constitution that explicitly stresses international law as an integral part of Russia's legal system. [493]

As a logical follow-up to the Constitutional Court judgment in December 2015, mirroring the court's decision, Russia amended the Law on the Constitutional Court,[494] which no longer accepts the binding force of ECtHR judgments and allows the Constitutional Court to declare these judgments unenforceable when implementation would be in conflict with the Russian Constitution.[495] The amended law empowers the Constitutional Court to decide at the request of the relevant federal executive authority (in most cases the ministry of justice) whether the decision of an international court, such as the ECtHR, should or should not be enforced in Russia.[496] The Constitutional Court should give its assessment when interpretation of an international treaty given by an international human rights protection body such as the ECtHR is presumably in conflict with the Constitution of the Russian Federation[497].

The law uses the term "an interstate body for protection of the rights and freedoms of a person" (*межгосударственный орган по защите прав и свобод человека*); however, the implicit aim of the law has been to block implementation of ECtHR case law. If the Constitutional Court decides that an interstate body's ruling is unenforceable due to conflict with the Russian Constitution, any action aimed at satisfaction under the relevant decision cannot be performed,[498] meaning that the judgment cannot and will not be enforced in Russia. The law has been widely criticized for its "all or nothing solution". The law is very black and white: it presumes that the Constitutional Court should declare that there either is no conflict between the Constitution and the decision of the

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[492] Zorkin, 'Challenges of Implementation of the Convention on Human Rights (n 478) 1.

[493] Mäger, 'Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court' (n 1) 19.

[494] Federal'nyy konstitutsionnyy zakon Rossiyskoy Federatsii ot 14.12.2015 No 7-FKZ "O vnesenii izmeneniy v federal'nyy konstitutsionnyy zakon "O Konstitutsionnom Sude Rossiyskoy Federatsii"" (hereinafter: amended law on the Constitutional Court).

[495] See further: Mäger, 'Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court' (n 1).

[496] See Article 3^2 of the amended law on the Constitutional Court (n 494).

[497] See Article 36(2) of the amended law on the Constitutional Court (n 494).

[498] See Article 104^4 of the amended law on the Constitutional Court (n 494).

ECtHR or, when there is a conflict, Russia should refuse to implement it, as conveyed by the Venice Commission.[499]

The Amended Law on the Constitutional Court does not provide any measures for reconciling domestic law and an ECtHR judgment; instead, the law firmly blocks execution as a whole. It also must be noted that using conflict with Russian constitutional principles as a justification for refusing to execute ECtHR judgments is not a valid argument from the perspective of international law. The provisions of a state's internal law cannot be invoked to justify failure to perform the state's duties, as stated in Article 27 of the Vienna Convention on the Law of Treaties.

The Amended Law on the Constitutional Court has been interpreted as a necessary precaution against attempts to exert external pressure on Russia. "Indeed, human rights are sovereign, but the state is sovereign too", argues Alexander Manov, an assistant professor at Kutafin Moscow State Law University.[500] "Interaction of the European and national legal orders is impossible in conditions of subordination", argues Valery Zorkin.[501] In his interpretation, the steps taken by the Constitutional Court aspire to safeguard Russia's interests in the complicated relationship with the CoE as especially reflected in ECtHR decisions intruding on the national sovereignty of Russia.[502] Another way to interpret the law is that it was meant to send a clear signal to the ECtHR that the Court should not go too far with its interpretations, otherwise Russia would refuse to enforce judgments, which in turn would discredit the authority of the ECtHR as well as the whole system of the CoE.

The Amended Law on the Constitutional Court has extensive legal and practical implications. Most importantly, it has weakened the position of Russian citizens in defending their rights. The law enables the Constitutional Court to adopt a position without holding a hearing,[503] meaning that only the federal authority, which submitted the complaint, has an opportunity to present its arguments but the applicant who is obviously affected by the decision to enforce or not to enforce the judgment is not heard. When only the federal authority is heard and the applicant's position is formally disregarded, the principle of a fair

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[499] European Commission for Democracy through Law (hereinafter: Venice Commission) *Opinion No. 832/2015: Interim opinion on the amendments to the Federal Constitutional Law 'On the Constitutional Court' of the Russian Federation CDL-AD(2016)005* (Strasbourg 15 March 2016) para 73 <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)005-e> accessed 2 December 2017.

[500] As cited by Yekaterina Sinelschikova in Yekaterina Sinelschikova 'International courts' rulings no longer enforceable in Russia' Russia Direct (10 December 2015) <http://www.russia-direct.org/russian-media/international-courts-rulings-no-longer-enforceable-russia> accessed on 2 December 2017.

[501] Zorkin, 'Challenges of Implementation of the Convention on Human Rights (n 478) 14.

[502] *Ibid.*

[503] See Article 47 of the amended law on the Constitutional Court (n 494).

trial is violated by the state.[504] When the constitutional court decides that a judgment should not be executed, applicants who have been rewarded with just satisfaction by the ECtHR are refused compensation for breach of their rights. Although Valery Zorkin has conveyed that the Constitutional Court blocks execution of ECtHR judgments only when the protection provided by the Russian Constitution is higher than by the ECtHR,[505] this does not seem a very plausible statement, considering the standards of rights protection in Russia. In any case, the ECHR sets forth minimum standards for protecting rights and freedoms, and member states are not precluded from ensuring a higher level of protection as stated in Article 53 of the ECHR. It is indeed highly unlikely that the ECtHR would find a violation if the domestic legal order provided for a higher level of protection, as argued by the Venice Commission.[506]

Another implication is related to the role of international law in the Russian legal system. Under Article 26 of the Vienna Convention on the Law of Treaties, states are bound to respect ratified international agreements.[507] Considering that Article 15(4) of the Russian Constitution clearly acknowledges the binding nature of international law and treaty obligations, it can be argued that applying the amended Law on the Constitutional Court is itself in conflict with the Constitution as well as with Russia's international treaty obligations. International treaties that Russia has joined are the "supreme force in the land" according to the Russian Constitution, recalls Dmitry Kochenov, a professor of European Union constitutional law at the University of Groningen. [508] It is somewhat controversial that when the law aims to defend the Constitution, applying the law would violate the Constitution. [509] Moreover, Bill Bowring, a professor of international human rights law at the University of London's Birkbeck College, shares the position that the law is neither in accordance with the Constitution nor with the 1998 law ratifying the European Convention on Human Rights.[510] The 2015 amendments to the Law on the Constitutional Court require changing the Russian Constitution, as currently the part regulating the powers of the Constitutional Court as well as article 15 establishing the primacy of international law are not in accordance with new legislation, claims Iryna

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[504] Venice Commission (n 499) paras 85, 101.

[505] 'Prezident ob'jaznil neobhodimost' prioriteta Konstitutsionnogo suda nad ESPC' (14 December 2015) Pravo.ru. <http://pravo.ru/news/view/124886/> accessed on 3 December 2017.

[506] Venice Commission (n 499) para 76.

[507] *Ibid* para 97.

[508] As cited in Carl Schreck, 'Russian Law on rejecting human rights courts violates Constitution, experts say' (16 December 2015) Radio Free Europe
< http://www.rferl.org/content/russian-law-on-rejecting-human-rights-courts-violates-constitution-experts-say/27432125.html> accessed 2 December 2017.

[509] *Ibid.*

[510] *Ibid.*

Marchuk.[511] Declaring a judgment of the ECtHR unenforceable also clearly violates Article 46 of the ECHR, "which is an unequivocal legal obligation and includes the obligation for the State to abide by the interpretation and the application of the Convention made by the Court in cases brought against it".[512]

The Constitutional Court has used the powers granted by the Amended Law on the Constitutional Court to block execution of ECtHR judgments in two cases. On 19 April 2016[513] the Russian Constitutional Court rejected execution of the ECtHR ruling in *Anchugov and Gladkov v. Russia.*[514] The Russian Ministry of Justice lodged an application with the Constitutional Court to decide whether execution of the ECtHR decision pertaining to the question of prisoners' voting rights would be in accordance with the Russian Constitution. The applicants, who were convicted criminals, were barred from voting in elections to the State Duma and in presidential elections in accordance with Article 32(3) of the Russian Constitution. The ECtHR held that such a blanket ban on voting rights violated Article 3 of Protocol 1 of the ECHR providing for the right to free elections. The Constitutional Court held in its 2016 ruling that execution of *Anchugov and Gladkov* is impossible due to conflict with the Russian Constitution. In the court's interpretation only judgments that are in conformity with the Russian constitutional order are enforceable:

> Implementation in the legal system of Russia of the Judgment of the European Court of Human Rights … is admissible, if it conforms to the provisions of the Constitution of the Russian Federation, pertaining to the fundamental principles of the constitutional order and of the legal status of the individual in Russia.[515]

Evidently, neither the ECtHR nor any other international institution can oblige countries to use unconstitutional means for executing judgments. Conflicts between national systems and rulings of the ECtHR exist in practice, but a variety of solutions are available for reconciling the ECHR with the national constitution such as by means of dialogue, interpretation or by reforming national legislation, as stressed by the Venice Commission.[516] Moreover, a rich variety of methods of interpretation are available. Besides, several *amicus curiae* briefs submitted to the Constitutional Court by distinguished Russian lawyers and academics[517]

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[511] Marchuk (n 415).

[512] Venice Commission (n 499) para 99.

[513] Russian Constitutional Court, No. 12-P/2016 (19 April 2016). English translation available at http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf

[514] *Anchugov and Gladkov v. Russia* ECtHR (Apps 11157/04 and 15162/05) 4 July 2013.

[515] Russian Constitutional Court, No. 12-P/2016 (19 April 2016) Section 4.4.

[516] Venice Commisson (n 499) 97, 100.

[517] One *amicus curiae* brief was submitted by experts from the Institute for Law and Public Policy (http://ilpp.ru/en/), a Moscow-based independent NGO, one of the leading Russian think-tanks conducting research, educational activities and publishing in the sphere of

advised the Constitutional Court to resolve possible conflict through interpretation. They proposed analysing whether a specific method of execution of a judgment was in accordance or in conflict with the Constitution.

In the experts' view, the possible conflict between Article 3 of Protocol 1 of the Convention and Article 32(3) of the Russian Constitution can and should be resolved by means of interpretation of this constitutional provision. In their assessment, interpretation allows a higher standard to be set for human rights protection in harmony with the ECHR. They stressed that in most European legal systems interpretation is the primary means for resolving similar conflicts and the Russian Constitutional Court itself used this method when it decided to establish a moratorium on the death penalty in Russia. In doing so, the Court emphasized the special nature of the international obligations Russia had undertaken when joining the CoE as well as emphasizing the evolution of international legal standards of human rights.[518]

Legal experts from the Institute of Law and Public Policy noted in their *amicus curiae* brief[519] that using various means of interpretation such as systemic, historical and evolutionary approaches when interpreting Article 32(3) of the Russian Constitution and considering the test of proportionality, one can conclude that an absolute ban on prisoners' voting is by far not the only possible interpretation of this provision. For example, systemic interpretation allows analysis of various mitigating factors in accordance with the principle of proportionality, including guaranteeing the highest level of protection of individual rights and freedoms. Historical interpretation shows that the Russian Constitutional Court has previously successfully overcome obstacles between the Constitution and international law. Evolutionary interpretation allows consideration of modern trends in international law in interpreting voting rights.

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constitutional law and another by a group of legal scholars: Gleb Bogush, an assistant professor of criminal law and criminology at the law department of Lomonosov Moscow State University; Kanstantin Dzhetsiarou, a lecturer at the School of Law and Social Justice of Liverpool University (United Kingdom); Gennady Esakov, a professor and head of department of criminal law at the Higher School of Economics; Maxim Timofeev, a lecturer at the law faculty of the European Humanities University (Lithuania). See, further: Institut prava i puclichnoi politiki, 'Zakluchenie o tolkovanii stat'ti 32 (chast' 1) Konstitutsii Rossisskoii Federatsii dla tselei opredeleniya vozmoznosti ispolneniya postanovleniya Evropeiskogo Suda po pravam cheloveka ot 4 iulya 2013 goda po delu "Anchugov i Gladkov protiv Rossiiskoi Federatsii"' (28 March 2016) <http://www.ilpp.ru/netcat_files/ userfiles/ Litigation_Treinings/2016%20Amicus%20Curiae%20Brief%20(Anchugov%20i%20Gladkov).pdf accessed on 2 December 2017; Gleb Bogush, Kanstantin Dzetsiarou, Gennady Essakov, Maxim Timofeev, 'Pismennye soobrazeniya po suschestvu dela, kasajushegosya zaprosa Ministerstva iustizii Rossiiskoii Federatsii o razreschenii voprosa o vozmosnosti ispolneniya Postanovleniya Evropeiskogo Suda po pravam cheloveka ot 4 iulya 2013 goda po zalobam No No 11157/04 и 15162/05 "Anchugov i Gladkov protiv Rossiiskoi Federatsii" (23 March 2016) <http://chr-centre.org/wp-content/uploads/2016/03/Anchugov-and-Gladkov-Amicus-Brief.pdf> accessed on 2 December 2017.

[518] Bogush and others (n 517).

[519] Institut prava i publichnoi politiki (n 517)

However, in this case the Constitutional Court did not take into account the suggestions provided in the *amicus curiae* briefs. The Constitutional Court did not analyse whether a particular method of execution would be unconstitutional but analysed whether execution *per se* would be unconstitutional and preferred a more literal interpretation of Article 32(3). The Constitutional Court held that deriving from the idea of Article 15(1) and 15(4) of the Constitution, Russia cannot ratify international treaties that are in conflict with the Constitution. Accordingly, the ECtHR cannot cancel the supremacy of the Russian Constitution by providing interpretations that are in conflict with the Russian Constitution and the interpretation provided by the ECtHR clearly violates Article 32(3) of the Constitution.

As put by the Constitutional Court: Providing a literal interpretation of Article 32(3) of the Constitution, the Court held that execution of the ECtHR judgment in *Anchugov and Gladkov v. Russia* would be impossible "so far as the prescription of Article 32 (Section 3) of the Constitution of the Russian Federation, having supremacy and supreme legal force in Russia's legal system, with all certainty means an imperative ban, according to which all convicted persons serving a sentence in places of deprivation of liberty defined by the criminal law have no electoral rights with no exceptions".[520] The Constitutional Court's narrow approach to interpreting the Constitution was criticized by various Russian scholars and practitioners. For example, according to Dmitry Krasikov, the Head of European and Comparative Law Chair at Saratov State Law Academy, the Court arrived at its conclusions based on the linguistic and grammatical method of interpretation and subordinated other methods of interpretation fully to this approach, completely omitting the factor of Russia's international obligations from its interpretation.[521]

The Constitutional Court also emphasized the importance of dialogue and respect towards the constitutional identity of member states and warned that deviation from the principle of subsidiarity on behalf of the ECtHR can result in conflict with the constitutional legislator. As held by the Constitutional Court:

> The interaction of the European conventional and the Russian constitutional legal orders is impossible in conditions of subordination, so far as only a dialogue between different legal systems is a basis for their appropriate balance, and the effectiveness of norms of the Convention for the Protection of Human Rights and Fundamental Freedoms in the Russian legal order in many respects depends on respect of the European Court of Human Rights for national constitutional identity.[522]

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[520] Russian Constitutional Court, No. 12-P/2016 (19 April 2016), resolutive part.

[521] Dmitry Krasikov, 'Konventsionno-konstitutsionnye kollizii i illiuzii: chto lezit v osnove "vozrazhenia" Konstitutsionnogo Suda Rossii v adres Evropeiskogo süda po pravam cheloveka' (2016) 3 Mezdunarodnoe pravosudie 101–117; 101.

[522] Russian Constitutional Court, No. 12-P/2016 (19 April 2016) Section 1.2.

Occasionally the Constitutional Court also used softer language towards the ECtHR and emphasized the need to find compromises and a fair balance:

> Bearing in mind the significance of the system, which judgments of the European Court of Human Rights form a part of, and for the sake of maintaining its appropriate and successful functioning, the Constitutional Court of the Russian Federation is ready to search for a lawful compromise, whose bounds are outlined by the Constitution of the Russian Federation.[523]

However, the judgment did not propose any mechanisms for finding a fair balance or a compromise. "The Constitutional Court's line of arguments only creates an illusion of evaluating the possibility of interpretation of the Article 32(3) of the Constitution of the Russian Federation in consistency with the ECtHR's approach", argues Dmitry Krasikov, the Head of the European and Comparative Law Chair at Saratov State Law Academy.[524] Krasikov vocally criticized the Constitutional Court for its deficiencies in reasoning from the standpoint of law and facts, especially considering the Constitutional Court's powerful role in "guiding" the ECtHR's practice into the Russian legal system. As explained by Krasikov, the interpretation provided by the Constitutional Court serves as a guideline for developing Russian legislative and law enforcement traditions pertaining also to respect for international law and influences research and public discussion on matters of international law, this having very wide implications in Russia.[525]

The issue of prisoners' right to vote has also been a source of conflict between the United Kingdom and the ECtHR for many years. Over 12 years ago, on 6 October 2005 the ECtHR delivered a judgment in *Hirst v. United Kingdom No. 2*[526] stating that the blanket ban on convicted prisoners voting was contrary to Article 3 of Protocol 1 to the ECHR. The ECtHR argued that the act banning convicted prisoners from voting strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.[527]

Similarly with Russia, the government of the United Kingdom has so far failed to enforce the judgment and to take steps to secure compliance with the

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[523] *Ibid* Section 4.4.

[524] Krasikov (n 521) 101.

[525] *Ibid* 117.

[526] *Hirst v. United Kingdom No. 2 (*App 74025/01) ECtHR 6 October 2005.

[527] *Ibid* para 82

ECHR.[528] The continued failure to amend the legislation imposing a blanket ban on voting has resulted in various other cases in the ECtHR, where the ECtHR has reiterated that there had been a violation of Article 3 of Protocol 1 to the ECHR. Whereas certain problems with enforcing the judgments of the ECtHR exist in all Member States of the CoE, so far Russia is the only one to adopt legislation that expressly allows refusing to execute the ECtHR judgments.

On 19 January 2017[529] the Russian Constitutional Court blocked the enforcement of another ECtHR decision in the case of *OAO Neftyanaya Kompaniya Yukos v. Russia*.[530] The ECtHR held that Russia had breached Article 6 of the ECHR (fair trial) as Yukos shareholders did not have sufficient time to prepare their case before the Russian courts. The ECtHR also held that Russia had breached Article 1 of Protocol I of the ECHR *and* obliged Russia to pay an unprecedented amount of compensation – 1.8 billion Euros – to ex-shareholders of Yukos.

In its argumentation the Constitutional Court paid considerable attention to interpreting the central principles of international law. Inter alia, the Court interpreted Article 26 of the Vienna Convention on the Law of Treaties (the principle of *pacta sunt servanda)*[531] and Article 53[532] of the Vienna Convention stating that treaties conflicting with *jus cogens* at the time of conclusion are void. The Constitutional Court maintained that according to Article 26 of the Vienna Convention an international agreement and the interpretation given to it by an interstate body (such as the ECtHR) has to be in accordance with the constitution of the country that acceded to the treaty. Moreover, the interpretation given to a treaty by an interstate body has to be sufficiently concretized and not diverge from generally accepted norms of international law *(jus cogens)*. [533] *Jus cogens* norms "undoubtedly include the principles of state sovereignty and non-interference in the internal affairs of states" as stated by the Constitutional

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[528] See, for example: Ed Bates, 'The Continued Failure to Implement Hirst v UK'(15 December 2015) EJIL: Talk! <https://www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/#comments> accessed 10 March 2018.

[529] Russian Constitutional Court, No 1-P/2017 (19 January 2017). English translation available: http://doc.ksrf.ru/decision/KSRFDecision258613.pdf accessed on 3 Deember 2017.

[530] *OAO Neftyanaya Kompaniya YUKOS v Russia* (App 14902/04) ECtHR 20 September 2011 (merits) and 31 July 2014 (just satisfaction).

[531] Vienna Convention on the Law of Treaties (VCLT) 23 May 1969, entered into force 27 on January 1980, 1155 UNTS 331). Article 26 (Pacta sunt servanda) stipulates that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[532] Vienna Convention on the Law of Treaties Article 53 (Treaties conflicting with a peremptory norm of general international law ("jus cogens")) stipulates that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[533] Russian Constitutional Court, No 1-P/2017 (19 January 2017) Section 2.

Court[534] and that not even the ECtHR can be "an ultimate authority" and derogate from *jus cogens*.[535]

In the interpretation of the Constitutional Court, the principle of sovereignty is non-derogable and accepted as such by the international community of states as a whole as according to the definition of *jus cogens* provided in Article 53 of the Vienna Convention a *jus cogens* norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." This is a highly unconventional interpretation of *jus cogens*, as no authoritative international courts or legal scholars have provided evidence to support this statement. Whereas *jus cogens* norms are in constant evolution[536] there is no international consensus that the principle of sovereignty should amount to *jus cogens*.[537]

However, there is emerging consensus that the obligation to implement human rights without discrimination should be considered *jus cogens.*[538] Although sovereignty is an important principle of international law, it is widely recognized that the principle of sovereignty is not absolute and can be limited inter alia for the protection of human rights. In the words of Iryna Marchuk, the interpretation of sovereignty provided by the Constitutional Court "is a misreading of the fundamental principles upon which international law is erected".[539]

The Constitutional Court also used Article 46[540] of the Vienna Convention and argued that when the ECtHR interprets some concept differently from its ordinary meaning, or interprets it contrary to the object or purpose of the ECHR that is incompatible with the constitutional order, the state in respect of which a decision has been made has the right to refuse to execute it as in this case execution would go beyond the limits of obligations voluntarily adopted by the

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[534] *Ibid.*

[535] *Ibid* Section 2.1 (resolutive part).

[536] See, for example Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2014) 87–111.

[537] See, for example Alexander Orakhelashvili, 'Concepts Cognate to Jus Cogens' in Alexander Orakhelashvili (ed) *Peremptory Norms in International Law* (Oxford University Press 2009).

[538] De Schutter (n 536) 89.

[539] Marchuk (n 415).

[540] Vienna Convention on the Law of Treaties. Article 46 (Provisions of internal law regarding competence to conclude treaties)
1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

state upon ratification of the ECHR. [541] Article 46(1) allows invalidation of a state's consent to be bound by a treaty only if expressing consent to be bound by a treaty was in violation of national law when such violation "was manifest and concerned a rule of its internal law of fundamental importance." Moreover, a manifest violation has to be "objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith" (Article 46(2) of the Vienna Convention). The Constitutional Court did not explain details of this objectively evident violation evident at the time of giving consent to be bound by the ECHR. They concluded that:

> Accordingly, the decision of the European Court of Human Rights cannot be considered binding on the Russian Federation, if the specific provision of the Convention for the Protection of Human Rights and Fundamental Freedoms on which this decision rests, as a result of the interpretation carried out in violation of the general rules of interpretation of treaties, conflicts with the provisions of the Constitution of the Russian Federation that have their basis in the international public order and that form the national public order, especially in the case of conflict with those [provisions] that are related to the rights and freedoms of man and the citizen and with the foundations of the constitutional system of Russia. [542]

The Court also repeated the position expressed already in its decision of 14 July 2015 that, as an exception, Russia can refuse to implement a judgment of the ECtHR when this is the only way to avoid violating the Russian Constitution. Therefore, in the interpretation of the Constitutional Court, when an international treaty violates the principle of sovereignty and/or when the ECtHR has interpreted a treaty in a way that Russia could not have foreseen at the time of ratifying the ECHR, Russia may derogate from the principle of *pacta sunt servanda* and refuse to execute judgments of ECtHR in accordance with Articles 26, 46 and 53 of the Vienna Convention.

The Constitutional Court also conveyed that it cannot support the interpretation of the ECtHR when the Russian Constitution and the case law of the Russian Constitutional Court protects rights and freedoms "more fully in comparison with the corresponding provisions of the Convention as interpreted by the European Court of Human Rights, considering also the balance with rights and freedoms of others (Article 17(3) of the Constitution of the Russian Federation".[543] The CoE has always welcomed the setting of higher standards in national legal systems compared to the standards of the ECHR. However, in this case it remains unclear how exactly the Russian Constitution protects rights and freedoms "more fully" than the ECHR and why it should automatically rule out executing judgments of the ECtHR.

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[541] Russian Constitutional Court, No 1-P/2017 (19 January 2017) Section 3.

[542] *Ibid* Section 2.

[543] Russian Constitutional Court, No 1-P/2017 (19 January 2017) Section 2.

In its subsequent argumentation the Constitutional Court contended rather oddly that paying compensation to Yukos shareholders would in essence be immoral and unfair. The Constitutional Court explained that the Yukos Company "used sophisticated illegal schemes, manifested itself as a malicious defaulter of taxes and ceased its existence, leaving a substantial outstanding debt" and these actions by the company had a destructive effect on the legal order and prevented stabilization of the constitutional-legal regime and public order in Russia. The Constitutional Court argued that paying considerable compensation to the former shareholders of the company who used illegal schemes of tax evasion and "avoided making huge amounts of tax payments needed for fulfilment of public services to all citizens in order to overcome a financial and economic crisis, contradicts constitutional principles of equality and fairness in tax matters".[544]

Considering that equality and fairness in tax matters are not Russian constitutional principles but are regulated in the Russian Tax Code it seems as if the Constitutional Court had difficulties with finding well-founded arguments to demonstrate that execution of the ECtHR judgment indeed violated the constitution. As noted by Iryna Marchuk, an associate professor at the Faculty of Law at the University of Copenhagen, with this judgment the Constitutional Court elevated the Tax Code to constitutional law status and "construed by means of invoking overly broad and abstract principles of equality and fairness in the matters of taxation."[545]

Also in this case, experts from the Institute for Law and Public Policy submitted a thorough and a well-argued *amicus curiae* brief to the Constitutional Court, where they found that paying just satisfaction to YUKOS shareholders is a constitutionally permissible way to enforce the judgment in *OAO Neftyanaya Kompaniya Yukos v. Russia.* The payment of just satisfaction for the violation of the ECHR "resulting from the unlawful acts and decisions by domestic authorities, not only does not contradict but rather directly follows from the general principles of the relationship between the Russian Constitution and the ECHR judgments" as noted in the *amicus curiae* brief.[546]

Experts from the Institute for Law and Public Policy explained that Russian Constitution does not prohibit ECtHR from awarding just satisfaction to victims whose rights guaranteed under an international treaty have been violated or from determining the procedure for paying just satisfaction. They also noted that Constitutional Court has previously held that within the meaning of the

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[544] *Ibid* Section 4.

[545] Marchuk (n 415).

[546] Institute for Law and Public Policy, 'Brief *Amicus Curiae* concerning the enforceability of the European Court of Human Rights Judgment of 31 July 2014 in the case of OAO Neftyanaya Kompaniya Yukos v. Russia (Application no. 14902/04) submitted pursuant to the request by the Judge of the Constitutional Court of the Russian Federation' (7 December 2016) 23 <http://ilpp.ru/netcat_files/userfiles/Litigation_Treinings/Amicus/8_2016%20Amicus%20Curiae%20Brief%20_YUKOS_%20ENG.pdf> accessed on 10 March 2018.

provisions of the Constitution guaranteeing the effective judicial protection of everyone's rights and freedoms, "the final judgments of the ECtHR, including the award of just satisfaction, must be complied with."[547]As argued in the *amicus curiae* brief, the ECtHR judgment in *OAO Neftyanaya Kompaniya Yukos v. Russia* "does not contradict the fundamentals of Russia's constitutional system and constitutional legal framework".[548] The violation of the ECHR did not result from Russia's constitutional or other legislative provisions, but from unlawful actions and decisions of Russian domestic authorities.[549] It was explained that the Russian Federation can choose any of the options of just satisfaction within the boundaries provided in para 2(a) and 2 (b) of the said judgment.[550] Whereas the majority of the Constitutional Court did not find the arguments of the *amicus curiae* brief to be convincing enough, it must be noted that judges Konstantin Aranovskiy and Vladimir Yaroslavtsev issued dissenting opinions (added to the decision of the Constitutional Court) that reflect many of the positions provided in the *amicus curiae* brief.

During more than twenty years, Russian courts have interpreted and applied the provisions of international law in their judgments. The Constitutional Court has had a leading role in interpreting and implementing the judgments of the ECtHR and in defining the role of the ECtHR in Russia's legal system.

As put by Sergey Marochkin:

> During twenty years of Russia's participation in the Strasbourg system, practice and views regarding human rights in the country have changed radically. In 1996 the country joined the European human rights system and in 1998 put itself under international jurisdiction for the first time in its history. People now had an unprecedented opportunity to defend their rights against the state. From this perspective, such participation has been a success.[551]

According to Marochkin, in most cases the Russian Constitutional Court has correctly referred to the judgments of the ECtHR judgments and has had a key role in implementing the ECtHR judgments in Russia. Generally the Constitutional Court has been aimed at remedying the situation in line with Strasbourg law.[552] Overall, the attitude towards the ECHR has been very diverse in the Russian legal community:

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[547] *Ibid* 14, see further: Russian Constitutional Court, No. 24-P (14 July 2015) para 2.1 of the reasoning; Russian Constitutional Court, No. 27-P (6 December 2013) para 2 of the reasoning.

[548] *Ibid.*

[549] *Ibid.*

[550] *Ibid* 23.

[551] Sergey Marochkin, "ECtHR and the Russian Constitutional Court: Duet or Duel?" in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press 2017) 123.

[552] *Ibid.*

> A significant part of researchers, experts, analysts, observers, judges from the Russian CC and other courts, as well as lawyers are in favor of strict adherence to international obligations, no matter how unpleasant this may be for the political and financial image of the country; the prevailing 'tune' is to keep Russia in the European legal field and to ensure the 'duet' of the two Courts. In comparison with this, on the political flank, predominant spirits are in favor of upholding national interests, sovereignty, non-interference by the ECtHR in domestic matters. Official and political statements about the Courts are more politicized and partisan. At a high official level, the possibility of leaving the ECtHR's jurisdiction has even been suggested. The prevalence of the 'party in power' over the 'rule of law' principle is obvious. [553]

In Marochkin's assessment, amending the law on the Constitutional Court and the latest case law interpreting the interplay of the ECHR and Russian Constitution, "clearly reflect political motives. They demonstrate an unwillingness to be open, to delegate some powers to international bodies, as stated in the Constitution, and 'rollback' in pursuit of former self-sufficiency."[554] He argues that the Constitutional Court has reversed from the approach of cooperation between the Constitutional Court and the ECtHR to contrasting the Constitutional Court and the ECtHR and to emphasizing the superiority of the Constitutional Court. These steps do not demonstrate "a dialogue or a duet with the ECtHR but rather a confrontation, fitting into the chain of political measures as well as legal ones."[555]

However, he concludes with the positive note, arguing that "nevertheless, a cumulative assessment of long-term participation practice in the European system and the interaction between the two Courts does not so far give grounds to speak of an overwhelming desire for a break or to walk out on Strasbourg law." [556]

The legislation and the case law of the Constitutional Court analysed above demonstrates that the interpretation concerning the interplay between the Russian Constitution and the ECHR has changed considerably during past twenty years. Whereas ECHR and the case law of the ECtHR has had a profound impact on Russian legal system and state practice, currently Russian legislation and the Constitutional Court no longer acknowledge the binding force of ECtHR judgments. This is in clear conflict with the previous interpretations of the Supreme Court and the Constitutional Court as well as with international obligations that Russia has undertaken.

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[553] *Ibid.*

[554] *Ibid* 124.

[555] *Ibid*.

[556] *Ibid.*

3.3. The role and interpretation of human rights in the Russian Constitution

Article 2 of the Russian Constitution stipulates, "Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State". Whereas pursuant to Article 2 of the Constitution man, his rights and freedoms are "the supreme value", this Article has given rise to highly controversial debates about the role and meaning of human rights in the Russian Constitution.

The Russian Constitution also enshrines the principle of ideological pluralism in Article 13: "In the Russian Federation ideological diversity shall be recognized…No ideology may be established as state or obligatory", as stipulated in article 13.[557] Valery Zorkin has argued that drafting such an article was aimed at defending pluralism of opinions, attitudes, and doctrines, to separate the state's integrity from ideological dictates.[558] Constitutional recognition of political pluralism was a direct response to the ideological monism prevalent in Soviet constitutions. Soviet power implanted ideological monism into all walks of Soviet life. All Soviet constitutions echoed the spirit of Marxist-Leninist ideology and featured a direct relationship with the worldview of the ruling party. "Scientific communism" was the official and the only acceptable ideology.[559] The ideology of Marxism in the USSR was entirely statist and illiberal, an approach that also characterized the attitude towards international law, including human rights law.[560]

According to Soviet legal scholarship it was impossible to guarantee rights and freedoms that were not in accordance with the aims of building communism. Restricting rights and freedoms was considered to be necessary to protect society against abuse of rights and freedoms detrimental to the state and society.[561] The individual had to serve the state and society and to contribute to building communism as the state ideology. Hence, the approach of the 1993 Constitution was a sharp U-turn in terms of its approach to ideology and to human rights. Neutrality in respect of the ruling parties and establishing the legal foundation for political pluralism brought the 1993 Constitution close to the constitutions of modern democratic states.

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[557] Konstitutsiya Rossiyskoy Federatsii (The Constitution of the Russian Federation). Rossiiskaya Gazeta (25 December 1993).

[558] Valery Zorkin, 'Rossiya i Konstitutsiya v XX veke. 2-ye izdaniye, dopolnennoye' (Moscow Norma 2008) 15.

[559] Orest Vladimirovich Martyshin, 'Konstitutsiya i Ideologiya' (2013) 12 Gosudarstvo i Pravo 34–44; 34–36.

[560] Mälksoo, *Russian Approaches to International Law* (n 6).

[561] Vladimir Kudryavtsev (ed), *International Covenants on Human Rights and Soviet Legislation* (Novosti Press Agency Publications 1986) 35.

The Russian Constitution, like any other constitution, contains a system of constitutional values, which, depending on the specific historical and social preconditions, can line up hierarchically, argues Orest Martyshin, Professor of Constitutional Law at Kutafin Moscow State Law University.[562] Constitutions inevitably enshrine conflicting values and finding the right balance point between those values is an everlasting issue of debate in all societies. Martyshin posits that in Russia there are two "excesses" of constitutional values trying to be "absolute" principles: the priority of human rights and (ultra-) conservatism.[563]

These two approaches have also been described in terms of person-centred and system-centred worldviews. The person-centred worldview highlights the paramount importance of human rights and treats "the common good" as a precondition for the realization of human rights. In the system-centred worldview, in contrast, "the common good" dominates over the individual, explains Valentina Lapaeva, a senior scholar from the Institute of State and Law of the Russian Academy of Sciences.[564] Scholars supporting the system-centred approach rely on the limitations deriving from Article 55(3) of the Constitution stipulating: "The rights and freedoms of man and the citizen may be limited by federal law only to the extent necessary for protecting the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring the defense of the country and the security of the State".

Professor Yelena Lukyanova from National Research University Higher School of Economics, and a fierce opponent of Valery Zorkin, also claims that in Russia there are two legal communities, which speak quite different languages and have diametrically different understanding of rule of law and human rights. One community is composed of officials, judges and parliamentarians, members of election commissions and law enforcement officers. Others are lawyers, human rights activists and some independent scientists. Whereas there are highly professional independent experts in the field of law, as a rule they have little impact on the level of the state, argues Yelena Lukyanova.[565]

Valentina Lapaeva argues that the adoption of the Constitution was an important step in the movement towards freedom in its normative (human rights) and institutional (democracy based on rule of law) forms as the person-centred orientation of government's legal policy was normatively consolidated in the Constitution.[566] In 1998 Valery Zorkin expressed that the Constitution had become a systematic legal expression of the basic political values that define the "face of the new Russia": the rights and freedoms of man and the citizen, democracy, federalism, rule of law, the social state, separation of powers,

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[562] Martyshin (n 559).

[563] *Ibid.*

[564] Valentina Lapaeva, 'Kriterii Ogranicheniya Prav Cheloveka i Grazdanina v Konstitutsii Rossiiskoi Federatsii' (2013) 2 Gosudarstvo i Pravo 14–24; 15.

[565] Lukyanova, 'O prave nalevo' (n 329).

[566] *Ibid* 14.

parliamentarism.[567] He argued that adopting the new Constitution in 1993 was a transition to an entirely new phase of development for Russia, where man with his rights and freedoms was placed at the centre of the political system and declared "Today we can say with certainty that over the past ten years there have been fundamental changes in the legal conscience of Russians. Society is beginning to learn the basic values of democracy and the rule of law"[568]. He emphasized the development towards a liberal, open and democratic society and noted that the Constitution and its interpretation by the Constitutional Court must ensure Russia's integration into the "open world". He argued that Russia had no future if it did not fit into the world community, setting European standards as a model. In his assessment, European standards of rights and freedoms would change the whole national legal culture; however, this would take a long time.[569]

Valentina Lapaeva argues that the basic vector for modern political and legal development in Russia is the transition from a system-centred type of arrangement of society, traditional to a country in which individual freedom is dominated by the government, to a person-centred model of society, based on the principle of priority of human rights and freedoms. She claims that "with all the inherent difficulties and contradictions, our society's movement towards freedom is following a historically predetermined logic of post-Soviet socio-economic transformation and objective processes of globalization, dictating the need for universalization of national policies and legal systems based on the civilizational achievements of Western democracies."[570] Implicit references to the ideas of Francis Fukuyama can be recognized in her argumentation. However, the roots of this line of thought can also be found among Russian philosophers. For example, the 19th century Russian philosopher Vladimir Solovyov argued:

> Human community consistently aspires to become a free association of individuals…The aspiration of the individual to self-affirmation and to sheer liberation from the primitive unity of the clan remains a universal and indisputable fact…Freedom is the foundation of all human existence …In the absence of individual freedom, human dignity and higher moral development are impossible.[571]

However, overall there is widespread opposition amongst Russian scholars to the idea of human rights and freedoms as the "supreme value". Such criticism became apparent after the initial optimism of the 1990s, also entailing that support for the Western model of democratic government and democratic values

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[567] Zorkin 'Rossiya i Konstitutsiya v XX veke. 2-ye izdaniye, dopolnennoye' (n 558) 15. A similar definition is given by Martyshin. See: Martyshin (n 559) 38.

[568] Zorkin, 'Rossiya i Konstitutsiya v XX veke. 2-ye izdaniye, dopolnennoye' (n 558) 11.

[569] *Ibid* 19, 72, 92.

[570] Lapaeva (n 564) 14.

[571] Vladimir Soloviev, *Politics, Law, and Morality: Essays by VS Soloviev* (Yale University Press 2008) 133–148.

evaporated. The representatives of the conservative school argue that whereas the drafters of the Constitution set a goal to lift the text of the Constitution to the level of world standards of liberalism, these liberal ideas had little to do with Russia and hence should be dropped. In the early 1990's the idea of world standards of constitutional law, expressing universal human values and the idea of "civilized nations" – referring to the democratic liberal states of the West – were popular. However, they never materialized in Russia, as argued by Orest Martyshin. He claims that this is due to the fact that Russia and the West are fundamentally different. Liberal democracy has a long tradition in the West and it has become an integral part of the national consciousness in Western countries, but not in Russia.[572] In his view a great discrepancy exists between the ideology aimed at by the drafters of the Constitution and reality.

According to Martyshin's interpretation, the proclaimed principles of human rights in the Russian Constitution "are of programmatic character" and that the thesis that "Man, his rights and freedoms are of the highest value" is only a kind of an ideal benchmark, far from current social realities. [573] The Russian people have met the claim that Russia should move towards freedom and other liberal concepts with "strong internal resistance", as presented by Martyshin. He asserts that although ideals are important guidelines for a constitution, "the constitution must be in accordance with reality, because the constitution should not only be a document setting purposes, but a working document".[574] According to this understanding, when a country for whatever reasons is not able to stand up to the principles and standards established in its constitution, those principles and standards should be dismissed and interpreted more as idealistic goals rather than legal norms giving rise to legal obligations.

Besides, Valery Zorkin now views liberal values as not compatible with the Constitution and considers any influence from Western democracies as a threat to Russian sovereignty.[575] Recently Zorkin conveyed that talking about the dilemma between rights and freedoms and national security was meaningless, as security is one of most important human rights. Therefore, the state should be able to restrict other freedoms and to transform the legal system in accordance with security needs especially in the complicated security situation that Russia is currently facing. [576] Orest Martyshin has clearly stated that the idea of human

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[572] Martyshin (n 559) 38.

[573] Lapaeva (n 564) 14.

[574] Martyshin (n 559) 40.

[575] See, for example: Valery Zorkin, 'Pravo – i tol'ko pravo. O vopiyushchikh pravo-narusheniyakh, kotoryye uporno ne zamechayut' (2015) Rossiyskaya Gazeta. Federal'nyy vypusk N6631 (24 March 2015). <http://www.rg.ru/2015/03/23/zorkin-site.html> accessed on 3 December 2017; Valery Zorkin, 'Otnosheniya cheloveka i gosudarstva stroyatsya cherez prizmu konstitutsionnykh tsennostey' (2011) 10 Sudya < http://subscribe.ru/archive/socio.state.zhurnalsudya/201111/16120243.html> accessed on 3 December 2017.

[576] Kommersant (n 376).

rights as a priority in Russian Constitution is fallacious. [577] He argues that the human rights-centred position has received "a distinctive, though not a literal and a rather softened expression" in Article 2 of the Constitution and that the reality of a system-centred society simply cannot be questioned in Russia. "A person-centred society is not only problematic, but it is simply fundamentally not feasible… Any society is a union of people. It is centripetal and not centrifugal… A society whose members possessed complete freedom would be an anarchic utopia."[578] Such claims are evidently directed at belittling the role of human rights in the Russian Constitution and its value-basis as well as undermining the whole idea of protecting individual rights and freedoms. Arguments labelling the idea of protection of human rights in the Russian Constitution as "false" and in other ways problematic also mirror the official rhetoric of the Russian authorities.

Conservative legal scholars tend to be highly critical of liberal scholars and practitioners advocating human rights. Liberal scholars are often accused of incompetence, stupidity, treason, extremism and other misdoings. Advocating universal human rights and international standards is considered to be "characteristic of certain social circles"[579] in Russia, implying that those social circles are not mainstream and do not have good reputation among mainstream scholars and practitioners. Orest Martyshin claims that Russian liberal scholars' slogans of the priority of human rights indicate a wrongful and naïve understanding of liberalism and global standards of post-totalitarian consciousness.[580] In his view the priority of human rights is not a global standard of democracy or of liberalism and that Russian liberal scholars have misunderstood the true meaning of these concepts by giving them "a wrong, libertarian interpretation".[581] In Martyshin's view, Russian liberalism "is a product of a sick political consciousness, brought up by totalitarianism, built on its denial and unable to move beyond opposites…if totalitarianism sacrifices a person for the sake of a state, then the post-totalitarian Russian "liberasts" offer another extreme: they are ready to sacrifice the state for the sake of a person."[582]

It is evident that some Russian legal scholars interpret the concepts and principles of international relations and international law in their own distinct way that is often not in accordance with Western understandings of those concepts. For example, in the interpretation of Orest Martyshin, liberalism, formed

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[577] Martyshin (n 559) 41.

[578] *Ibid.*

[579] *Ibid* 43. However, it should be mentoned that also liberal progressives in Russia as well as in the West can employ much the same logical fallacies to discredit those who disagree with them: for example, by using the term "deplorables" as a label for those who voted for President Trump.

[580] *Ibid* 41.

[581] *Ibid* 43.

[582] *Ibid* 40.

over centuries in "civilized countries", avoids extremes, is meant to synthesize personal and social interests, and ensures that in case of conflict the public interest prevails over personal interests. He concludes that society should always take priority over individual interests and that this principle is fully consistent with international standards such as Article 29 (2)[583] of the Universal Declaration of Human Rights (UDHR).[584] Surely a claim that, in case of conflict, limitations protecting the common good should overshadow an individual's right or freedom is unfounded. Obviously no individual right is absolute and Article 29(2) of the UDHR sets limits on exercising individual rights, but those limitations are not outright exceptions from rights: limitations cannot overshadow the right itself.[585]

Another claim demonstrating derogation from human rights as the central value of the Constitution is the requirement that Russia should clarify its ideological foundations based on its own national and historical characteristics and abandon treating the experience of "civilized nations" as an absolute, "especially in its naive sense" as put by Martyshin.[586] In addition to values and principles expressly mentioned in the Constitution, conservative scholars emphasize implicitly expressed values such as patriotism or traditional values and skilfully tie such concepts with the "underlying meaning" of the Constitution. They argue that the phenomenon of constitutional ideology is much broader than just law, that it cannot be found from precise provisions of the Constitution and also includes the spirit, traditions and values that all contribute to the normative content of the existing legal environment.

For example, Gadis Gadziev, a justice of the Constitutional Court of the Russian Federation and one of the authors of the Law on the Constitutional Court, argues that the Constitution is sometimes criticised for enshrining selfish personal rights and overlooking common interests. For him this is not problematic, as he claims that the focus of the Constitution is not on human rights. Gadziev emphasizes that the preamble to the Constitution establishes both human rights and freedoms, but also "civic peace and accord". Gadziev argues that a country based on the rule of law has to ensure that the freedom of one person is united to the freedoms shared by everyone. This includes respect for traditions, especially the tradition of patriotism, which he considers to be one of

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[583] Universal Declaration of Human Rights, General Assembly resolution 217 A (III), December 10, 1948 (UDHR). According to Article 29(2) of the UDHR in the exercise of his rights and freedoms everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in the democratic society.

[584] See further: Martyshin (n 559) 40–41.

[585] See, for example: Asbjørn Eide and others (eds), *The Universal Declaration of Human Rights: A Commentary* (First Edition edition, Oxford University Press 1993) 449.

[586] Martyshin (n 559) 42.

the most important traditions.[587] The preamble to the Constitution highlights "reviving the sovereign statehood of Russia and asserting the firmness of its democratic basis" and "honouring the memory of ancestors who have conveyed to us the love for the Fatherland, belief in goodness and justice." Justice Gadziev praises these lines as his favourites in the Constitution, as in his interpretation these lines reflect the ideology of constitutional patriotism.[588]

Sergey Horunzhi posits that – based on the text and the idea of Constitutional norms – we can speak of a minimum of patriotic, social, democratic and legal ideological foundations of our country.[589] Nikolay Bondar, another justice of the Constitutional Court of the Russian Federation, distinguishes three dimensions of constitutional values in modern constitutionalism: 1) the value of the constitution itself; 2) values enshrined in the norms and institutions of the constitution; 3) implicitly expressed constitutional values deriving from practical constitutional-judicial axiology.[590] The spiritual, non-normative basis of constitutional values is vastly emphasized. It is argued that the spiritual basis of constitutional values derives from combining the interests of the individual and the interests of society. It is emphasized that the civilizational identity of Russia, Russian politics and political culture are related to the Byzantine tradition. In particular this applies to the idea of a universal hierarchical order, where a single individual is included in the collective structure, which forms part of a higher, divine cosmic order and traditionally formed priority of the collective interest over individual interests.[591]

Besides, religious arguments are increasingly popular in interpreting the underlying values of the Russian Constitution, notwithstanding that according to Article 14 of the Constitution Russia is a secular state. Although Russian society is to a large degree secularized, religion still exercises considerable influence on the values of the Russian people.[592] According to the position of the Russian Orthodox Church, redemption from sin is the ultimate goal for humans and in the Church's view the interpretation of human rights should also stem from this goal. The Orthodox Church contrasts the "egoistic" rationality of

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[587] Gadis Gadziev 'Otechestvo – ne korporatsiya: Rossiya – gosudarstvo bez objazatel'noi ideologii' (19 February 2014) Rossiiskaya Gazeta <https://rg.ru/2014/02/19/ideologia.html> accessed 4 December 2017.

[588] *Ibid.*

[589] Sergey Nikolaevich Horunzii, 'Konstitutsionnaya ideoloogia kak element pravovoi sredy' (2014) Gosudarstvennaya Vlast' i mestnoe samoupravlenie 5.

[590] Nikolay Bondar, 'Konstitutsionnye tsennosti – kategoriya deistvuiuzhego prava (v kontekste praktikii Konstitutsionniogo Suda Rossii) (2014) 6 Zurnal konstitutsionnogo pravosudiya 3.

[591] Alexander Kalinin, Politichestaya kul'tura Rossii i protsessy pravoobrazovanie' (2009) 4 Prestavitel'naya vlast' 32.

[592] Alexei Sitnikov, *Vlianie pravoslaviya na instituty vlast'i i grazdanskogo obshestva v sovremennoi Rossii. Avtoreferat dissertatsii na soiskanie uchenoi stepeni doktora filosofskih nauk* (Moscow 2012) 4.

human rights with self-sacrifice, the ultimate (Orthodox) Christian value.[593] "Instead of discussing human rights in terms of the state's responsibility to respect and protect people, the Church chooses to elaborate on human rights in terms of personal morality and salvation. Instead of looking for mechanisms to protect human beings from the institutional abuse of power, the Church worries that people become egoistic when using the rationality of human rights", explains Namli.[594]

Orthodox believers have a negative perception of an ideologically neutral state, aimed at modernization and democratization, associated with ideals and expectations formed in the previous century. According to their standpoint, the secular basis for public morality is unacceptable, as are rational democratic principles of the state apparatus and legitimation of power.[595] Such trends have received incarnation in the works of authors declaring themselves to be representatives of "Russian protective political and legal thought"[596]. They argue, for example, that "ideals of rule of law, individual freedoms, the prevalence of law as a means of social control are spiritually emasculated, in a civilizational sense destructive and suitable for spiritual and cultural conditions exclusively in Europe" and they find it is necessary for Russia to overcome the evil of Western culture with the help of conservative thinkers.[597] Their position is that, as the order for organizing a state is derived from the Kingdom of God, the only possible form of government is Orthodox and absolute monarchy.[598]

In the interpretation of conservative scholars, when analysing the relationship between Articles 2 and 55(3) of the Constitution, either there is no one "higher value" or the existence of "even higher values" as listed in Article 55(3) must be assumed.[599] The liberal approach derives from the position according to which: whereas rights and freedoms inevitably impose mutual limitations on each other, the starting point for finding a balance between them should be human rights "especially in light of the effort to build Russian civil society on constitutional principles of democracy and a law-bound state, in which human rights are proclaimed to be the primary value."[600] Valentina Lapaeva also

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[593] Elena Namli, 'Powerful rationality or rationality of power? Reflections on Russian skepticism towards human right' in: Per-Arne Bodin, Stefan Hedlund, Elena Namli (eds) *Power and Legitimacy: Challenges from Russia* (Routledge 2012) 143.

[594] *Ibid*

[595] Sitnikov (n 592) 11–12.

[596] See for example: Anton Vasil'ev, *Ohranitel'naya Kontseptsiya prava v Rossii* (Iustitsinform Moscow 2013)

[597] Anton Vasil'ev, *Istoriya russkoi konservativnoi pravovoi mysli (VII–XX vv.)* (Barnaul 2011) 252, 260.

[598] Alexei Velichko, 'Gosudarstvennye idealy Rossii i Zapada' (2013) 12 Konstitutsiya i Ideologiya 42.

[599] Martyshin (n 559) 41.

[600] Dmitry Kuznetsov, 'Freedoms Collide: Freedom of Expression and Freedom of Religion in Russia in Comparative Perspective' (2014) 2 Russian Law Journal 75–100; 76.

emphasizes the need to find a proportionate balance between the protection of rights and freedoms and protection of morality or other constitutional values enshrined in Article 55(3), as only such an approach adequately fits into a systematic analysis of the Constitution.[601]

Lapaeva has criticized Russian courts for carelessly, without proper legal analysis, concluding that restricting rights and freedoms was necessary for protecting the constitutional values listed in Article 55(3) of the Constitution. She explains that the courts should also analyse the consequences when human rights and freedoms as constitutional values are not properly protected. While discussing the aspect of proportionality, the courts should convincingly demonstrate that the protection of relevant constitutional values is impossible without restricting the right or a freedom of a person.[602] The Supreme Court has established that the courts should always substantiate the necessity for restriction of human rights and freedoms based on established factual circumstances. The courts can conclude that a restriction is justified only when there are relevant and sufficient grounds for such restriction, as well as if the balance between the lawful interests of the person whose rights and freedoms are restricted and the lawful interests of other persons, the state and society, is preserved.[603]

Some Russian constitutional law scholars have taken a more moderate position and seek to conciliate the two approaches to interpreting the Constitution: the West-looking pro-human rights school and the statist, anti-Western school. As explained by Sergey Belov, a constitutional law professor from St Petersburg State University, norms on human rights in constitutional texts and international treaties, although textually similar, are interpreted not *in abstracto* but under the influence of national constitutional values, in the context of specific national constitutional systems. He explains that there is no universality in a constitutional court's approaches to human rights and freedoms even in culturally relatively similar European countries. According to Belov it is important to analyse the diverse experience of constitutional systems and identify the special features of those systems. If we want to move towards universal constitutionalism, this can be born only "as a result of the dialogue of constitutional systems, rather than the imposition on national constitutional jurisdictions of those approaches that have been developed in the practice of certain states and are seen as fundamentally unacceptable in other states".[604]

In the view of Yelena Lukyanova, the Constitution lays out the value systemic meaning of the activities of all state institutions defines their goals and

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[601] Lapaeva (n 564) 19.

[602] *Ibid* 18–19. See also *Republican party of Russia v Russia* (App 12976/07) ECtHR 12 April 2011, para. 129.

[603] The Resolution of the Plenum of the Supreme Court of the Russian Federation (27 June 2013) para 8.

[604] Sergey Belov, 'Predely universal'nosti konstitutsionalizma: vliyanie natsional'nyh tsennostei na praktiku prinyatiya reshenii konstitutsionnymi sudami' (2014) 4 Sravnitel'noe konstitutsionnoe obozrenie 37–56; 56.

objectives and outlines the limits of interference in the life of man and society. "These goals, meanings and limits coincide with their international and European reading. Only it is hardly possible to call this constitutional choice Western. It is universal. But if someone likes to call it Western, let it be Western." She also points out "if we recognize the priority and inviolability of the current Russian Constitution – we do not have an object for a dispute over values. We have a direct constitutional duty to follow the prescriptions that have the highest legal force."[605]

3.4. Consequences of changed interpretations

As highlighted in Section 1.4.1 of this study, compliance with the ECHR can happen only when its norms are incorporated in the national legal order and are enforceable. This is the second major precondition for compliance with international human rights treaties. In this chapter I have examined how the ECHR has been incorporated into the Russian legal order. I have analysed the construal and domestic treatment of human rights in legislation, in the practice of the Constitutional Court and in Russian legal scholarship. I have focused on the interplay between international human rights law and the Russian Constitution, relying on relevant legislation and the case law of the Constitutional Court as well as interpretations by Russian constitutional law scholars.

I found that the case law of the Russian Constitutional Court allowing execution of ECtHR judgments to be blocked and the amendments to the law on the Constitutional Court are important obstacles hindering compliance with the ECHR. CoE member states are obliged to enforce ECtHR judgments. In my view the ECHR is not effectively incorporated into the Russian legal order, as is also demonstrated by the method of "cherry-picking" used for enforcing the judgments of the ECtHR. *À la carte* compliance with ECtHR judgments backed by the Russian Constitutional Court threatens the effective functioning of the ECHR framework as well as further impeding dialogue between Russia and the CoE.

Whereas Article 15 of the Constitution highlights the priority of international law over national law, such priority has not become a legal reality in Russia. Instead, the position of international law is contingent on approval by the Constitutional Court. Implementation of international agreements can be refused when they are not in accordance with the interpretation of the Constitutional Court. By refusing to enforce the judgments of the ECtHR – mainly on the grounds of sovereignty – the Constitutional Court has restricted protection of the rights and freedoms deriving from the ECHR for Russian citizens. As a result, enforcing the ECHR in Russia is clearly limited and to a great extent depends on the political sensitivity of the case.

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[605] Yelena Lukyanova, 'Konstitutsionnyy vybor Rossii – Vostok ili Zapad?' (10 December 2016) Polit.ru < http://polit.ru/article/2016/12/10/lukyanova/> accessed on 10 March 2018.

On the one hand, Russia has a modern, human rights-centred constitution enshrining that man, his rights and freedoms are the supreme value and that protecting those rights and freedoms is the obligation of the state. When the Constitution was adopted, many leading scholars and judges could second that idea. However, more than twenty years have passed since adoption of the Constitution and the liberal, human rights-centred approach has gradually been substituted by the system-centred and vocally anti-human rights and anti-liberal interpretation of the Constitution by many scholars. There are two opposing approaches to interpreting constitutional values in Russia: the liberal, human rights-centred school and the conservative, traditional values-centred school and currently the conservative school is clearly dominant. Lauri Mälksoo has noted in the context of international law scholars that there are "statist" and "pro-human rights" schools of international law: "[t]he statist school talks about "is" and the pro-human rights school about "ought" – an alternative vision of what Russia could have become like – but did not".[606] As demonstrated above, the same pattern is applicable in the case of constitutional law scholars. The drafters of the Constitution belonged to the latter group: they had a liberal approach emphasizing human rights as the highest value. That approach was initially very popular in Russia and many prominent authorities, including Valery Zorkin, the head of the Constitutional Court, supported it.

"The Constitution, as acknowledged by virtually all reputable legal scholars, fully complies with the best democratic standards in the world", proudly proclaimed Valery Zorkin, when the Constitution had been in force for ten years.[607] Yet, now as the Constitution will soon be celebrating its twenty-fifth anniversary, the views of the head of the Constitutional Court have taken a U-turn. Zorkin now views liberal values as not compatible with the Constitution and considers any influence from Western democracies as a threat to Russian sovereignty.[608] Recently Zorkin conveyed that talking about the dilemma between rights and freedoms and national security is meaningless, as security is one of the main human rights. Therefore, the state should be able to restrict other freedoms and to transform the legal system in accordance with security needs especially in the complicated security situation that Russia is currently facing.[609]

Overall, since the beginning of the 21st century Russia has experienced a re-orientation in terms of ideology and values: from "universal standards" towards national traditions, from liberalism towards conservatism.[610] Although the text of the Constitution has remained the same, the interpretation of the Constitution

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606 Mälksoo, *Russian Approaches to International Law* (n 6) 99.

607 Zorkin, 'Rossiya i Konstitutsiya v XX veke. 2-ye izdaniye, dopolnennoye' (n 558) 12.

608 See, for example: Zorkin, 'Pravo – i tol'ko pravo. O vopiyushchikh pravonarusheniyakh, kotoryye uporno ne zamechayut' and Zorkin, 'Otnosheniya cheloveka i gosudarstva stroyatsya cherez prizmu konstitutsionnykh tsennostey' (n 512).

609 Kommersant (n 376).

610 Martyshin (n 559) 41.

has changed considerably during that time. Despite initial optimism regarding respect for individual rights and freedoms, currently the system-centred, conservative approach, which denies the principle of human rights as the highest value, dominates interpretation of the Constitution. This approach emphasizes collective values, patriotism and religious norms as the core values of the Constitution and constitutional ideology. Supporters of this conservative approach agree that restricting civil and political rights such as freedom of expression, freedom of assembly and freedom of association is justified, if it helps to protect religious values, morality and other traditional values. The conservative school is also focused on belittling the meaning of Article 2 of the Constitution and demeaning and de-humanizing messages from liberal scholars and human rights activists.

Leading legal authorities such as Valery Zorkin argue that liberal values are not compatible with the Russian Constitution and that any influence from Western democracies is a threat to Russian sovereignty. Majority of legal scholars argue that protecting human rights and freedoms as the highest value of the Constitution is false and in other ways problematic. The Constitutional Court has been criticized by some liberal voices for its failure to establish a proportionate balance between protection of rights and freedoms and protection of morality and other constitutional values enshrined in Article 55(3) of the Russian Constitution. According to this criticism, the courts often conclude that restricting rights and freedoms is necessary for protecting the constitutional values listed in Article 55(3) of the Constitution without proper analysis and use of the principle of proportionality.

Widespread confrontation with human rights became especially evident when the initial optimism of the 1990s evaporated and, instead of the expected progress, chaos was still prevalent in many walks of life. The idea – that although the drafters of the Constitution aimed to lift the text of the Constitution to the level of world standards of liberalism and Russia was on its way to joining the club of "civilized nations", these standards have never had anything to do with Russia and should be dropped – is clearly more prevalent than the claim of human rights as the supreme value. There is an emerging consensus among mainstream scholars that Russia should not try to mimic Western standards while interpreting its Constitution, nor in any other field. They argue that moving towards a freer society has encountered strong internal resistance in Russia and the Constitution should be interpreted in accordance with local realities rather than a set of idealistic standards, which are unsuitable and unacceptable in Russia.[611]

Although Russia is a secular state, the Russian Orthodox Church has a vast influence on the interpretation of constitutional values in Russia. The Orthodox Church emphasizes that the Russian legal system should have a firm ideological basis and this basis should be in accordance with the viewpoints of the Orthodox Church. Pursuant to Article 2 of the Constitution, it is the obligation

[611] See, for example: Martyshin (n 559) 40.

of the state to protect the rights and freedoms of its people. However, the Russian Orthodox Church has chosen to elaborate on human rights not in terms of the state's obligations to protect people from institutional abuse of power but from the perspective of personal morality and salvation. According to the position of the Russian Orthodox Church, interpretation of human rights should stem from the goal of "redemption from sin". In the Church's view, human rights are associated with "egoistic" rationality, which is a reflection of individualist Protestantism and reformist Jewish thought, whereas in Russian society the ultimate (Orthodox) Christian value at the top of hierarchy of all values is self-sacrifice. The Russian Orthodox Church focuses its attention on criticizing people for wanting to protect their egoistic motives rather than on the duty of the state to fulfil its constitutional obligations.

In the view of the Russian Orthodox Church, the rule of law, human rights and democratic principles are "spiritually emasculated", destructive and suitable only in Europe, whereas Russia should overcome these evils of Western culture with the help of conservative thinkers and the spiritual guidance of the Russian Orthodox Church.[612] The Orthodox Church construes human rights through its own specific lens and has gathered its approach to human rights in the Orthodox Declaration of Human Rights.[613] Thus, the Church in Russia is actively interpreting legal texts related to human rights and is developing its own compilations of human rights based on the ideology of the Russian Orthodox Church.

Eliminating state ideology and respecting the principle of ideological diversity enshrined in Article 13 of the Constitution has been associated with various problems in Russian society by legal authorities as well as religious leaders. Calls for clear guidance on values have increased. The Russian Orthodox Church as an institution is willing to provide such guidance. However, the Russian Orthodox Church does not support the idea of an ideologically neutral state. Its standpoint is that rational democracy, the rule of law and the principle of a secular state are an unacceptable basis for public morality.

Lauri Mälksoo has noted that the "otherness" of the West characterizes Russian legal scholarship on international law. There is a sharp distinction between the "native" (domestic, local, national) and "foreign" or "Western"[614] understandings of international law and its role, mirroring the differentiation between "socialist" and "bourgeois" in Soviet academic works. A separate "epistemological community" of international law scholars which is speaking and publishing in Russian is largely isolated from Western international law scholarship.[615] Neglecting Western influences and focusing on inward-looking perspectives can "act as protective castles" for Russian scholars. Mälksoo argues that

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612 *Ibid.*

613 *Ibid.*

614 In Russia the 'West' is perceived as a coherent concept involving both Western Europe and the USA. See further: Mälksoo, *Russian Approaches to International Law* (n 6) 88–90.

615 *Ibid* 87–90.

this is largely a political matter, related to issues of Russia's autonomy and independence.[616] The trend to neglect approaches characterized as "Western" is also visible in other fields in academia. Controversies between different approaches are "translated into the epistemological domain, leading to a totally counterproductive assertion that "Western" science is unable to understand Russia's specificity", argue Andrey Makarychev and Viatcheslav Morozov.[617] My research on interpretations of Russian constitutional law confirms the sharp distinction between "native" and "Western" and the prevalent tendency to neglect everything related to "Western" in Russian legal scholarship as well as in the overall functioning of the legal system, its institutions and most importantly, in the process of adjudication.

Whereas Article 15 of the Constitution highlights the priority of international law over national law, this priority has not become a legal reality in Russia. My research on the recent practice of the Russian Constitutional Court confirms the finding of Anna Jonsson Cornell that Russian courts "employ methods of constitutional interpretation that directly restrict the impact of European human rights on Russian law and hence individuals' rights protection".[618]

In its recent judgments, the Constitutional Court has established that despite what is written in article 15 of the Constitution, the position of international law is contingent on approval by the Constitutional Court. In the interpretation of the Constitutional Court, any international agreement that does not comply with the Constitution of the Russian Federation as interpreted by the Constitutional Court can be challenged and refused implementation. This approach can "lead to the lack of predictability at the international level as to whether Russia, as a party to any treaty, will honour its obligations under international law"[619] as pointed out by Iryna Marchuk. Russian lawyer Sergei Golubok predicts "An open and flagrant refusal by the highest domestic court to fulfil obligations under the Convention is jeopardizing international legal cooperation among European countries, such as the recognition and enforcement of Russian court decisions abroad".[620]

The positions established by the Constitutional Court *vis-à-vis* ECtHR judgments can be described as "yet another example of the application of international law *à la carte"*.[621] Although neither the Russian Constitution nor

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[616] *Ibid* 91.

[617] Andrey Makarychev and Viatcheslav Morozov, 'Is "Non-Western Theory" Possible? The Idea of Multipolarity and the Trap of Epistemological Relativism in Russian IR' (2013) 15 International Studies Review 328–350; 328.

[618] Jonsson Cornell (n 7) 34.

[619] Marchuk (n 415).

[620] Efimova and Pushkarskaya (n 462).

[621] Natalia Chaeva 'The Russian Constitutional Court and Its Actual Control over the ECtHR Judgment in Anchugov and Gladkov' (26 April 2016) EJIL: Talk! <https://www.ejiltalk.org/the-russian-constitutional-court-and-its-actual-control-over-the-ecthr-judgement-in-anchugov-and-gladko/> accessed 4 December 2017.

Article 46 of the ECHR allow for "cherry-picking" in implementing international law and enforcing ECtHR judgments, the case law of the Constitutional Court as well as the amended law on the Constitutional Court suggest that such cherry-picking is a reality**.** The case law of the Constitutional Court that in effect blocks execution of ECtHR judgments and the amendments to the Law on the Constitutional Court have potentially far-reaching implications for the Russian legal order, for the level of protecting rights and freedoms, for attitudes in Russian society and for the relationship between Russia and the CoE.

The amendments to the law on the Constitutional Court and preceding decisions of the Constitutional Court carry a strong ideological message to both internal and external audiences. Firstly, protecting human rights is interpreted as a Western influence that has to be avoided. Secondly, the principle of sovereignty is indisputably set at the apex of the hierarchy of legal principles. The principle of sovereignty is the main guiding principle behind the amended law on the Constitutional Court and the case law of the Constitutional Court that inspired these amendments. "Whereas in the interpretation of most Western scholars the balance point between state sovereignty and human rights has inclined towards human rights, in Russia the principle of sovereignty has priority in the hierarchy of principles".[622] Russian debates on sovereignty reject "Western influences" that set certain limits to the principle of sovereignty.[623] For example, in the "West" it has been argued that authoritarian countries do not possess properly legitimate sovereignty, as governments that do not respect the basic idea that people are the source of the power of the government lose their sovereignty.[624] However, Stanislav Chernichenko, a Russian legal scholar and diplomat, has contested the wording of the Russian Constitution, according to which the people are the bearer of sovereignty, as in his interpretation only the Russian Federation itself can occupy such a role.[625]

"Russian preoccupation with sovereignty" does not dovetail with placing democratic governance and human rights at the centre of a standard of international legitimacy, argues Roy Allison, as such ideas "give rise to the image of an exclusive club of liberal democratic states, a club denied to Russia".[626] Russia's approach to the principle of sovereignty can be characterized as somewhat nineteenth-century Hegelian, as in Russia sovereignty as such is glorified, viewed as "an embodiment of the Absolute Idea, often detaching the state from

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622 Mälksoo, *Russian Approaches to International Law* (n 6) 141.

623 Mälksoo, 'Markin v Russia' (n 476) 101.

624 See, for example: W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 American Journal of International Law 866–876.

625 As referred in Mälksoo, *Russian Approaches to International Law* (n 6) 100. See for original: Stanislav Chernichenko. 'Vzgljad na opredelennye polozhenia konstitutsii Rossiskoi Federatsii s mezdunarodno-pravavyh pozitsii'. In: *Vestnik Diplomaticheskoi Akademii MID Rossii. Mezdunarodnoe pravo.* (Moscow: Diplomaticheskaya Akademia, 2013) 45.

626 Allison (n 35) 18.

its democratic legitimacy".[627] It is important to remember that Russia does not praise sovereignty in the abstract but focuses on "Russia's sovereignty", at the same time ideologically questioning the sovereignty of smaller neighbouring states.[628]

Russia's refusal to execute high-level ECtHR cases due to conflict with the values of the Russian Constitution meshes well with the concept of sovereign democracy.[629] In principle the Constitutional Court recognizes the jurisdiction of the ECtHR, emphasizes its importance and praises the role of the ECHR. However, when there are judgments that in the interpretation of the Constitutional Court do not fit with Russian constitutional principles, especially the principle of sovereignty, the judgments of the ECtHR should be blocked. In the view of the Constitutional Court, human rights must be subordinated to national interests.

One aspect of sovereign democracy is "refusal to undergo foreign supervision and meddling. Yet the decisions of the CoE are seen as such in Russia, and are thus a source of irritation and misunderstanding".[630] Lauri Mälksoo has argued that, according to the prevailing view in Russian international law scholarship, state interests and international law are closely connected and accordingly, the doctrine of international law to a great extent follows the official positions of Russia.[631] Similar trends also emerge while analysing the positions of constitutional law scholars, but also the positions of the Constitutional Court and individual judges. One of the underlying reasons might be that in Russia it has almost at all times been potentially dangerous to openly discuss politically sensitive questions while more philosophical but less practical research has been tolerated.[632]

Obviously, previously described Russian state practice further torments Russia's fragile relationship with the CoE. The amended Law on the Constitutional Court and blanket refusal to implement judgments of the ECtHR as already twice decided by the Russian Constitutional Court are unprecedented in the CoE. These steps clearly pose a threat to the effectiveness of the ECtHR and create an even greater stumbling block to dialogue between Russia and the ECtHR. It has been argued that the Constitutional Court ruling refusing to implement *Yukos* "leaves a serious rupture beyond repair in relations between Russia and the ECtHR" [633] The Russian Constitutional Court ruling to refuse implementation of *Yukos* "threatens the very integrity and legitimacy" of the

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627 Mälksoo, *Russian Approaches to International Law* (n 6) 100.

628 *Ibid* 102.

629 See further: Section 4.1 of this study.

630 Massias (n 12) 117.

631 Mälksoo, *Russian Approaches to International Law* (n 6) 80–82, 84.

632 *Ibid* 95, 97.

633 Marchuk (n 415).

European Convention on Human Rights, noted Nils Muiznieks.[634] In 2009 Bill Bowring assessed that it would be very unlikely for Russia to leave the CoE as its standards were not "alien implants" in Russia, the ECHR is integrated into the Russian legal system and a new generation of Russian lawyers have been educated in the spirit of it[635]. Currently Russian voting privileges in the PACE are suspended since the annexation of Crimea and there is increasing discussion about Russia leaving the CoE system altogether.[636]

Persistent problems with implementation demonstrate "a clear lack of political will to execute the Court's judgments and to follow the Committee of Ministers' recommendations", claims Klaas de Vries, a rapporteur with the PACE Committee on Legal Affairs and Human Rights.[637] If there is no political will to cooperate with the CoE then, despite Russia's violations, there is very little the organization itself can do to restore the relationship with Russia. It is still unlikely that Russia wishes to step out of the CoE as the Committee of Ministers and other organs of the CoE allow Russia to influence European processes and maintain a useful dialogue, which Russia does not want to give up.[638]

However, it has become increasingly questionable whether Russia can legally remain a member of the CoE. All members of the CoE are obliged to enforce ECtHR judgments and clearly *à la carte* compliance with ECtHR judgments backed by the Russian Constitutional Court is not in accordance with the membership criteria.[639] It is increasingly difficult for the CoE to defend the principles that form its core when some member states fundamentally oppose those principles. "The rulings of international human rights courts are at the centre of their mission to protect human rights, and states' compliance with these rulings is critical for the tribunals to meet their objectives", as emphasized by Courtney Hillebrecht.[640] The Venice Commission has noted that, considering Europe's multi-layered legal order, certain tensions between those different layers may indeed be unavoidable.[641] However, the CoE can play a meaningful role only when all parties are motivated to resolve those tensions and find compromises, otherwise the organization risks with turning into a pitiful shadow of itself.

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634 BBC News 'Council of Europe in dispute with Russia over Yukos case' (20 January 2017). <http://www.bbc.com/news/world-europe-38691148> accessed on 4 December 2017.

635 Bill Bowring, 'Russia and Human Rights: Incompatible Opposites?' (2009) 2 Göttingen Journal of International Law 33–54.

636 Zakon.ru 'Rossija zadumalas o vyhode iz Soveta Evropy' (31 January 2015) <http://zakon.ru/Discussions/rossiya_zadumalas_o_vyxode_iz_soveta_evropy__eto_povlechet_prekrashhenie_yurisdikcii_espch_po_rassmo/16110 > accessed on 4 December 2017.

637 PACE report 2015 (n 135) para 17.

638 Efimova and Pushkarskaya (n 462).

639 Chaeva (n 621).

640 Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (n 24) 11.

641 Venice Commission (n 499).

The crisis in the relationship with the CoE also directly influences Russian citizens. The Russian decision not to implement *Yukos* "weakens the safeguards for individuals and companies against possible state abuses", as noted by Nils Muiznieks.[642] Steps taken by the Russian authorities and judiciary to block implementation of ECtHR judgments severely harm the protection of rights and freedoms of Russian citizens as they are not able to get the protection that should be provided by the ECHR system. However, it must be recalled that most ECtHR rulings are not as politically sensitive as *Yukos* or *Anchugov and Gladkov* and probably will be enforced despite the mechanisms provided by the Amended Law on the Constitutional Court. Although the future relationship between Russia and the CoE is unsure, cooperation between them is still ongoing. Russia has made its annual payment to the CoE for 2017 and has not taken any steps to remove itself from the organization.

[642] BBC News, 'Council of Europe in dispute with Russia over Yukos case' (20 January 2017) <http://www.bbc.com/news/world-europe-38691148> accessed on 4 December 2017.

IV CONSTRUAL AND THE ROLE OF HUMAN RIGHTS IN THE RUSSIAN SOCIO-POLITICAL CONTEXT

A stable society is achieved not by balancing opposing forces but by conscious self-limitation: by the principle that we are always duty-bound to defer to the sense of moral justice.
(Aleksandr Solzhenitsyn, "Rebuilding Russia: Reflections and Tentative Proposals")

Human rights law is very much a normative field and the interpretation and implementation of human rights in a specific country is closely tied to the values adhered to in that country: both on the state level of as well as in society at large. As explained in Section 1.3.3 of this study, the influence of international human rights treaties greatly depends on the domestic political and social context where international treaties have to operate. International human rights law can shape actions and outcomes in the domestic arena only when the prevailing political climate and the value-system in state institutions as well as in society at large are supportive towards human rights and their underlying values and enable citizens to demand their rights. This is the third central precondition for successful compliance with international human rights law, as revealed by my analysis.

Accordingly, in this chapter I examine the Russian political and social context where international human rights treaties are functioning. I analyse whether the political climate in Russia respects human rights and enables citizens to demand their rights. Firstly I focus on ideological searches by the Russian state and the values guiding these searches in the period following the collapse of the Soviet Union. Secondly, I discuss how the underlying values of human rights are interpreted in Russia and analyse the issue of legal nihilism and its influences on compliance with international human rights law.

4.1. Searching for the ideological face of modern Russia: values underlying the Russian constitutional framework and political climate

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" is the starting line of the preamble of the Universal Declaration of Human Rights (UDHR). Article 1 of the UDHR continues: "All human beings are born free and equal in dignity and rights." Thus, inherent dignity and equality are the core principles of international human rights law. This ideological basis for human rights has mostly been established and developed by liberal states: "states with some form of representative democracy, a market economy based on private property rights and constitutional protections

of civil and political rights".[643] Inevitably, human rights can thrive and develop in societies that accept the ideological underpinnings of human rights. Mostly these underpinnings have been accepted by Western liberal democracies.

Ideas and ideology shape the decisions and actions of governments in both the domestic and international arena as well as shaping the decisions and actions of citizens. Hence, when speaking of implementation of human rights in Russia, it is vital to focus on the ideological currents prevalent in Russian society. The breakdown of the Soviet Union left Russia with an ideological vacuum. Russia had to reinvent and redefine its ideological roots, to find a new strategy for defining Russia, its essence and aims. The principles of ideological pluralism and de-ideologisation that rose from the shadows into the limelight during the 1990s never became solidly rooted in the Russian legal and social landscape.

At the beginning of the 1990s, Russian President Boris Yeltsin voiced that whereas historically Russia always has had its own ideology "now we have none."[644] Following decades of pervasive control by the Communist Party, the collapse of the Soviet order produced a unique situation of vacuum. Not only had the centralized power of the party-state collapsed: "In a simultaneous process, its associated ideology evaporated, leaving subjects to grope for new senses of identity and for new interpretations of what had happened and what would follow."[645] In 1990 Russia became in many ways more liberal. Joining the "liberal club" was a message that Russia wanted to send to the international audience by adopting a modern constitution based on democracy, rule of law and protection of human rights and freedoms and by ratifying the ECtHR. Rein Müllerson, a Professor of International Law at King's College of London University and previously an adviser to the Chair of the Supreme Soviet of the USSR (Mikhail Gorbachev), has characterized the approach Russia took in the 1990s as naïve and simply unbelievable:

In the 1990s, I was shocked to read that the then Russian Foreign Minister Andrei Kozyrev had said that post-Soviet Russia did not have any specific or particular national interests, that its foreign policy would in the future be guided only by universal interests and human values. Even then I wondered how such a person could be the Foreign Minister of a country with the size and history of Russia.[646]

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[643] Michael W Doyle, 'Kant, Liberal Legacies, and Foreign Affairs' (1983) Philosophy & Public Affairs 205–208 as referred to in Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 European Journal of International Law 503–538; 509.

[644] Anton Barbashin and Hannah Thoburn, 'Putin's Brain' (2014) 31 Foreign Affairs <https://www.foreignaffairs.com/articles/russia-fsu/2014-03-31/putins-brain> accessed on 7 December 2017.

[645] Per-Arne Bodin and others, *Power and Legitimacy-Challenges from Russia* (Routledge 2012) 3.

[646] Rein Mullerson, *Dawn of a New Order: Geopolitics and the Clash of Ideologies* (IBTauris 2017).

However, in his book "Human Rights: Ideas, Norms and Reality" from 1991 Müllerson, one of the leading international lawyers of the late Soviet period, was substantially more friendly towards human rights and criticised the inability of the Soviet Russia to guarantee human rights protection in practice. He argued that without a multi-party system, without political pluralism and free and fair elections it is impossible to guarantee human rights and freedoms.[647] Müllerson explained that although socialist doctrines often emphasized the central importance of a human being, claiming that a person is a measure of all things, in reality the "social" was always given a priority over the "individual". The needs and the interests of the individual were completely subordinated to the public interests, particularly to state interests in the understanding of the leaders of the socialist revolution. Although after the death of Stalin, mass repressions in Russia largely stopped, the idea of the complete subordination of the individual to the collective and, above all, to the state, continued in all spheres of life.[648] He demonstrated in his book that the rift between the written text of the Constitution and the "reality on the ground" was wide during Soviet period. Although the Constitution enshrined the protection of the social and economic rights, in real life they were guaranteed on a low level, especially considering the rights of millions of innocent people who suffered in GULAG camps, noted Müllerson.[649]

Whereas joining the "liberal club" was a political goal in the beginning of the 90s, liberal ideas have not become the guiding idea of Russian contemporary political ideology. Russian scholar Orest Martyshin claims that constitutional reform and eliminating the state ideology has led to ideological uncertainty, amorphism and confusion amongst Russians who were used to clear guidelines during the Soviet era.[650] Increased "omnivorousness" regarding values, loss of moral principles and other "disastrous effects such as overwhelming egoism, cynicism and distrust of others" are also related to these processes, argues Orest Martyshin.[651] International law is involved in an increasingly severe ideological struggle, whereas compared to Soviet science of international law contemporary Russian scholarship has lost its ideological foundation, argues Sergey Bakhin, a Professor of International Law at St Petersburg State University. He regrets that

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[647] Rein Müllerson, *Prava cheloveka: idei, normy i real'nost'* (Moscow: Iuridicheskaja literatura 1991) 135. On Rein Müllerson, see also: Bill Bowring, 'Russian Approaches to International Law. By Lauri Mälksoo. Oxford University Press, Oxford, 2015. 240 pp' 85 (2014) British Yearbook of International Law 189–193.

[648] *Ibid* 143.

[649] *Ibid* 142.

[650] Martyshin (n 559) 34.

[651] *Ibid* 34–35.

Western ideas and interpretations are transmitted without critical reflection and that the connection with the Soviet legacy has been lost.[652]

Defining Russia in terms of ideology and distinguishing Russia from other states has been given increasing prominence by the Russian ruling elite. It has been noted that Vladimir Putin "has searched for an ideological, even spiritual, underpinning for his grip on power. Disturbed by the protest movement…Putin turned to a mishmash of nationalism, conservative values, Russian Orthodoxy, and a fear of the corrupting influence of the degenerate West."[653] The process has been described as a "morality turn"[654] and a quest for "moral sovereignty".[655] Besides, Russian Orthodoxy increasingly actively claims the role of the main carrier and guardian of national culture, spirituality, morality, and the creator of a uniting ideology for all people and as such has become an important partner for the state authorities in rediscovering Russia's ideological underpinnings. During his speech at Valdai, Vladimir Putin has demonstrated protecting Christian values as an important aspect of the blossoming complexity of Russian "state-civilization", simultaneously accusing Euro-Atlantic countries of rejecting the root-values and moral principles of Western civilization and implementing policies equating belief in God with belief in Satan at the same time.[656]

Various Russian legal scholars emphasize the ideological function of the Russian Constitution and are supportive of the idea that the Constitution is the basis for the "national idea" or even "state ideology" of Russia. Ideological function is one of the main features of the Russian Constitution, argues Vyacheslav Maklakov, Professor of Constitutional Law at Kutafin Moscow State Law University.[657] Maklakov emphasizes that the constitutions of developed countries always contain universal ideological values *(общечеловеческие идеологические ценности)*, above all human rights, compliance with which is the first duty of

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[652] Sergey Bakhin, 'Razmyshleniya o nauchnom nasledii professora R.L.Bobrova (k 100-letiu dnya rozhdenia)', in Sergey Bakhin (ed) *Materialy nauchno-prakticheski konferentsii 'Mezdunarodnoe pravo:vchera, segodnya, zavtra', 8–9 oktyabrya 2010.g. K 100-letiyu so dnya rozhdenia professora Romana L'vovicha Bobrova* (St Petersburg Rossiya-Neva 2011); 35, 37.

[653] Joshua Yaffa, 'Putin's New War on "Traitors" (28 March 2014) The New Yorke r <https://www.newyorker.com/news/news-desk/putins-new-war-on-traitors> accessed on 7 December 2017.

[654] Gulnaz Sharafutdinova, 'The Pussy Riot Affair and Putin's Démarche from Sovereign Democracy to Sovereign Morality' (2014) 42 Nationalities Papers 615–621; 618.

[655] Cai Wilkinson, 'Putting "Traditional Values" into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia' (2014) 13 Journal of Human Rights 363–379; 365.

[656] Vladimir Putin, 'Vladimir Putin Meets with Members of the Valdai International Discussion Club. Transcript of the Speech and Beginning of the Meeting' (2013) 20 Valdai Discussion Club. < http://eng.kremlin.ru/news/6007 > accessed on 7 December 2017.

[657] In addition to ideological function he mentions legal, political, organizational and economic functions. See: Vyacheslav Maklakov, *Konstitutsionnoe pravo zarubeznyh stsan. Obshaya chast'* (Volter Kluwer 2006) 68–70.

the state according to the Russian Constitution.[658] Every social transformation presumes and generates ideological justifications that are reflected in most important political and legal documents that represent a kind of ideological manifesto. Therefore, constitutions also contain certain ideological foundations, which are based on constitutional values, explains Martyshin.[659]

Although the Russian Constitution enshrines the principle of ideological pluralism, this does not limit the right to design and develop theories of an ideological nature, explains B. S. Ebzeev, a former judge of the Constitutional Court.[660] The principle of ideological pluralism does not prohibit the existence of "a national idea", which may in turn become the subject of an ideology for political and civil institutions, argues Sergey Horunzy.[661] However he stresses that the principle of ideological pluralism presumes that no ideology should be enforced by the state as binding.[662] A constitution declares the most important principles on which life in a society should be built, and this can be labelled a "state ideology", argues O. V. Martyshin. He claims that all countries have a state ideology to a smaller or larger extent, but "the real problem is not whether there should be a state ideology, but rather what kind of ideology it is".[663] The state may have an ideology; however, it should not be exclusive and binding on all; the state should remain neutral and equidistant regarding ideology, argues Constitutional Court judge G. Gadziev.[664]

As can be seen from their writings, Russian legal scholars and judges in general do not support an exclusive and binding state ideology as it existed in Soviet times. Nevertheless, several of them highlight the ideological function of a constitution as one of the most important functions of the Russian Constitution and they are rather positively minded about a certain "national idea" or "modern state ideology" that comprises the most important principles for a given society and that should also be mirrored by the political and civil institutions of the country.

The value-conflict between the "decadent West" and "righteous Russia" with its distinct set of "higher" values is visible not only in interpretations of the constitution, but also in many other areas. This value-conflict seems also to be the focal point for the search for the ideological face of contemporary Russia. Hostility towards the West, emphasis on the sovereignty of Russia as one of the most influential centres of the modern world and its civilizational distinctiveness are also reflected in Russia's latest foreign policy strategy from 2016. According

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658 *Ibid.*

659 Martyshin (n 559) 35.

660 Boris Ebzeev, *Konstitutsiya, vlast' i svoboda Rossii: opyt sinteticheskogo issledovaniya* (Izdatel'stvo Prospekt, Moscow 2014) 236–239.

661 Horunzii (n 589) 4–5.

662 *Ibid.*

663 Martyshin (n 559) 36.

664 Gadziev (n 587).

to Russian foreign policy strategy,[665] Russia's foreign policy is first and foremost aimed at ensuring the security of the country, its sovereignty and territorial integrity and consolidating the position of Russia "as one of the most influential centres of the modern world". However, strengthening the rule of law and democratic institutions and international peace, security and stability "in order to establish a just and democratic international system based on collective principles in solving international problems, on the supremacy of international law" is also mentioned as one of the top priorities. The foreign policy strategy also emphasizes good-neighbourliness with adjacent countries and assistance in the elimination of tension and conflicts in their territories. Development of "mutually beneficial and equal partnerships" with other countries and organisations "based on respect for the principles of independence and sovereignty, pragmatism, transparency, multipolarity, predictability and non-confrontational upholding of national priorities" is mentioned. Also emphasized are strengthening Russia's role in global space through strengthening the position of the Russian language, popularizing Russian culture, cultural identity and historical heritage, education and science and consolidating the Russian diaspora. Interestingly, the strategy stresses the need to strengthen the position of the Russian mass media and mass communication in global information space and the necessity to bring the Russian point of view on international processes to the wider circles of the world community.

Lastly, the strategy focuses on promoting development of constructive dialogue and partnership in the interests of strengthening consensus and mutual enrichment between different cultures and civilizations. Compared to the 2013 foreign policy concept[666], references to human rights and freedoms have been removed; the term "religions" has been replaced by "civilizations" and the new task of propagating the Russian point of view on international processes is included.[667]

A statement that Russia and its value-system are essentially different from the West has roots in Russian philosophical discussions from centuries ago. Slavophiles[668] and Eurasianists[669] emphasized that Russian civilization was

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[665] Kontseptsiya vneshnei politiki Rossiiskoi Federatsii (utverzdena Prezidentom Rossiiskoi Federatsii Vladimirom Putinym 30 noyabrya 2016 goda) (Moscow 2016) <http://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2542248> accessed on 7 December 2017.

[666] *Ibid.*

[667] *Ibid.*

[668] Slavophiles such as Nikolay Danilevsky (1822– 1885) claimed that Russia was a distinct civilization, differing from Europe by its values and path of development. *See for example:* Nikolay Danilevsky, *Rossia i Evropa. Vzgljad na kulturnyya i politicheskiya otnosheniya Slavyanskogo mira k Germano-Romanskomu*, 5th edn (Pantleevs, St Petersburg 1895; first print in 1869).

[669] Eurasianism has its roots in the Russian émigré community. Some of these exiled Russians such as Georges Florovsky, Nikolai Trubetzkoy, Petr Savitskii, and Petr Suvchinsky

distinct from the decadent West regarding its values and trajectory of development. Lauri Mälksoo has observed "the constant preoccupation with Europe/the West, particularly through the concept of "civilization", has also been an uninterrupted trend in Russian international law scholarship.[670] Contemporary anti-Western rhetoric in Russia has been considerably influenced by the ideas of Alexander Dugin[671], an ideologist of New-Eurasianism. Dugin has supported and popularized Vladimir Putin's positions on limiting human rights and freedoms, intolerance of homosexuality, the need to support traditional family values and emphasized the role of Orthodox Christianity in Russia's rebirth as a great power. In Dugin's view, Russia progressed from Communism to democracy, and from a pro-Western, extremist, liberal democratic Atlantic model to a patriotic Eurasian course.[672] In his view it was impossible to introduce Western liberal values into Russia due to a profound resistance by society because Western values confronted "the basic archetypes of our national way of life".[673]

However, also liberal, pro-Western ideas have deep historical roots in Russia. The first Russian professor of law, Semyon Desnitskiy (1740–1789) studied in the University of Glasgow during Scottish Enlightenment and when he returned to Russia, he brought the ideas of Enlightenment with him, which had an important impact on the education of his students.[674] During 1830s and 1840s most active debates between Westernisers *(западники)* and Slavophiles took place in Russia. Westernisers viewed Russia as a Western country that should learn from the West and develop Western democratic institutions. Westernisers associated the West with progress and development and they thought that following the patterns of the West would solve Russia's problems. Slavophiles,

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argued that the misson of Russia is to create a different center of power and culture that would be neither European nor Asian but have traits of both. According to Eurasianists, Russia is a unique civilization with its own path. Eurasianists believed in the eventual downfall of the West and regarded any form of democracy, open economy, local governance, or secular freedom as highly dangerous and unacceptable. *See, for a short overview:* Barbashin and Thoburn (n 580). *See further*: Nikolai Trubetzkoy, Petr Savitskii, Georges Florovsky, and Petr Suvchinsky, *Ishod k vostoku* (Sofia, 1921).

[670] Lauri Mälksoo, 'The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe' (2008) 19 European Journal of International Law 211–232; 216.

[671] Alexander Dugin became the chair of the geopolitical section of the Duma's Advisory Council on National Security in 1999 and his ideology, being extremely anti-Western, anti-liberal, totalitarian, ideocratic, and socially traditional, gained much popularity amongst the political and military elite of Russia. (See further*:* Barbashin and Thoburn (n 580). For a selection of Aleksander Dugin's works see, for example: Alexander Dugin, *Putin vs Putin: Vladimir Putin Viewed from the Right* (Arktos 2014); Alexander Dugin, *Proekt Evraziia* (IAUZA/Eskimo, Moscow 2004; Alexander Dugin Evraziiskii put' kak natsional'naia idea (Arktogea-Center, Moscow 2002).

[672] Dugin, *Putin vs Putin: Vladimir Putin Viewed from the Right* (n 671)

[673] *Ibid* 134.

[674] See further: Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge 2013) Chapter II.

on the contrary, viewed Russia as a unique country that should not mirror Western institutions, but should only mirror Western technical progress.[675] Thus, the contemporary debates over the role of the West, its flaws and benefits for the development of Russia very much resemble the debates that took place already centuries ago.

Whereas Russian contemporary political rhetoric is not monolithic, and there are contemporary Westernisers as well as contemporary Slavophiles, the prevailing tendency in the official political rhetoric is to construe human rights as external Western influences hindering the traditional values of Russian society and the sovereignty and security of Russia. Russian political documents picture the West as decadent, dangerous and inferior, suffering from various immoral "diseases". For example, "Russia is not Europe" is the central assertion of Russian cultural policy requiring *inter alia* abandoning the principles of multi-culturalism, tolerance, to develop Russia's cultural policy solely on the basis of a unique and distinctive Russian civilization and to prohibit state support for behaviours that are unacceptable from the perspective of traditional Russian values.[676]

The idea of unlimited sovereignty is the core principle for contemporary Russia. One implication of the idea of unlimited sovereignty is the concept of "sovereign democracy", invented by Vladislav Surkov, who has been viewed as the main ideologist of the Kremlin during the term of office of Vladimir Putin. According to the concept of sovereign democracy, "democratic values are neither contested nor rejected [,] but subordinated to national interests".[677] Put simply: democracy is not always a bad idea but it is bad when it messes with "higher values": Russian unique interests, values, culture and traditions should always stand above democratic values and institutions. A wish to legitimize its conduct by reference to Russia's own culture, traditions and norms, not international standards, underlies the idea of "sovereign democracy".[678] In the view of Roy Allison, this concept "expresses a statist rejection of the transference of "external" norms to the Russian domestic order" and is aimed at fostering regional public order opposing "external", Western influences.[679] Russia as a regional hegemon defining and enforcing norms in its surrounding CIS region uses global principles such as sovereignty and non-intervention in its rhetoric. However, it "exercises

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[675] Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge 2013) 35. See also a collection of essays by Russian thinkers critically reflecting the debates between Slavophiles and Westernisers, but also covering other intellectual traditions in Russia: Nikolai Aleksandrovich Berdyaev et al., *Vekhi: sbornik statei o russkoi intelligentsii* (Novosti 1909).

[676] Ministerstvo Kultury Rossiiskoi Federatsii, *Materialy i predlozeniya k proektu osnov gosudarstvennoi kulturnoi politiki* (Moscow 2014)
< http://izvestia.ru/news/569016#ixzz30ivbkC62>, accessed 7 December 2017.

[677] Massias (n 12).

[678] Allison (n 35) 21.

[679] *Ibid.*

discretion whether or not to apply these principles in the CIS regional order", argues Roy Allison.[680] Moreover, preserving its own domestic structure of power – for example, order and concentration of power – is a top priority for Russia that vastly influences the construal of international society in Russia. Russia has privileged order over justice on a domestic level and also advocates the same approach internationally, such as by emphasizing the principle of state sovereignty and rejecting the idea that external actors should be able to judge or influence "internal affairs" claims Roy Allison.[681]

The Kremlin has skilfully taken advantage of the authority and popularity of the Orthodox Church in Russia. Politicians use religious interpretation of dignity, morality and sinfulness to demonstrate that human rights and freedoms and liberal values are not in accordance with Russian civilizational values. In Russia, the political and religious authorities increasingly use the language of "sinfulness" and "lost dignity" when they talk about human rights. As I have argued previously, Russian people have very little – almost no – experience with basic freedoms and a law-based state.[682] The concept of a law-based state is not part of Russian legal culture and is alien to the Russian people. In Russia only a small fraction of society has any interest in freedoms.[683] Only 4% of Russian people consider limited civil rights and democratic freedoms to be one of the most alarming problems in Russian society.[684]

Russian people might not have experience with individual rights and freedoms. However, they have quite a lot of experience with the Orthodox Church and its code of conduct. Lack of knowledge and experience regarding human rights makes it possible to "translate" the meaning of rights and freedoms by using the vocabulary of the Russian Orthodox Church, an institution that enjoys high reputation and authority in Russia. "Morality" is one of the key concepts used in this "translation process" and this concept is highly meaningful for Russians. Russian politicians and political documents construe civil and political rights as "sin", "sodomy", "immorality" and "insult of religious feelings" and supporters

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680 *Ibid* 19.

681 *Ibid* 20.

682 Mäger, 'Russia's Illiberal Ideology and Its Influences on the Legislation in the Sphere of Civil and Political Rights' (n 1).

683 Maksim Ivanov, 'Rossija zaprosili strogii rezim. Grazdane privetstvujut novye zaprety' (28 July 2012) Kommersant <http://www.kommersant.ru/doc/1990744> accessed on 7 December 2017.

684 This was the least popular option from 24 options presented in the study. See further: Levada Center 'The Most Alarming Problems' (Levada Center 2017) <https://www.levada.ru/en/2017/09/26/the-most-alarming-problems/> accessed on 7 December 2017.

of civil and political rights are labelled as a "liberasty", a "fifth column" or "foreign agents."[685]

Lev Gudkov, director of the Levada Center, one of very few independent sociological research centres in Russia, claims that the authorities successfully use propaganda to influence the Russian people and to discredit the meaning of liberal values, perceptions of the rule of law and human rights.[686] Russian human rights lawyers Maria Kiskachi and Maria Issaeva claim "state-blessed homophobia … has affected not only the minds of an abstract "vast majority" but also those of the political elite and professional communities of lawyers, judges, and even scholars."[687]

As a result of this "translation" process the majority of Russians view freedom as an element of threat, because they have been convinced that as only some people can use their freedom "correctly" so that it makes sense to limit freedoms for all. In Soviet times people were accustomed to equality in poverty, and also nowadays prefer to have equality in having not too much freedom, because according to the mainstream it is better to avoid "overly free" people like the girls from Pussy Riot or demonstrators at rallies.[688]

The "uniqueness" of Russia as a country and of Russian values is the guiding idea of Russian government's approach to human rights. The central claim is that the liberal ideas that human rights carry are fundamentally unsuitable for Russian society and are not in accordance with the value-system of Russians.

On the one hand it can be agreed that "due to differences in history and culture, in certain aspects the Russian people differ in their values from the Western mainstream".[689] However, not all scholars agree that these differences are indeed as wide as they are pictured for the public. In many ways Russians are very liberal. Whereas the government emphasizes the idea of traditional family values to justify adopting restrictive legislation, Russia has one of the world's highest rates of both divorce and abortion and very liberal abortion legislation.[690] Whereas "Western" permissiveness and moral relativism is neglected in various Russian political and legal documents, in practice Russians are

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[685] See, for example: Sean Guillory, 'Repression and Gay Rights in Russia' (26 September 2013) The Nation < https://www.thenation.com/article/repression-and-gay-rights-russia/> accessed on 7 December 2017.

[686] Lev Gudgov, 'Rossija perezivaet retsidiv totalitarisma' (5 Febrary 2015) Novoe Vremja <http://nv.ua/opinion/Gudkov/rossiya-perezhivaet-recidiv-totalitarizma--25255.html> accessed on 7 December 2017.

[687] Maria Issaeva and Maria Kiskachi, 'Immoral Truth vs. Untruthful Morals-Attempts to Render Rights and Freedoms Conditional upon Sexual Orientation in Light of Russia's International Obligations' (2014) 2 Russian Law Journal 82–105; 103.

[688] Ivanov (n 683)

[689] Mälksoo, *Russian Approaches to International Law* (n 6) 187.

[690] Masha Lipman, 'The Battle over Russia's Anti-Gay Law' (10 August 2013) The New Yorker <https://www.newyorker.com/news/news-desk/the-battle-over-russias-anti-gay-law> accessed on 7 December 2017.

highly "permissive" in terms of family life and sexual relations. Vladimir Magun and Maksim Rudnev[691] from the Higher School of Economics have shown that compared to most Europeans an average Russian has a strong focus on self-interest and is more committed to the values of wealth and power, personal success and social recognition rather than solidarity, equality, justice or tolerance. Research by Magun and Rudnev demonstrates that Russia's value-system is relatively similar to other post-communist countries and to Mediterranean countries. They argue that Russia shares a general logic of cultural and social development with the rest of the world and has much in common with countries of a similar economic level and recent political history.[692]

Hence, it derives from the study by Magun and Rudnev that liberal values are not inherently alien to "the Russian soul". It is likely that the idea that Russian people value solidarity and well-being of society more highly than they value individual goals is to a great extent construed and successfully exploited by Russia's political, legal and religious elite. Contrary to their claims that Russian culture and society are deeply "ethico-centric", studies show that Russian people value individual success and freedom of choice in matters related to family life, instead of leading their lives in the spirit of Orthodox Christian values. Therefore, the thesis that Russian people are willing to contribute to the well-being of society and are somehow distinctly more righteous and caring than their European counterparts, regularly exploited by Russia's political, legal and religious elite, seems unjustified. Whereas Russians are indeed more religious and more patriotic than an average Western-European, they also do value freedom of choice when it comes to their private lives.[693]

One of the aims of the current Russian government has been to convince Russian people that there are fundamental differences between Russia and the West, especially regarding the values these societies adhere to. However, Vladimir Magun and Maksim Rudnev's work[694] based on a European Social Survey has demonstrated that such a value-conflict between Russia and the West is not based on objective facts. Rather, such assessments are to great extent ideological constructs, although very enduring and influential. There have been periods in Russian history when such a value-conflict has not been dominant at all and it is likely that when the political context changes, such value-conflicts will also lose their relevance.

Using civilizational arguments to justify the refusal to comply with international law is just a convenient propaganda device to excuse lack of develop-

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[691] Vladimir Magun and Maksim Rudnev, 'Basic Human Values of Russians: Both Different from and Similar to Other Europeans' (2013)] Higher School of Economics Research Paper No. WP BRP 23/SOC/2013.

[692] *Ibid*.

[693] Masha Lipman, 'The Battle over Russia's Anti-Gay Law' (10 August 2013) The New Yorker.

[694] Magun and Rudnev (n 691).

ment or to hide the true reason for such refusal, argues Yelena Lukyanova. In her view the crux of the civilizational problem is not reflected in the disparity between different types of civilization, but the disparity between civilization and barbarism. As put by Lukyanova:

> In the modern world the great divide between "civilization" and "barbarism" is rooted in the attitude of people towards law. When the state becomes more and more a service, the quality of which is assessed by society, law becomes the universal civilizational value, the preservation and development of which is the common task of all. Law is not just a list of rules, but a set of standards based on the international morality of peaceful coexistence, agreed by societies and states.

In Lukyanova's view the Constitutional Court's failure to rely on the true spirit of law and on the spirit of civilization, is an example of barbarism. However, "barbarism can be treated. Not instantly, but it can be treated. Quite simply. By education and culture," concludes Lukyanova.[695]

4.2. Interpreting the underlying values of human rights in Russia

4.2.1. The concept of human dignity in Russia

The idea of human rights is largely based on the inherent dignity of every human being. Inevitably, the success or failure of a country to implement human rights depends on the value-system of the society, particularly on the value the society imposes on a human being – whether the idea of the inherent dignity of every human being is accepted or only certain people are considered as dignified and worthy of protection.

In Russian society, the Russian Orthodox Church is a highly influential authority for defining concepts such as dignity and morality. The Orthodox Church has also actively taken up interpreting human rights documents from the Church's perspective. The Russian Orthodox Church vigorously emphasizes Russia's civilizational distinctiveness from the West: indeed, the Church has even adopted its own declaration of human rights "on behalf of the distinct Russian civilization".[696] Whereas the Universal Declaration of Human Rights derives from the idea of the inherent dignity of every human being, the Russian Orthodox declaration is based on the idea that dignity can be acquired when one acts in accordance with the norms and practices of the Russian Orthodox

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[695] Lukyanova, 'O prave nalevo' (n 329).

[696] Russkaya Pravoslavnaya Tserkov', *Deklaratsiya o Pravah i Dostoinstve Cheloveka X Vsemirnogo Russkogo Narodnogo Sobora* (Moscow 2006) <http://www.patriarchia.ru/db/text/103235.html> accessed on 7 December 2017.

Church. When one fails to do so, one is not acting in a moral way and cannot "acquire" dignity. The Russian Orthodox Declaration on Human Rights states:

> [W]e distinguish the worth and the dignity of the individual. Worth is inherent; dignity is acquired…[h]uman rights represent the basic worth of the individual and should be used to realize the individual's dignity. For this very reason, the support of human rights cannot be separated from morality. Uprooting these rights from morality is to profane them, for immoral dignity cannot occur].[697]

Accordingly, there is a deep value conflict between the interpretations provided by the Russian Orthodox Church and the interpretations given to human rights in international human rights documents. The Russian Orthodox Church views human dignity as something "acquired", something that an individual has to earn by acting in accordance with Christian morality "for immoral dignity cannot occur". The declaration also underscores that it is up to the religious tradition to distinguish good from evil; therefore the Orthodox Church itself is the one that can determine the content of dignity. The declaration approves the rights and freedoms of man only "to the extent that they help the individual to ascend to goodness, save the individual from internal and external evil, and allow the individual to be fully integrated to society".

Hence, the declaration contests the idea of universal and inherent human rights and is willing to approve only these rights that remain in the limits of the Church's interpretation of "good". The declaration also lists values that are "no less important than human rights": faith, morality, the sanctity of holy objects and one's homeland and warns that "We must not allow situations to occur in which the realization of human rights tramples upon religious or moral traditions, insults religious or national feelings or sacred objects, or threatens our homeland's existence." The declaration also alerts that "inventing" rights that legalize behaviour condemned by traditional morality is dangerous.

Patriarch Kirill I, the head of Russian Orthodox Church, and an extremely powerful and popular figure in Russia, is also positioning himself as an expert on human rights, having published a book on human rights and human dignity and interpreted topics related to human rights in various speeches and publications. In his book on human rights and human dignity, Kirill interprets the concept of human dignity as being worthy of respect, having high status and not being sinful, as by committing sinful deeds people lose their dignity. [698] The Orthodox Church's interpretation of human rights, fortified by the authority of Kirill I, is aimed at belittling the meaning of human rights and de-humanizing people who support rights and freedoms apart from church-defined morality as sinful and unworthy. As noted by Lauri Mälksoo: "[t]he ultimate effect of such re-thinking of the notion of human dignity is evident: philosophical relativi-

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[697] *Ibid.*

[698] Patriarch Kirill I, *Svoboda i otvetstvennost': v poiskah garmonii. Prava cheloveka i dostoinstvo lichnosti* (Moscow 2008)

zation of the validity of human rights. Instead of–at least fundamental–human rights being inalienable, they can in fact be taken away (or back) by the state and the society if the person herself is understood as having undermined her human dignity."[699]

It is characteristic of Russian (legal) culture that citizens value interpersonal relationships more highly than conformity with imposed legal rules, argues Jane Henderson.[700] The idea of acting in a "moral" way is more important than any legislation. As explained by Erich Solovev: "such is its philosophy, its fine literature, and its folklore. A Russian will not accept in its heart any norm or institution that is not morally justified; hence, the ethical foundation of law has a decisive significance for the development of legal consciousness and the formation of a legal conscience in every citizen." [701]

However, deriving from its strong Orthodox heritage, Russian culture has is a rather specific understanding of morality. Elena Namli, a professor of ethics at Uppsala University, argues that the essence of morality in Russian culture is responsibility for society. In Russian culture "rights" and "morality" are completely different concepts. "The very mention of rights appears as a sign of person not taking moral responsibility", explains Namli.[702] Accordingly, when a Russian is convinced that some legal norm is immoral it is very easy to neglect these norms. Importantly, in Russian society the "moral watchdog" that gets to define what is moral and ethical and what is not, is to a great extent the Russian Orthodox Church. The position of the Russian Orthodox Church concerning the responsibilities of each human being for society constitutes the essence of "moral behaviour" for a majority of Russians. For example, Patriarch Kirill I advises punishing "those who in their obsession with pride and selfishness set themselves above society, destroying its values…in tune with the inner voice of the majority of our people".[703] Hence, in the interpretation of Kirill I, it is dangerous for a society when the moral code of some citizens is not in accordance with the "inner voice of the majority" and therefore such people should be punished and treated as outcasts.

The position of the Russian Orthodox Church not only influence construal of norms and values among the ordinary Russian people, but they are also very much connected to the official rhetoric of the state analysed in Section 4.1 of this study. For example, Kirill I skilfully associates the concept of the morality

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[699] Lauri Mälksoo, 'The Human Rights Concept of the Russian Orthodox Church and Its Patriarch Kirill I: A Critical Appraisal' (2013) European Yearbook on Human Rights, Vienna: Neuer Wissenschaftlicher Verlag 403–416; 411.

[700] Henderson (n 13) 259.

[701] E Iu Solov'ev, 'The Concept of Right in Kant and Hegel A View from the Russian Tradition and the Present' (1999) 38 Russian studies in philosophy 42–56.

[702] Namli (n 593).

[703] Patriarch Kirill I. Speech at the XVII World Russian People's Council (Vsemirnyi russkii rarodnyi sobor) (31 October 2013) <http://www.patriarchia.ru/db/text/3334783.html> accesed 7 December 2017.

of the Russian Orthodox Church with the paramount value in rhetoric of current Russian government: the principle of sovereignty. According to Patriarch Kirill I, the most important proof of the sovereignty of Russia as a unique civilization is its spiritual sovereignty "based on values shared by the moral majority of our society."[704] In his interpretation, protecting the values of Russian society equates with protecting Russian (spiritual) sovereignty.[705] There is a well-functioning "symbiosis" between the Russian Orthodox Church and the state, as the state very much relies on the authority of the Russian Orthodox Church to defend its anti-human rights policies.

Notwithstanding that Russia's constitutional claim to be a democratic, rule-of-law state, where "man, his rights and freedoms are the supreme value", in modern Russia human rights are construed as inherently inferior to the values of patriotism, unlimited sovereignty and traditional values as – mainly – defined by Orthodox Christianity. Human rights are framed as a dangerous Western influence that must be fought against. Liberal values are belittled, regarded as inferior to "ideologically approved" values such as patriotism and morality, as defined by Orthodox Christianity.

Whereas the inherent dignity of every human being is the guiding idea of international human rights law, including the ECHR, the Russian Orthodox Church views human dignity as something that an individual has to earn by acting in accordance with Christian morality. In the interpretation of the Russian Orthodox Church, "sinful" individuals such as LGBT people are not worthy of dignity and hence their rights should not be protected equally with "dignified" people. This interpretation belittles the meaning of human rights and de-humanizes people who do not wish to live in accordance with church-defined rules about dignity and morality.

4.2.2. The influences of legal nihilism

Legal nihilism: "finding creative ways to get around *(oboiti)* the law has long been the norm in Russia," as conveyed by Kathryn Hendley.[706] Lack of respect, condescension, a negative disposition towards the law, all form the essence of legal nihilism: "legal nihilists obey the law when convenient, and otherwise ignore it."[707] Russian political culture has been characterized by such a lack of respect for law for centuries and legal nihilism is still widespread in modern

[704] *Ibid.*

[705] *Ibid.*

[706] Hendley, 'Rule of Law, Russian-Style' (n 267).

[707] Kathryn Hendley, 'Who Are the Legal Nihilists in Russia?' (2012) 28 Post-Soviet Affairs 149–186; 150, 160.

Russia. Prime Minister Medvedev has openly labelled Russia as a country of legal nihilism unseen in any other European country.[708]

In Russian culture "not just possessors of power but even ordinary people underestimate the importance of the rule of law", argues Elena Namli, a professor of ethics at Uppsala University and a research director at the Uppsala Centre for Russian and Eurasian Studies.[709] An important aspect of legal nihilism is lack of trust towards the judicial system. "Dramatic lack of trust in the capacity of the judicial system to sustain justice"[710] characterizes modern-day Russia. This famous Russian legal nihilism resulting from centuries-long abuse of power is reflected in hopelessness and cynicism in regard to the legal system.[711]

Another aspect of legal nihilism is a belief that moral justice is possible regardless of the lack of legal justice. In Russia, justice and rights are not associated with morality: they are completely distinct concepts. Namli argues that in Russia the essence of morality is responsibility for society. She cites an example that even when Khodorkovsky was not legally "guilty" of the crimes he was sentenced for, he is considered to be responsible for the difficult economic situation in Russia; he is considered morally "guilty" by society.[712] Moral guilt is considered to be more important than fair trial and justice, while talking about human rights is interpreted as a sign of refusing to take moral responsibility.[713] For individual citizens, interpersonal relationships are valued more highly than conformity to imposed legal rules.[714] Namli suggests that a strong Orthodox heritage is an important historical explanation for this phenomenon. [715]

Various factors contribute to legal nihilism in contemporary Russia, such as the poor example set by the state, people's tolerance and lack of criticism towards state actions, low legal literacy and unwillingness to defend one's rights.[716]

However, Kathryn Hendley argues, based on various studies that the legal nihilism of Russian society is largely a myth since the majority of people do not agree that the law can be avoided if inconvenient or unjust and the majority of cases in courts are resolved without inappropriate interference. On the one hand legal nihilism is "an inescapable feature of Russian legal culture", but its popularity is decreasing.[717] In her latest contribution to the research on rule of

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[708] Dmitriy Medvedev, 'Polnyy tekst vystypleniya Dmitriya Medvedeva na II Grazhdanskom forume v Moskve 22 yanvarya 2008 goda' (24 January 2008) Rossiyskaya Gazeta <http://rg.ru/printable/2008/01/24/tekst.html> accessed on 7 December 2017.

[709] Namli (n 593) 139.

[710] *Ibid.*

[711] *Ibid.*

[712] *Ibid.*

[713] *Ibid* 142.

[714] Henderson (n 13) 259.

[715] Namli (n 593) 143.

[716] Hendley, 'Who Are the Legal Nihilists in Russia?' (n 707) 154, 155.

[717] *Ibid* 158, 179.

law and legal nihilism in Russia, Hendley concludes that "Russians are not as nihilistic as usually assumed, but neither are they free of skepticism when it comes to their legal system".[718] Hendley acknowledges that Russians have low trust towards the court system and that Russians try to avoid bringing their disputes to courts. "Their first reaction to difficulties – whether they arise with a neighbour, a stranger, or a state official – is to work out an informal solution. They contemplate turning to the courts only when such efforts prove unsuccessful."[719] Russians are reluctant to sue their friends and neighbors because "to do so would be to violate informal norms built up over generations". However, when there is no personal connection, they are more willing to turn to court. "Lacking any basis for trust, they turned to law to protect their interests."[720] Hendley argues that the main reason why Russians are reluctant to turn to the courts is not telephone law but "dread of the inevitable red tape and emotional turmoil that accompany litigation."[721] This is similar in many countries, as "everywhere litigation tends to be a last-resort solution."[722]

Indeed, in many cases Russians do trust their court system enough and many cases get resolved in Russian court system without telephone law or other external influences. However, the overall trust towards the court system remains low and majority of Russian people are not used to turning to the courts to defend their rights. Culturally, the aspect of "moral justice" has been more important than "legal justice" because people have not been able to get legal justice from the state institutions and resolving conflicts in court is often in conflict with informal norms rooted in Russian society. In general, Russian people have little faith in the legal framework of the country, including the legislation related to human rights protection.

Legal nihilism contributes to the fact that liberal values and civil and political rights are understood as morally unjustified and not serving the "well-being of the polity" in Russia. Almost half of Russian people (45%) are convinced that Western democracy would have "disastrous effects" on Russia.[723] Russians do not feel threatened or concerned when civil and political rights are limited in the country. They do not notice it or, when they do, they do not consider it as a serious issue.[724]

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[718] Hendley, *Everyday Law in Russia* (n 312) 222.

[719] *Ibid*.

[720] *Ibid* 223.

[721] *Ibid* 222.

[722] *Ibid.*

[723] Levada Center, *Ezegodnik 2014. Ot mnenii – k ponimaniju: obshesvennoe mnenie* (Levada Center, Moscow 2014) <http://www.levada.ru/sites/default/files/om14.pdf> accessed on 7 December 2017.

[724] Mikhail Kozyrov 'Svoboda slova, v printsipe, ne v prioritete' (14 October 2014) Dozd <http://tvrain.ru/articles/svoboda_slova_v_printsipe_ne_prioritete_mihail_kozyrev_obsuzhdaet_s_ekspertami_svezhij_opros_levada_tsentra_o_predpochtenii_rossijanami_tsenzury-376619/> accessed on 7 December 2017.

It is my view that they do not consider it a serious issue because they know that in the Russian system one cannot rely on the state defending your rights and freedoms, but everybody has to fight for themselves and their close ones. Moreover, as I demonstrated in Chapter II, Russian people have for centuries lived in conditions where power has constantly been abused and they have very little experience with democracy, rule of law and human rights, they have little knowledge of these concepts and little trust in them. Accordingly, defending one's legal rights via the court system and other state institutions is not culturally inherent to the Russian people. Considering the lack of experience and lack of knowledge in the field of human rights and freedoms, the Russian people simply do not understand the effects of repressive laws and what is at stake for the Russian political landscape. All these tendencies leave the Russian people particularly vulnerable to further abuse of power by the authorities.

4.3 Analysis and conclusions

A supportive attitude towards human rights and their underlying values in the political climate, state institutions as well as in society at large is a crucial precondition for successful compliance with international human rights treaties, as explained in Section 1.3.3 of this study. Therefore, in this chapter I have focused on the attitude towards human rights and their underlying values in the Russian political and social context. Whereas there is no monolithic body of Russian opinion, it emerged from my research that the dominant political rhetoric in contemporary Russia is anti-human rights and is fuelling antagonism between a dangerous and immoral West and a righteous Russia in Russian society. Today's government is reluctant to acknowledge the value of human rights and is undermining human rights in its rhetoric, as evidenced by various Russian official political documents that I analysed in this chapter and by speeches and other expressions of the ruling political coalition. This attitude is a clear obstacle to effective compliance with international human rights treaties. Furthermore, I found that the idea of human rights remains alien to a majority of Russian people.

Whereas this cannot be said about all Russians and there surely is a diversity of views and attitudes: there are scholars, human rights NGOs, lawyers and other activists who defend human rights in courts, in universities and other fora, their impact on the overall attitudes towards human rights in Russian society and their impact on state policies remains low. A problem with legal nihilism is still present in Russia. Overall Russian people have little trust towards the judicial system, towards human rights and rule of law. As an interesting tendency, the Russian Orthodox Church has taken a very active role in interpreting human rights in Russia. However, the Church interprets the underlying values of human rights, particularly the concept of human dignity very differently from the interpretation underlying international human rights law. According to the view of the Russian Orthodox Church, dignity is not inherent, but has to be earned:

thus, not all are equally dignified and not all people deserve protection of their rights and freedoms. Although in many ways the Russian people are very liberal, the Russian political mainstream utilises all means possible to convince the Russian people of the downsides of political liberalism and the disastrous effects of human rights, which in their interpretation are only suitable for the degraded West. In my view the anti-human rights attitude of the government as well as the fact that the idea of human rights has remained alien to a majority of the Russian people are important obstacles that hinder compliance with the ECHR as well as effective cooperation with the CoE.

Russia has had to struggle with an ideological vacuum for over twenty years. On the one hand, neutrality in respect of the ruling parties and establishing the legal foundations for political pluralism brought the 1993 Constitution close to the constitutions of modern democratic states. However, whereas Russia previously had had a strong ideology – however problematic this might have been – suddenly they had none. In the 1990s Russia started to reinvent its identity. Whereas all post-communist societies had to reinvent their identities to some extent, for Russia the change was extremely bitter. In many countries, such as the Baltic States, the collapse of the Soviet Union meant long-awaited freedom and independence; in Russia the collapse of the Soviet Union meant losing the position of a superpower and is to this day perceived as a negative event by a majority of Russians.[725]

Initially Russia opened up to European human rights law by adopting a modern constitution enshrining human rights as the highest value, by becoming a member of the CoE and by making various reforms in its legal system. During the 1990s the constitutional principle of ideological diversity was regarded as a gigantic step towards pluralism of values and ideas, considering Russia's authoritarian past and the compulsory ideology of Marxism-Leninism that permeated all walks of Soviet life. As Zorkin has explained, the principle of ideological pluralism in the Russian Constitution was drafted with the aim of protecting pluralism of opinions, attitudes, and doctrines and to separate the state's integrity from ideological dictates, to oppose the ideological monism of Soviet constitutions.[726]

Despite the aim of opposing ideological monism reflected in Article 13 of the Russian Constitution, in modern Russia ideological monism is vigorously and insidiously sneaking back in. Starting from the 2000s the approach towards human rights started to change both in the political arena as well as in academia and the court system. As I have argued elsewhere, Russia's contemporary prevailing political ideology can be characterized by fundamental separation

[725] See, for example: Levada Center, 'Nostalgia for the USSR' (Levada Center, December 2017). <https://www.levada.ru/en/2017/12/25/nostalgia-for-the-ussr/>

[726] Zorkin, 'Rossiya i Konstitutsiya v XX veke. 2-ye izdaniye, dopolnennoye' (n 558) 15.

from the West[727] on the issue of values and rights, particularly regarding civil and political rights and freedoms.[728] Notwithstanding that Russia's constitutional claim to be a democratic, rule-of-law state, where "man, his rights and freedoms are the supreme value", Russian ruling elite construes human rights as inherently inferior to the values of patriotism, unlimited sovereignty and traditional values mainly defined by Orthodox Christianity. Human rights are framed as a dangerous Western influence that must be fought against. Liberal values are belittled, regarded as inferior to "ideologically approved" values such as patriotism and morality as defined by Orthodox Christianity. Promoting Christian values, the Russian Orthodox interpretations of morality and the security and sovereignty of Russia are recognized as unqualified values by the government.

While searching for an ideological underpinning for his power, Russian President Vladimir Putin has guided the official rhetoric of Russia away from the idea of human rights and towards protecting Russia's own values, Russian "moral sovereignty", from Western influences. In Russian official documents human rights are now construed as a negative influence of the West, lacking moral principles and causing disastrous effects in Russian society. According to the prevailing view, human rights and freedoms should be respected and protected only when they do not infringe upon truly "higher values" such as morality and other traditional values, state security and sovereignty. Although this approach does not amount to a state ideology in the sense of Marxist-Leninist ideology, it clearly infringes the principle of ideological pluralism and in the bigger picture this emerging 'state idea' endangers protection of human rights and overall pluralism in Russian society.

Interpretations given to human rights in contemporary Russia by mainstream legal scholars as well as the political and religious elite are increasingly following a pattern familiar from Soviet Constitutions. The rhetoric of the Kremlin as well as mainstream scholarship supports the idea that the task of the individual is to adhere to the dictates of the state. Rights are granted to those who are loyal to the state.[729] Pursuant to the Russian Orthodox interpretation of human rights, only those rights that are in accordance with the inner morality of Russian society and other needs such as state security should be respected – and others neglected. Moreover, people whose morality code is not in accordance with the "inner voice of the majority" are considered to be dangerous for society and therefore should be punished and treated as outcasts, as advised by the head of the Russian Orthodox Church, Patriarch Kirill I.

In the history of Russia the noblest task of being a leading Russian internationalist has been to help the state with legitimizing arguments, as noted by

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[727] It is hard to give a meaningful definition to the term 'the West', but this concept is actively used in Russian legal and political debate, referring broadly to the European Union and to the United States of America and to NATO member states

[728] See further: Mäger, 'Russia's Illiberal Ideology and Its Influences on the Legislation in the Sphere of Civil and Political Rights' (n 1).

[729] *Ibid* 44.

Lauri Mälksoo.[730] Today, the majority of legal scholars as well as of the judiciary use ideological arguments familiar from official political rhetoric to interpret the Constitution and the balance of rights and freedoms with other values. The focus of mainstream legal scholarship is on denouncing individual liberties and promoting Christian values, the Russian Orthodox interpretation of morality and security and the sovereignty of Russia as unqualified values. Several legal scholars and Constitutional Court judges also approve a state ideology guiding the actions of political institutions as well as society as a whole. Thus, various groups and authorities that legitimize official arguments denouncing human rights back the state.

Whereas many lawyers, NGOs and other activists in Russia promote human rights protection, the idea of human rights has remained largely alien to the majority of Russian society. In my view, at least three underlying factors can be distinguished. Firstly, Russian society is characterized by legal nihilism resulting from centuries-long abuse of power. Whereas it cannot be argued that all Russians are legal nihilists, the problem of legal nihilism is still widespread. A majority of Russians have little trust towards the judicial system; they underestimate the importance of rule of law and are mainly guided by interpersonal relationships and social norms present in these relationships, whereas legal norms tend to have little importance. It is also noteworthy that the doctrine of the Russian Orthodox Church, which construes defending one's rights and freedoms as a sign of avoiding moral responsibility towards society, is very influential in Russia. Secondly, in Russia the interpretation of underlying values of human rights, particularly the concept of human dignity is greatly influenced by the doctrine of the Russian Orthodox Church arguing that not all people are dignified, that dignity must be earned by proper behaviour. Thirdly, the idea of human rights remains alien because the Russian political elite uses all means possible to convince the Russian people of the disastrous effects of human rights, which in their interpretation are only suitable for a degraded West. As a result of this "translation" process, the majority of Russians view human rights as something dangerous and immoral and are not motivated to demand protection of human rights from their government.

In 1947 George F. Kennan, a famous American diplomat, argued in his iconic essay "X" that Stalin needed the concept of a hostile world to legitimize his autocratic rule. The innate socialist antagonism with capitalism served the needs of Soviet leaders.[731] As can be concluded from the analysis in this chapter, the Russian state has replaced the antagonism of Socialism versus Capitalism with

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[730] Mälksoo, 'The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe' (n 670) 215.

[731] Kennan (n 279). Interestingly, a historian Friedrich Heer traces the antagonism between Russia and the West back to "the shrill protests of Anna Comnena, imperial [Byzantine] princess and chronicler, who in the 12th century voiced virtually all the reproaches to be levelled against the West in the future…". See: Friedrich Heer, *The Medieval World: Europe 1100–1350* (Phoenix London 1998) 98.

antagonism between the West and Russia, but the official rhetoric is strikingly similar.

The Russian government has various means to influence the prevalent value-system in Russian society and to fuel the antagonism between the West and Russia among the Russian people. The Russian state has used the authority of the Russian Orthodox Church to justify its ideological messages. Moreover, political leaders can shape the views of people via the media, which are almost completely under the control of the Kremlin. Furthermore, they can transmit ideologically "suitable" messages through the educational system, socializing Russian people into certain norms and values from a very young age. While an exchange student at St Petersburg State University, I was very surprised to see how the educational system is extremely critical towards the West in general; how international law or the law of Western states is referred to as 'bourgeois law' *(буржуазное право)* in textbooks; how human rights law is marginalized and how young students mirror these statements in their conversations and scholarly works.

I was also surprised to see how actively the victory in the Second World War and the "achievements" of Communism were praised. When I introduced my views about historical events as experienced by my family and other Estonians during and after the Second World War, including occupation, mass deportation of Estonians by the Soviets, the destruction of the Estonian political and cultural elite, demolition of people's homes and property and various ideological pressures, the students in the classroom were utterly amazed and said that they had never heard of anything like this. The professor's interpretation was that "Estonians wanted to be part of the Soviet Union and there was no pressure. Were you there when all those events happened? If you were not, how can you be sure? Most probably these are just stories." Thus, no true debate of historical events was possible and alternative views were quickly downgraded. When discussions about controversial topics are discouraged in the educational system as well as in the public sphere, this inevitably hinders the development of civil society whose central task is to pose questions and to demand changes.

Sociological research has demonstrated that value-based civilizational differences between Russia and the West are not objective facts, but are to great extent ideological constructs. It is hard to find evidence for the claim that there is a certain set of uniquely "Russian values" incompatible with the values of Western or other countries. The Russian people are very much focused on individualistic values such as personal success, individual wealth and power. [732] Therefore the thesis that Russian society is somehow more righteous than the liberal West, which has been regularly exploited by the Russian political, legal and religious elite, has little proof. Incompatibility of the Russian value system and Western liberalism is to a great extent a social construction that could be changed when the social and political context in Russia changes. However, as

[732] Magun and Rudnev (n 691).

long as the Russian political mainstream does not support the idea of human rights, but is actively contesting it with all means available, little change can be expected.

The Russian state does not want to base its international reputation on protection of human rights, does not want to belong to the "club" of rights-adhering states. On the contrary, human rights and countries respecting human rights are ridiculed in the official rhetoric. As demonstrated in Chapters II and III, the Russian constitutional framework does not support compliance with international human rights law and international human rights law is not institutionally embedded in the Russian legal order. Accordingly, mechanisms for persuading or shaming Russia into compliance with human rights law cannot be expected to be effective and when the social and political milieu remains actively anti-human rights, little hope is at hand for better compliance with international human rights treaties. Thus, as the Russian state has little motivation to adhere to the norms and values underlying the CoE and as the idea of human rights has remained largely alien to Russian society, the relationship between Russia and the CoE will likely remain complicated and controversial.

V IMPLEMENTING THE RIGHT TO FREEDOM OF EXPRESSION IN RUSSIA

"Freethinkers are those who are willing to use their minds without prejudice and without fearing to understand things that clash with their own customs, privileges, or beliefs. This state of mind is not common, but it is essential for right thinking"
(Leo Tolstoy, On Life and Essays on Religion)

As demonstrated in Section 1.4.2 of this study, the presence of a strong civil society able and willing to demand and realize human rights and compliance with international human rights is central for effective compliance with the ECHR. As noted by Beth Simmons, it is of central importance whether domestic groups have the motive and the means to demand protection of their rights as reflected in international treaties.[733] Thus, civil society can play a meaningful role when the legal order provides people with the basic means to demand protection of their rights and freedoms. This chapter and the following two chapters provide an overview of numerous legislative amendments adopted in Russia since 2011 in the field of civil and political rights, focusing on three central rights: the right to freedom of expression (Chapter 5); the right to freedom of association (Chapter 6); and the right to freedom of assembly (Chapter 7). It will be analysed how these three central rights are incorporated into the Russian legal order and implemented in practice and what implications the amendments have on the protection of rights and freedoms guaranteed under the ECHR.

5.1. Overview of the legal framework

Freedom of expression is enacted in most constitutions these days, "whether ratified by liberal democracies or announced by petty dictators".[734]In accordance with Article 29 of the Russian Constitution, everyone shall be guaranteed the freedom of ideas and speech. Propaganda or agitation instigating social, racial, national or religious hatred and strife is not allowed and propaganda of social, racial, national, religious or linguistic supremacy is banned. Pursuant to Article 29 no one may be forced to express their views and convictions or to reject them. Article 29 also guarantees freedom of information and freedom of mass communication and bans censorship.

[733] Simmons (n 2) 17.

[734] Kahn, 'Freedom of Expression in Post-Soviet Russia (Contribution to the Symposium Building BRICS: Human Rights in Today's Emerging Economic Powers)' (n 293).

Freedom of expression and the right to information are regulated more specifically by several federal laws. Pursuant to Federal Law № 149-FZ[735] citizens (individuals) and organizations (legal entities) shall be entitled to seek and receive any information in any form and from any source, subject to the requirements established by Federal Law № 149-FZ and other federal laws. [736]Access to information can be limited in order to protect the constitutional order, morality, health, rights and lawful interests of other persons, national defence and state security.[737] Dissemination of information is carried out freely, subject to the requirements established by the legislation of the Russian Federation.[738] Transmission of information through the use of information and telecommunication networks is carried out without restriction, subject to the requirements established by federal laws on disseminating information and protection of intellectual property.[739]

Some limitations of freedom of expression are enacted in Article 4 paragraph 1 of the Federal Law "On mass media"[740] according to which it is prohibited to use the media for committing a criminal offense, for disclosure of classified information, for distribution of materials containing public calls for terrorist activities or publicly justifying terrorism, for publishing other extremist materials, materials that promote pornography, violence and cruelty, and materials that contain foul language. Activities by the media can be terminated by a court when in the case of repeated violations of these requirements during a twelve-month period (Article 16, paragraph 3).

While interpreting the scope of freedom of expression and its limits, the Constitutional Court and the Supreme Court of the Russian Federation have in many aspects mirrored the positions of the ECtHR. According to the Supreme Court: "Freedom of expression and freedom of the media constitute the foundations of modern society and a democratic state. Implementation of these rights and freedoms may be subject to such limitations as are prescribed by law and are necessary in a democratic society."[741] Similarly, the Constitutional Court of the Russian Federation has repeatedly stressed that the right to freedom of expression and dissemination of information may be restricted only for the protection of constitutional values, while respecting the principle of legal

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[735] Federal'nyy zakon Rossiyskoy Federatsii ot 27.07.2006 No 149-FZ "Ob informatsii, informatsionnykh tekhnologiyakh i o zashchite informatsii" (hereinafter: federal law on information).

[736] *Ibid* Article 8 para 1.

[737] *Ibid* Article 9 para 1.

[738] *Ibid* Article 10 para 6.

[739] *Ibid* Article 15.

[740] Federal'nyy zakon Rossiyskoy Federatsii ot 27.12.1991 No 2124–1 "O sredstvakh massovoy informatsii" (hereinafter: federal law on mass media)

[741] Supreme Court of the Russian Federation, No 5-APG 13–57 (19 March 2014) <http://base.garant.ru/70622862/> accessed on 6 December 2017.

equality and the criteria of reasonableness, proportionality and necessity in a democratic state; emphasizing that such restrictions cannot distort the core meaning of the constitutional right and encroach on its essence – otherwise it leads to derogation and abolition of the right itself.[742] The Constitutional Court has also referred to the case law of the ECtHR stating that freedom of expression, being one of the essential foundations of a democratic society and the basic conditions for its progress and for each individual's self-realization, also extends to cases where unpopular, shocking and provocative statements are being made.[743]

The Supreme Court has noted that when resolving cases related to the activities of the media, it is necessary to take into account that the exercise of freedom of expression and freedom of the media carries with it special duties, a special responsibility, and may be subject to limitations established by law, when they are necessary in a democratic society to respect the rights or reputations of others, for protection of national security and public order, the prevention of disorder or crime, for the protection of health or morals, for preventing disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary.[744] However, often the aim of referring to the case law of the ECtHR remains unclear, as the Constitutional Court often connects referred-to case law to the facts of the case before it and the conclusions in many cases are contrary to the main points of referred-to case law.[745] Although the Constitution and federal laws in principle protect freedom of expression, a wide discrepancy exists between norms established by the Constitution and "reality on the ground".

5.2. Freedom of expression and the internet

The internet media and internet access have developed at accelerated speed in Russia. The new media – social media channels such as Facebook, Vkontakte, Twitter, Youtube and various blogs – have provided a forum for free discussion and information-dissemination among Russian civil society. The new media has purveyed an alternative to the Kremlin-controlled media-landscape. When for most of Putin's term of office national broadcast media and national newspapers

[742] Russian Constitutional Court, No. 15-P (30 October 2003); Russian Constitutional Court, No 7-P (16 June 2006); Russian Constitutional Court, No. 14-P (22 June 2010).

[743] Russian Constitutional Court, No. 1053-O (2 July 2013)

[744] The Supreme Court explicitly referred to Article 29 of the Universal Declaration of Human Rights, paragraph 3 of Article 19 and Article 20 of the International Covenant on Civil and Political Rights, Article 10 (2) of the Convention for the Protection of human Rights and Fundamental freedoms, Article 29 and 55 of the Constitution of the Russian Federation). Russian Supreme Court, No. 16 (15 June 2010) <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=125973> accessed on 7 December 2017.

[745] Russian Constitutional Court, No. 1053-O (2 July 2013)

were placed under tight control, the internet-media were left relatively independent.[746] However, in recent years a considerable change has occurred and a number of laws restricting dissemination of information on the internet have been passed. Most of them are characterized by the possibility of blocking various internet resources by public authorities without any court decision.

5.2.1. Law on blacklists

In July 2012 restrictions on internet content were introduced by Federal Law No. 139-FZ[747] "On Amendments to the Federal Law "On protection of children from information harmful to their health and development" and other legislative acts of the Russian Federation" (hereinafter: "law on blacklists"). The law amended Federal Law "On information, information technologies and protection of information"[748] (Federal law No 149-FZ) and provided for creation of a register of prohibited websites containing certain types of information, the distribution of which is prohibited in the Russian Federation. According to the amendments, web-sites are included in the register when they contain pornographic images of minors or material which could attract minors to participate in pornographic acts; information on manufacture or use of drugs; and information that incites commission of suicide or contains suicide instructions.[749] This list of prohibited information was later complemented by information about minors who have suffered as a result of illegal acts or inaction[750] and information in violation of regulations on gambling and lotteries[751]. In addition, web-pages can be included in the register on the basis of a court decision when the court has established that the web-page contains content that is forbidden in the Russian Federation[752]. Obviously there is no clearly defined list of such

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[746] Anna Nemtsova, 'Life for Russia's Liberals Just Got a Whole Lot Worse' (9 April 2014) Foreign Policy <http://www.foreignpolicy.com/articles/2014/04/09/life_for_russias_liberals_just_got_a_whole_lot_worse> accessed on 8 December 2017.

[747] Federal'nyy zakon Rossiyskoy Federatsii ot 28.07.2012 No 139-FZ "O vnesenii izmeneniy v Federal'nyy zakon "O zashchite detey ot informatsii, prichinyayushchey vred ikh zdorov'yu i razvitiyu" i otdel'nykh zakonodatel'nykh aktov Rossiyskoy Federatsii" (hereinafter: federal law for protecting children from harmful information 2012).

[748] Federal law on information (n 735).

[749] *Ibid*, Article 15.1 (5) sub-sections 1 a), b) and v).

[750] Federal'nyy zakon Rossiyskoy Federatsii ot 05.04.2013 No 50-FZ "O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v chasti ogranicheniya rasprostraneniya informatsii o nesovershennoletnikh, postradavshikh v rezul'tate protivopravnykh deystviy (bezdeystviya))".

[751] Federal'nyy zakon Rossiyskoy Federatsii ot 21.07.2014 No 222-FZ "O vnesenii izmeneniy v Federal'nyy zakon" O gosudarstvennom regulirovanii deyatel'nosti po organizatsii i provedeniyu azartnykh igr i o vnesenii izmeneniy v nekotoryye zakonodatel'nyye akty Rossiyskoy Federatsii "i otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii".

[752] Federal law on information (n 735), Article 15.1 (5), sub-section 2.

prohibited information in Russian legislation and the judiciary has wide discretion in determining what is allowed and what is prohibited.[753]

Web-resources can be included in the register based on a decision by three authorized federal executive bodies: Russia's Federal Service for Supervision in Telecommunications, Information Technology and Mass Communications (Roskomnadzor), the Federal Drug Control Service (FSKN), or the Federal Service on Surveillance for Consumer Rights Protection and Human Well-Being (Rospotrebnadzor). The register is managed by Roskomnadzor and management of the list is regulated by Government decree No. 1101[754] When Roskomnadzor adds a website to the register, content-hosting providers have twenty-four hours to notify the website owner and ask to remove the prohibited content. The website owner has another twenty-four hours to comply and to remove the content.[755] If the website owner does not comply, the service provider is obliged to block access to the website within twenty-four hours. The website will be removed from the register when the owner removes prohibited content and sends a request for reinstatement or appeals the ban in court.[756]

The ideological justification for the law on blacklists has been protection of family values, specifically protecting the health and development of Russian children. The official title of Federal Law No 139-FZ: "On amendments to the federal law "On protection of children from information harmful to their health and development" and other legislative acts of the Russian Federation" clearly refers to the stated goal of the law: to protect children. Sergey Zhelezniak, one of the authors of the law, has noted: "Our goal is … protecting our children from the information that directly can damage their health and even life."[757]

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[753] Maksim Mart'yanov, 'Kriterii otsenki zapreshennoi informatsii' (13 December 2013) Garant.ru < http://www.garant.ru/article/510868/> accessed on 7 December 2017.

[754] Postanovleniye Pravitel'stva Rossidkoy Federatsii ot 26 oktyabrya 2012 g. No. 1101 "O yedinoi avtomatizirovannoi informatsionnoi sisteme» Yedinyy reyestr domennykh imen, ukazateley stranits saytov v informatsionno-telekommunikatsionnoy seti «Internet» i ikh adresa, pozvolyayushchikh identifitsirovat' sayty v informatsionno-telekommunikatsionnoy seti «Internet», soderzhashchiye informatsiyu, rasprostraneniye v Rossiyskoy Federatsii (Pravila sozdaniya, formirovaniya i vedeniya yedinoy avtomatizirovannoy informatsionnoy sistemy «Yedinyy reyestr domennykh imen, ukazateley stranits saytov v informatsionno-telekommunikatsionnoy set "Internet" i setevykh adresov, pozvolyayushchikh identifitsirovat' sayty v informatsionno-telekommunikatsionnoy seti "Internet", soderzhashchiye informatsiyu, rasprostraneniye kotoroy v Rossiyskoy Federatsii zapreshcheno").

[755] Federal'naya Sluzba po Nadzoru v sfere svyazi, informatsionnyh tehnologii i massovyh kommunikatsii, *Protsedura rassmotreniya zayavok v edinom reestre* (no date) <https://eais.rkn.gov.ru/> accessed 7 December 2017.

[756] Federal law for protecting children from harmful information 2012 (n 747), Article 3 section 2 (subsections 7–11).

[757] Damir Gaynutdinov, *Analiz pravoprimenitel'noy praktiki Federal'nogo zakona ot 28.07.2012 № 139-FZ "O vnesenii izmeneniy v Federal'nyy zakon "O zashchite detey ot*

Denis Davydov, the head of the League for a Safer Internet, claims that about 80% of harmful information in Runet is located on foreign websites and the new law provides an opportunity to combat this information in a civilized way. Another author of the law, Ekaterina Larina, has argued that the law was passed to combat foreign sites and block them".[758] According to the explanatory note to the law on blacklists,[759] forced blocking of web pages containing prohibited information mirrors the best practices of other countries: for example, in the UK access is also blocked to sites containing child pornography or other prohibited material. Besides, Denmark, Finland, Italy, Norway, Sweden, Switzerland, New Zealand and Malta have special systems to combat the spread of child pornography.

It is difficult to argue that countries should not combat child pornography or other activities harming children. It is the duty of every country to protect children from such harmful influences. However, in the Russian case the law officially aimed at protecting children from harmful influences has been used for many other "informal aims" not enacted in the law nor explained in the explanatory note. In reality, using the noble goal of protecting children, millions of adults in the Russian Federation have been deprived of their constitutional right to receive information, as noted by the experts of Moscow Helsinki Group.[760]

As prohibited material is very vaguely defined in the law, not only sites potentially dangerous for children, but all sorts of websites, mainly operated by opposition-minded citizens, are at risk of being taken offline. Experts warn that the law leads to disproportionate over-blocking of legal content also because often it is technically impossible to block access only of a certain article or video and as a result the whole web-page must be blocked in order to comply with the law. Moreover, the law leaves a very wide discretion to government agencies that can submit websites for the register without a court order and cause disproportionate harm to freedom of expression.[761] The Russian Presidential Council

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informatsii, prichinyayushchey vred ikh zdorov'yu i razvitiyu" i otdel'nykh zakonodatel'nykh aktov Rossiyskoy Federatsii" (Moskovskaya Hel'sikskaya gruppa 2012) <http://www.ihahrnis.org/sites/default/files/files/analiz_primeneniya_fz_o_zashchite_detey_ot_informacii.pdf> accessed on 8 December 2017.

[758] Interfax.ru 'Za "chernye spiski" zaplatyat pol'zovateli' (12 October 2012) <http://www.interfax.ru/russia/271468> accessed on 8 December 2017.

[759] Poyasnitel'naya zapiska k proyektu federal'nogo zakona «O vnesenii izmeneniy v Federal'nyy zakon "O zashchite detey ot informatsii, prichinyayushchey vred ikh zdorov'yu i razvitiyu" i otdel'nykh zakonodatel'nykh aktov Rossiyskoy Federatsii <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=89417-6&02> accessed on 8 December 2017.

[760] Gaynutdinov (n 757) 2.

[761] See, for example, Ekaterina Vinokurova, 'Cet' za URL ne otvechaet' (4 August 2012) Gazeta.ru <http://www.gazeta.ru/politics/2012/08/03_a_4709265.shtml> accessed 8 December 2017); OSCE, 'Plans for Internet blacklist in Russia may lead to censorship' (10 July 2012) < http://www.osce.org/fom/92023> accessed 8 December 2017.

for Civil Society and Human Rights has also criticized the law, claiming that the proposed procedure for blocking domain names and IP-addresses (rather than URLs) may result in mass closure of *bona fide* resources; that the restrictions are based on subjective criteria and evaluations and that blocking does not address the underlying causes of harm to children.[762] They emphasize that it is important to stop censorship of the internet and warn against building new "electronic curtains" with a detrimental impact on the rights and opportunities of Russian citizens and on the development of society and the economy in general.[763]Wikipedia's Russian website protested against the bill with a 24-hour blackout: they published a critical heading "Imagine the world without free access to knowledge" on their websites.[764] Vkontakte, Yandex, and LiveJournal also joined the protest.[765]

Overall, the law on blacklists can be viewed as another attempt to exercise control over the media and to increase censorship. As with other "morality-driven" laws, a law ostensibly aimed at protecting from harmful information has been used very widely for blocking various internet-resources, most of which have nothing to do with protecting children.

During the first year after the law was passed, Roskomnadzor received tens of thousands of requests to place web content in the register and the register contained thousands of items.[766] In 2014, according to the RosKomSvoboda project, 6876 domains out of 7103 located in the register, that is, 96.8% of domains, were blocked without any legal basis, for the sole reason that they were located on the same IP-address as resources considered as forbidden information.[767] Examples of blocking influential websites under the new legislation include blocking the entire LiveJournal platform for three days.[768] RuTracker, a file-sharing website, was blocked due to a copy of "The Suicide Handbook" in

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[762] Sovet pri Prezidente Rossiyskoy Federatsii po razvitiyu grazhdanskogo obshchestva i pravam cheloveka 'Zayavleniye chlenov Soveta v otnoshenii zakonoproyekta No. 89417-6 "O vnesenii izmeneniy v Federal'nyy zakon "O zashchite detey ot informatsii, prichinyayushchey vred ikh zdorov'yu i razvitiyu' (2 July 2012)
<http://president-sovet.ru/documents/ read/47/> accessed 8 December 2017.

[763] *Ibid.*

[764] See for example: Charles Clover, 'Russia's Wikipedia strikes over blacklist' (10 July 2012) Financial Times.

[765] RBK, 'Vkontakte, Yandeks, i ZHZH protestuyut protiv tsenzury v Internete' (11 July 2012) <http://top.rbc.ru/society/11/07/2012/659368.shtml> accessed 8 December 2017.

[766] Roman Rozhkov, 'Minkomsvyazi ottachivaet tehniku' (26 March 2013) Kommersant <https://www.kommersant.ru/doc/2154714> accessed on 8 December 2017.

[767] Roskomsvoboda, 'Monitoring sostoyaniya Reestra zapreshennyh saitov' (no date) http://reestr.rublacklist.net/ accessed 8 December 2017.

[768] Malavika Jagannathan, 'Temporary block on LiveJournal in Russia exemplifies overblocking' (6 August 2012) OpenNet Initiative <https://opennet.net/blog/2012/08/temporary-block-livejournal-russia-exemplifies-overblocking> accessed 8 December 2017.

their database[769]; online library Librusek was blocked because it contained a copy of "The Anarchist Handbook"[770]; the LiveJournal blog of Rustem Adagamov, one of most popular blogs in Russia, was blocked for publishing "suicide propaganda" as the blog entry included photos of Tibetan independence activists performing self-immolation.[771] A blog entry by another famous Russian blogger, Artemy Lebedev, was blocked due to a link to the YouTube video called "Dumb Ways to Die", as the lyrics of the song "described various methods of suicide and animated characters illustrated methods of suicide in a humorous way that attracts and incites children and teenagers to commit suicide".[772] In June 2013, the state-owned ISP Rostelekom blocked fifteen web-pages[773], including Gazeta.ru and Lenta.com, after the regional court of Ulyanovsk ruled on 23 May 2013 in case No 2-3551/13[774] that material published on those websites promoted bribery and undermined the authority of Russian Federation.[775]

The court referred to Article 10 (6) of federal law № 149-FZ, which prohibits dissemination of information which is subject to criminal or administrative liability and the provisions of the criminal code regulating bribery and corruption. However, the court did not indicate which materials published on the websites were illegal and on what grounds, nor what information on the websites formed the basis of the claim. The Court argued that access to those webpages should be limited to restore the rights of the citizens of the Russian Federation as "free access to this information promotes the formation of social

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[769] Maxim Solopov, 'Porosenok Petr perepakhal konoplyu' (13 November 2012) Gazeta.ru < https://www.gazeta.ru/social/2012/11/13/4850645.shtml > accessed on 8 December 2017.

[770] Interfax, 'Dostup k 'Libruseku' vosstanovlen' (13 November 2012) <http://interfax.ru/news.asp?id=275544> accessed 8 December 2017.

[771] RIA novosti, 'Roskomnadzor vnes v 'chernyi spisok' ZHZH post Adagamova yeshche v noyabre' (11 January 2013) <http://ria.ru/society/20130111/917775565.html> accessed 7 December 2017.

[772] Artemy Lebedev (blog) <http://tema.LiveJournal.com/1331473.html> accessed 8 December 2017; Gorbunova and Baranov (n 28) 58, 59.

[773] Web-pages cripo.com.ua, glavnoe.ua, www.aloepole.ru, www.krasjob.biz, www.daslife.ru, www.scandalim.ru, bbcont.ru, www.homearchive.ru, gal58.ukrblogs.net, articles, gazeta.kz, www.kp.ru, lenta.com.ua, www.tvoemnenie.net, posovesti.com.ua and www.gazeta.ru.

[774] Leninsky Regional Court of city of Ul'yanovsk, No. 2-3551/13 (23 May 2013) <http://leninskiy.uln.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=12024589&delo_id=1540005&text_number=1> Accessed on 7 December 2017.

[775] In April 2003 the prosecutor of Ul'yanovsk region monitored online resources. As a result 15 websites were found containing "information on how to bribe, the circumstances under which it is necessary to give a bribe, as well as on how to evade criminal liability for corruption offenses". The prosecutor's office filed a lawsuit in the court of Ulyanovsk Referring to the law "On Combating Corruption". Investigating the case, the prosecutor asked the court to order Rostelekom to restrict user access to the pages of the above-mentioned Web sites as they contain information about methods of bribery, on the circumstances under which it is necessary to give a bribe, as well as on how to avoid criminal liability for corruption offenses.

consensus on the possibility of committing corruption offenses and undermines the authority of the government of the Russian Federation and Russian laws". As the court did not indicate which materials published on the websites were illegal, Rostelekom restricted all access to the websites.[776]

Despite criticism by international and national human rights defenders and lawyers, Russian society in general has been supportive of the new measures to regulate the internet. Additional regulation of the internet and creation of a register of banned websites was welcomed by 62% of Russians in 2012. Some 51% of respondents said that banning sites did not limit freedom of expression.[777] Moreover, global ISPs have been rather cooperative with Russian requests. Google, YouTube and Twitter have all removed or blocked content allegedly violating Russian legislation.[778]

5.2.2. Law on arbitrary blocking of extremist materials

On 1 February 2014 new amendments to the federal law "On information, information technologies and protection of information"[779] came into force. Federal Law No. № 398-ФZ[780] ("law on arbitrary blocking of extremist materials") enables the General Prosecutor's Office to block resources that, in its assessment, contain calls for riots, extremist activities, and participation in mass (public) events held in violation of the established order without a court order.[781] A characteristic feature of the new regulation is the lack of mechanisms to address violations preceding blocking and lack of an appeal mechanism. In addition, the powers given to the Prosecutor General in fact substitute judicial procedure for the recognition of materials as extremist, as set forth in the Federal Law of 25 July 2002 № 114-FZ "On countering extremist activities". Another characteristic feature of the law on arbitrary blocking of extremist materials is the vagueness of its terms. No definition appears of what constitutes "extremist activities"; "illegal activities" or "participation in public events held in violation of the established order". These expressions have been described very broadly, allowing for blocking of various resources.

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[776] Aleksandra Koshkina, Mikhail Belyy, 'Gazetu.Ru zakryli v Ul'yanovske' (25 June 2013) Gazeta.ru <http://www.gazeta.ru/social/2013/06/24/5391777.shtml> accessed on 7 December 2017.

[777] Ivanov (n 683)

[778] Andrei Soldatov and Irina Borogan, 'Russia's Surveillance State' (2013) 30 World Policy Journal 23–30.

[779] Federal law on information (n 735).

[780] Federal'nyy zakon Rossiyskoy Federatsii ot 28.12.2013 No 398-FZ "O vnesenii izmeneniy v Federal'nyy zakon "Ob informatsii, informatsionnykh tekhnologiyakh i o zashchite informatsii".

[781] See Article 15.3 of the Federal law on information (n 735).

The Constitutional Court has held[782] in the context of the law "On countering extremist activities" that it is not necessary to enact clear criteria for defining extremist activities and extremist materials, as such concepts should be comprehensible for Russian citizens even without clear criteria. The Court noted that the requirement of certainty, clarity and unambiguity of legal norms arising from the constitutional rule of law and legal equality does not preclude the use of estimated or universally understood concepts that subjects should comprehend either directly or through clarifications issued by the courts. The Constitutional Court established that classifying all activities and materials associated with initiation of social, racial, national or religious hatred and propaganda of exclusivity, superiority or inferiority of a person on the basis of their social, racial, national, religious or linguistic affiliation or attitude towards religion, as extremist activities (extremism) and extremist materials is based on reproduction and concretization of the positions of the Russian Constitution and therefore as such do not violate constitutional rights and freedoms. The Constitutional Court also referred to the ECtHR, which has explained that in all cases the law cannot be completely free from the terms which to a greater or lesser extent require judicial interpretation, clarification of doubtful points and adaption to changing circumstances.[783]

The Constitutional Court concluded that there was no conflict with the principles of rule of law and the requirements of legal equality and legal certainty. Although the ECtHR has indeed established that the law cannot be completely free from terms needing certain interpretation, the Constitutional Court did not compare the facts of the cases, but simply used the argumentation of the ECtHR to fit its own explanation without considering the overall context.

The official guiding idea of the law on the arbitrary blocking of extremist materials is to protect the Russian people from threats related to extremism and to protect the security of the Russian Federation. The authors of the law have explained in the explanatory note [784] that the law allows a functioning mechanism to be created to protect Russian society from illegal information distributed in the media, including the internet, especially to protect against threats related to inviting people to participate in illegal mass riots and against threats related to carrying out extremist or terrorist activities that spread religious or national hatred. It is also explained that since only the Prosecutor General of the Russian Federation or his deputies can carry out actions aimed at protecting

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[782] Russian Constitutional Court, No. 1053-O (2 July 2013).

[783] See cases *Cantoni v France* (45/1995/551/637) ECtHR 15 November 1996; *Coeme and others v Belgium* (Apps 32492/96, 32547/96, 32548/96, 33209/96, 33210/96) ECtHR 22 June 2000; *Achour v France* (App 67335/01) ECtHR 29 March 2006; *Huhtamaki v Finland* (App 54468/09) ECtHR 6 March 2012.

[784] Poyasnitel'naya zapiska k proektu federal'nogo zakona "O Vnesenii izmeneniy v federal'nyi zakon "Ob informatsii, informatsionnyh tehnologiyah i o zachite informtsii" <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=112263&rnd=259927.2079124603#0> accessed on 8 December 2017.

people from dissemination of unlawful information under the law on arbitrary blocking of extremist materials, it excludes the possibility of abusing the law and full protection of the rights and freedoms of Russian citizens is guaranteed.

Although the authors of the law have full trust that the Prosecutor General is not abusing the powers granted to him, practice has shown that the law has been widely used to silence activities by the political opposition. In 2014 about 4,500 websites were blocked due to alleged extremist content.[785] For example, in March 2014 the prosecutor ordered the blogs of prominent opposition figures Garry K. Kasparov and Aleksei A. Navalny and posts published in the independent media outlets *Daily Journal* and Grani.ru to be blocked because they had encouraged "illegal activities and participation in public events held in violation of the established order." ISPs also blocked access to the site for the radio station Ekho Moskvy, which carried Mr. Navalny's blog. Blocked pages contained content critical of Kremlin policy in Ukraine and in all cases it remained unclear what "illegal activities and participation in public events held in violation of the established order" had been promoted.[786] In January 2015 Moscow lawyer Anton Sorvachev sent a complaint[787] to the Prosecutor General regarding Alexei Navalny and Grani.Ru in connection with publication of a video of the verdict in the case of "Yves Rocher". On 30 December 2014 after hearing the verdict, Alexei Navalny said, "This government does not deserve to exist, it must be destroyed", which was filmed and published on the Grani.Ru video channel on YouTube[788].

Sorvachev required the prosecutor to initiate criminal proceedings pursuant to Article 280(2) of the Criminal Code for public calls for extremist activities by using the internet. According to Sorvachev: "Alexei Navalny, using the media and the internet, called for a mass gathering of people on the streets and for the destruction of power in the Russian Federation". On 14 January 2015 Roskomnadzor asked the news portal "Agency of Business News" to take down illustrations of "Charlie Hebdo" magazine depicting Mohammad as, according to Roskomnadzor, those illustrations are extremist and recommended not mentioning the illustrations in a positive tone. [789] At the request of the General

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[785] Howard Amos, 'Putin Raises 'Extremism' Fines for Russian Media Tenfold' (4 May 2015) The Moscow Times <https://themoscowtimes.com/articles/putin-raises-extremism-fines-for-russian-media-tenfold-46297> accessed on 8 December 2017.

[786] Ellen Barry, 'Russia Blocks Web Content Amid Tension Over Ukraine' (13 March 2014) The New York Times <http://www.nytimes.com/2014/03/14/world/europe/russia-blocks-web-content-amid-tension-over-ukraine.html?_r=0> accessed on 8 December 2017.

[787] Anton Sorvachev, 'Zayavlenie v General'nuyu prokuratury RF' (30 December 2014) <http://grani.ru/files/79297.jpg> accessed on 8 December 2017.

[788] Grani.ru, 'Naval'nogo i "Grani" obvinili v prizyvakh k ekstremizmu' (2 January 2015) <http://grani.ru/Society/Media/Freepress/m.236615.html> accessed on 8 December 2017.

[789] Bumaga, 'Roskomnadzor poprosil peterburgskoye «Agentstvo biznes novostey» ubrat' s sayta oblozhku Charlie Hebdo' (14 January 2015) <http://paperpaper.ru/papernews/2015/01/14/rskmndzr-2/> accessed on 8 December 2017.

Prosecutor's Office of the Russian Federation, a page of the Ukrainian children's camp "Azovets" in the social network "VKontakte" was included in the register of banned information in September 2015 as the majority of the material published there was arguably illegal in Russia. According to the General Prosecutor the community carried out propaganda of Ukrainian extremist organizations whose activities are prohibited on the territory of the Russian Federation. The materials of the community arguably encouraged minors to become their followers, and also stimulated violence.[790]

5.2.3. The law on bloggers

In May 2014 Federal Law No. 149-FZ "On information, information technologies and protection of information" was amended again. Federal law of 5 May 2014 No 97-FZ (the "law on bloggers"), which came into force on 1 August 2014,[791] establishes strict control over the blogosphere and social media by assigning additional responsibilities for social networks, forums and bloggers. According to the law on bloggers, they must notify the authorized federal body of initiation of dissemination of information (or) exchange of data between users. Secondly, they are obliged to keep data on admission, transfer, delivery and processing of information by all users of electronic communications and also data on the users themselves for six months after the end of the specified actions on the territory of Russia. This information must be provided to authorized state bodies engaged in operational investigative activities or ensuring the security of the country. In the case of failure to meet those duties, access to information resources may be limited. In addition, this would entail administrative liability.

The new amendments also provide for a register of websites, including blogs, that host public information and which are accessed by over three thousand users a day. Roskomnadzor organizes monitoring of web-sites; determines the number of daily users; and has the right to request information necessary to maintain the register. There is an obligation to provide requested information no later than within ten days from the date of receipt of the request [792] Bloggers are also assigned a number of duties, which oblige them to follow the same standards as the mass media. In particular, they should not allow disclosure of secret

[790] Federal'naya Sluzba po Nadzoru v sfere svyazi informatsionnyh tehnologii i massovyh kommunikatsii, 'Dostup k stranitse ukrainskogo detskogo voyennogo lagerya «Azovets» v sotsial'noy seti «VKontakte» ogranichivayetsya po trebovaniyu Genprokuratury' (29 September 2015) <http://rkn.gov.ru/news/rsoc/news35030.htm> accessed on 8 December 2017.

[791] Federal'nyy zakon Rossiyskoy Federatsii ot 05.05.2014 No 97-FZ "O vnesenii izmeneniy v Federal'nyy zakon «Ob informatsii, informatsionnykh tekhnologiyakh i zashchite informatsii» i otdel'nykh zakonodatel'nykh aktakh Rossiyskoy Federatsii po voprosam uporyadocheniya obmena informatsiyey s ispol'zovaniyem informatsionno-telekommunikatsionnykh setey".

[792] See Article 10.2 Section 8 of the federal law on information (n 735).

information protected by law, public calls to terrorism, extremist materials, pornography or use of foul language on their blogs. Bloggers are obliged to check the accuracy of information prior to publishing it and immediately remove false information. Bloggers are obliged to disclose their surname, initials and e-mail address on the blog.

According to the explanatory note to the law on bloggers, the law aims to protect the rights of Russian citizens and to regulate dissemination of information and data exchange between internet users.[793] The explanatory note is very laconic in its explanations and it remains unclear what precise rights the law aims to protect. Critics of the law claim that its "hidden" aim is to impose censorship on ideas and opinions on the internet although censorship is prohibited under Article 29(5) of the Constitution. The law has been described as another proof of Russia being a "police state".[794] Anton Nosik, a blogger and media entrepreneur argues: "It's about creating a situation where big brother is watching you; you are part of a list, you are being watched, being observed, you are being served notices and could even serve a criminal sentence if you choose to speak out."[795]

5.2.4. Regulating the internet media in the practice of the ECtHR

In its landmark freedom of expression case *Handyside v United Kingdom* the ECtHR held that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[796]

The ECtHR has developed the "necessary in a democratic society test" for balancing the essential protection of freedom of expression with the equally important necessity of protecting those interests limiting freedom of expression. The concept of "margin of appreciation" enables to assess "whether and to what extent differences in otherwise similar situations justify a difference of

[793] Poyasnitel'naya zapiska k proektu federal'nogo zakona "O vnesenii izmeneniy v otdel'nye zakonadatel'nye akty Rossisskoi Federatsii po voprosam uporyadocheniya obmena informatsiey s ispol'zovaniem informatsionno-telekommunikatsionnyh setei"

[794] Yury Dmitriev, 'Rossiiskiy bloger – vrag naroda ili inostrannyi agent? ' (2014) 191(5) Pravo i Zizn 103–107.

[795] As referred in: Alec Luhn, 'Russia tightens controls on blogosphere' (31 July 2014) The Guiardian <http://www.theguardian.com/world/2014/jul/31/russia-controls-blogosphere-new-law> accessed on 8 December 2017.

[796] *Handyside v The United Kingdom* (App 5493/72) ECtHR 7 December 1976, para 49.

treatment"[797]. However, the margin of appreciation is not a magic tool allowing states to step over human rights simply stating that this is necessary to protect the values or cultural background of their country. For example, it was held by the ECtHR in *Öllinger v Austria* that there is little scope for restrictions on political speech or on debate over questions of public interest[798] and restricting a person from receiving information that others wish or may be willing to impart[799] is a violation of the right to freedom of expression. Otherwise, "society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion."[800] Limitations in order to protect the rights of others should not be interpreted, inter alia, to restrict political debate. [801] The threshold for prohibiting expression on the basis of protecting public order is high and must be evidence-based, rather than premised on speculation.[802]

In a similar fashion, the United Nations Human Rights Committee has stated that for a limitation on the right to freedom of expression or freedom of peaceful assembly to be considered necessary, states must demonstrate in a "specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[803] The ECtHR has on numerous occasions stressed, "the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general."[804]

Analysing the law on blacklists in the context of ECtHR case law, it can be concluded that mechanisms provided under the law would in most cases amount to a violation of Article 10 of the ECHR. For example, in the case of *Ahmet Yildirim v. Turkey*[805] the ECtHR unanimously held that the blanket blocking of

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[797] *X. and others v Austria* (App 19010/07) ECtHR 19 February 2013, para 98.

[798] *Öllinger v Austria* (76900/01) ECtHR 29 June 2006, para 38.

[799] *Leander v Sweden* (App 9248/81) ECtHR 26 March 1987, para 74; *Sirbu and others v Moldova* (Apps 73562/01, 73565/01, 73712/01, 73744/01, 73972/01) ECtHR 15 June 2004, para 18.

[800] *Alekseyev v Russia* (Apps 4916/07, 25924/08 and 14599/09) ECtHR 21 October 2010, para 77.

[801] United Nations Human Rights Committee, *General Comment No. 34* (12 September 2011) CCPR/C/GC/34, para 28.

[802] Article 19, *Traditional values? Attempts to censor sexuality. Homosexual propaganda bans, freedom of expression and equality* (London 2013) 14 <http://www.article19.org/data/files/medialibrary/3637/LGBT-propaganda-report ENGLISH.pdf> accessed on 8 December 2017.

[803] United Nations Human Rights Committee (n 801) para 35.

[804] *Times Newspapers Ltd v The United Kingdom* (Apps 3002/03, 23676/03) ECtHR 10 March 2009, para 27; *Ahmet Yıldırım v Turkey* (App 3111/10) ECtHR 18 December 2012, para 48.

[805] *Ahmet Yıldırım v Turkey* (App 3111/10) ECtHR 18 December 2012.

access to an entire online platform was a violation of the right to freedom of expression. The case was brought by Ahmet Yıldırım, who published his academic work and other materials on a website hosted by the "Google Sites" portal. In 2009 the Denizli Criminal court ordered blocking of access to another website also hosted by Google Sites, as it allegedly insulted the memory of Atatürk. The administrative body responsible for executing the blocking order, the TİB (Turkish Telecommunications and Electronic Data Authority), requested that an order be issued blocking all access to Google Sites and this order was upheld by Denizli Criminal Court. The ECtHR found that the blocking amounted to a violation of Yıldırım's right to freedom of expression. It was noted that in order to comply with the requirements of Article 10 of the ECHR, a restriction must be prescribed by law and must be formulated with sufficient precision to enable individuals to regulate their conduct.

The Turkish regulation did not authorise the wholesale blocking of an entire online platform such as Google Sites. The law also failed to provide sufficient safeguards against potential abuses. The ECtHR also held in *Ahmet Yildirim v. Turkey* that Turkish legislation had conferred extensive powers on an administrative body, the TİB, in the implementation of a blocking order originally issued in relation to a specified site. The ECtHR noted: "In matters affecting fundamental rights it would be contrary to the rule of law…for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.[806] At the time the blocking order was issued, there must be a clear and precise rule enabling the applicant to regulate his conduct in the matter." [807]

Besides, the Russian law on blacklists does not authorize the wholesale blocking of an online platform and does not provide sufficient safeguards against potential abuses. The majority of blocked websites have nothing to do with the aims of the law and the law does not protect those sites against the abuses of Rozkomnadsor and organizations authorized to block websites, as there are no clear and precise rules enabling people to regulate their conduct in this matter and very wide discretion is granted to Rozkomnadzor and other organizations authorized to block websites. The ECtHR also stressed the importance of judicial review, designed to strike a balance between different interests, and argued that this is "inconceivable without a framework establishing precise and specific rules regarding the application of preventive restrictions on freedom of expression"[808] It is the task of the national court to analyse "whether a less far-reaching measure could have been taken to block

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[806] *Ahmet Yıldırım v Turkey* (App 3111/10) ECtHR 18 December 2012, para. 59. See also: *The Sunday Times v The United Kingdom* (App 6538/74) ECtHR 26 April 1979, para 49; *Maestri v Italy* (App 39748/98) ECtHR 17 February 2004, para 30.

[807] *Ahmet Yıldırım v Turkey* (App 3111/10) ECtHR 18 December 2012, para 60.

[808] *Ibid*, para 64; *RTBF v. Belgium* (App 50084/06) ECtHR 29 March 2011, para 114.

access specifically to the offending website." [809] In *Ahmet Yildirim v. Turkey* the ECtHR held that "the judicial review procedures concerning the blocking of internet sites are insufficient to meet the criteria for avoiding abuse, as domestic law does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general."[810] The Russian case is different in this regard, namely that the court is not involved at all – it is the discretion of Rozkomnadzor and other authorized bodies to make relevant decisions about blocking websites, which makes the situation even worse. The staff of those organizations is hardly competent to strike a balance between different interests and avoid abuse of freedom of expression.

Regarding the role or bloggers, the ECtHR has noted that bloggers and popular users of social media sites play an important role in enhancing public access to news and facilitating the dissemination of information; hence they are also "public watchdogs" like the traditional media and fall under the protection of Article 10 of the ECHR. [811]

5.3. Freedom of expression vs traditional values[812]

This Section focuses on the federal law on protection of the feelings of believers[813] criminalizing insults to religious feelings and establishing administrative prohibition of "propaganda of untraditional sexual relations"[814], which are the central examples of Russian legislators' initiative to protect Russian traditional values.

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[809] *Ahmet Yıldırım v Turkey* (App 3111/10) ECtHR 18 December 2012, para 64.

[810] *Ibid*, para 68.

[811] *Magyar Helsinki Bizottsag v Hungary* (App 18030/11) 8 November 2016, para 168.

[812] In this sub-chapter I extensively rely on my previously published article. See: Mäger, 'Russia's Illiberal Ideology and Its Influences on the Legislation in the Sphere of Civil and Political Rights' (n 1).

[813] Federal'nyy zakon Rossiyskoy Federatsii ot 01.07.2017 No 136-FZ "O vnesenii izmeneniy v stat'yu 148 Ugolovnogo kodeksa Rossiyskoy Federatsii i otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v tselyakh protivodeystviya oskorbleniyu religioznykh ubezhdeniy i chuvstv grazhdan" (hereinafter "federal law to counter the insult of religious beliefs and feelings of citizens").

[814] Federal'nyy zakon Rossiyskoy Federatsii ot 29.06.2013 No. 135-FZ "O vnesenii izmeneniy v stat'yu 5 Federal'nogo zakona "O zashchite detey ot informatsii, vrednoy dlya ikh zdorov'ya i razvitiya" i nekotoryye zakonodatel'nyye akty Rossiyskoy Federatsii v tselyakh zashchity detey ot informatsii, kotoraya sposobstvuyet otritsaniye traditsionnykh semeynykh tsennostey"" (Hereinafter: "federal law for protecting children from harmful information 2013").

5.3.1. Law on protection of the feelings of believers

The federal law on protection of the feelings of believers amended the Criminal Code of the Russian Federation, making insulting the feelings of believers a criminal offence. According to the regulation, public action expressing obvious disrespect to society and committed in order to insult the religious feelings of believers is punishable by up to one year of imprisonment or in aggravated form up to three years of imprisonment.[815] Similarly to previously analysed legislative amendments restricting freedom of expression in the internet, in the case of the law on protection of the feelings of believers the terms are also very vaguely defined. The law gives no indication what "obvious disrespect to society in order to insult the religious feelings of believers" entails; thus it is up to the courts to define what deeds demonstrate obvious disrespect to society and insult the religious feelings of believers.

Several State Duma representatives have argued that acts committed in order to insult the religious feelings of believers are socially dangerous, because they violate the traditional and religious norms developed in Russian society over many centuries, its moral foundations are contrary to morality, entail serious consequences and have an antisocial orientation. [816] On the one hand, the majority of Western countries also protect the honour and dignity of people – in most cases this is done in civil codes and insults to feelings are not criminalized. However, Russian legislators have demonstrated that in Russia insulting the feelings of believers is considered to be a truly grave act worthy of criminal punishment.

Liberal voices from Russia and the West have labelled the law "a blasphemy bill". The law was adopted shortly after the Pussy Riot trial, which initiated a passionate debate in Russian society on the subject of protecting religious feelings. Interestingly, in Russia only a small fraction of people viewed this debate as a debate over free speech. Most Russians viewed this debate rather as "a targeted assault on a religious group and a trespass on the rights of religious believers to worship in their holy places unmolested", as explained by Dustin Koenig.[817] The political and religious elite also framed the debate in a similar vein. Although considerable international criticism was levelled at how the Pussy Riot trial was resolved in Russia and freedom of speech was in the focus of this criticism, these arguments did not convince ordinary Russians. The Russian political and religious elite skilfully used this criticism to demonstrate the immorality of Western values and to consolidate support for their methods of punishing trespassers.

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[815] Federal law to counter the insult of religious beliefs and feelings of citizens (n 813).

[816] Anton Filomonov, 'Svoboda slova i rossiyskoye zakonodatel'stvo: tendentsii poslednikh let' (18 June 2014) Garant.ru <http://www.garant.ru/article/548283/#ixzz50lGBc2gb> accessed 8 December 2017.

[817] Dustin Koenig, 'Pussy Riot and the First Amendment: Consequences for the Rule of Law in Russia' (2014) 89 New York University Law Review 666–699; 696.

In the light of law on the protection of the feelings of believers, one may conclude that when dealing with debates over religious rights and freedoms, particularly those related to the Russian Orthodox faith, Russia clearly favours freedom of religion over freedom of expression, instead of providing equal treatment for both.[818] Additionally, it must be noted that the aim of protecting holy Russian Orthodox values is used to convince the Russian people of the immorality of Western values and the need to strictly punish those who overstep the moral boundaries established by the Orthodox Church.

5.3.2. Anti-homosexual propaganda law

The Ryazan Oblast was the first Russian region to impose administrative fines for "public actions aimed at propaganda of homosexuality (sodomy and lesbianism) among minors" under Ryazan's regional law on the protection of morality and health of minors[819] in 2006 and under Ryazan's regional law on administrative offences[820]. Following the example of Ryazan, several other regions in the Russian Federation enacted similar laws to prohibit propaganda of homosexuality: the Republic of Bashkortostan (2012), the regions of Arkhangelsk (2009) Chukotka, Irkutsk (2013), Kostroma (2012), Krasnodar (2012), Magadan (2012), Novosibirsk (2012), Samara (2012) and the City of St. Petersburg. Laws prohibiting "homosexual propaganda" share in common a provision of administrative or criminal sanctions banning the dissemination of any LGBT-related information. Most laws outline protection of either the rights of minors, the protection of public morality, or support for particular religious traditions as one of their purposes. The laws are also characterized by very vague definitions of key terms.[821] As a consequence of these laws, consistent and escalating interference has occurred with the freedom of expression of LGBT people, which has resulted in widespread arrests, detention and the imposition of fines.[822]

On 19 January 2010 the Constitutional Court of the Russian Federation held that the Ryazan regional law on the protection of morality and health of minors "did not provide for any measures aimed at prohibition of homosexuality, did not contain its official condemnation, was not of a discriminatory nature and was

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[818] Kuznetsov (n 600) 89.

[819] Zakon Ryazanskoy oblasti ot 03.04.2006 No 41 – OZ "O zashchite nravstvennosti detey v Ryazanskoy oblasti".

[820] Zakon Ryazanskoy oblasti ot 24.11.2008 No 182 – OZ "Ob administrativnykh pravonarusheniyakh".

[821] Article 19 (n 802) 7.

[822] For an overview, see: ILGA Europe, *Annual Review of the Human Rights Situation of LGBTI People in Europe* (ILGA Europe 2013) <https://www.ilga-europe.org/sites/default/files/Attachments/small_2013.pdf> accessed on 8 December 2017.

not capable of allowing any excessive acts by the authorities".[823] The Supreme Court of the Russian Federation gave its tacit approval to the propaganda laws by rejecting appeals against convictions in the lower courts. For example, in a consideration of the Arkhangelsk law, the Supreme Court held that regulating homosexual propaganda to minors was justified, lawful and not in violation of any other federal law.[824] The Supreme Court emphasized that regional laws do not prohibit all public expression of homosexuality and do not interfere with the right to obtain and convey general and neutral information regarding homosexuality. The Supreme Court also stated that anti-propaganda laws do not prevent the holding of public events (such as "gay pride" events) or debates but regulate the discussion of homosexuality specifically in relation to minors.[825]

The assessment of the Supreme Court has been repeatedly restated by the Russian government, which argues that propaganda laws are in compliance with federal and constitutional law and, rather than unnecessarily impairing citizens' right to freedom of expression, provide a "well–balanced" and proportionate response to the need to protect children from information that they are "not able to critically estimate" due to their age.[826]

On 29 June 2013 federal law introduced administrative liability for "propaganda of non-traditional sexual relations among minors" This applies throughout the whole of the Russian Federation. The law passed through the Federal Assembly of the Russian Federation with the enthusiastic support of all legislators. The Duma passed the Bill at First Reading by 388-1 on 25 January 2013, and at Second Reading by 436-0 on 11 June 2013. The Federation Council (the upper house of the Federal Assembly) passed the Bill by 137-0 on 26 June 2013. The law received the required approval from the President of Russia, Vladimir Putin, on 30 June 2013.[827]

The Code of Administrative Offences of Russian Federation now includes propaganda of non-traditional sexual relationships among minors, expressed in the dissemination of information aimed at forming non-traditional sexual attitudes among minors, the attractiveness of non-traditional sexual relationships, a distorted image of social equality among traditional and non-traditional sexual relationships, or forced imposition of information of non-traditional sexual relationships, which can attract interest in such relationships, as an administrative offence. The legislation also prohibits dissemination of information that negates

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[823] Russian Constitutional Court, N 151-O-O (19 January 2010).

[824] Russian Supreme Court, N 1 – APG12- 11 (15 August 2012) (hereinafter Russian Supreme Court 15 August 2012)

[825] See: Paul Johnson, 'Homosexual Propaganda Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights' (2015) 3 Russian Law Journal 37–61; 45.

[826] Russian Supreme Court 15 August 2012 (n 745); *Ibid* 46.

[827] Johnson (n 825) 44.

family values, propagates non-traditional sexual relationships and forms disrespect to parents and (or) other family members.[828]

As conveyed in the explanatory note to the draft law, propaganda of homosexuality is widespread in Russia today. It is argued that this kind of propaganda is carried out through the media as well as via public actions, which construe propaganda of homosexuality as a norm of behaviour. The explanatory note claims that such propaganda is especially dangerous for children and young persons, who are not capable of critically evaluating this kind of information "which is poured upon them every day". According to the explanatory note, in this regard, it is necessary first of all to protect the younger generation from the effects of homosexual propaganda.[829]

The anti-homosexual propaganda law prohibits "propaganda of non-traditional sexual relations among minors", more specifically the dissemination of information aimed at forming non-traditional sexual attitudes among minors, the attractiveness of non-traditional sexual relationships, a distorted image of social equality among traditional and non-traditional sexual relationships. Restricting the right to freedom of expression has to be prescribed by law and this condition has two requirements, as established by the ECtHR: 1) The law must be adequately accessible and 2) The law must be foreseeable: a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate their conduct and to understand the consequences of their actions.[830]

A study conducted by NGO Article 19 claims that key terms in the prohibitions are either not defined or are defined in vague terms. In particular, the laws fail to define the term "propaganda". It is not clear what types of information are prohibited, what intent must be proven to show culpability, and what "among minors" actually means.[831] This means that individuals cannot decide with any certainty whether their conduct is legal or not and the ambiguity of the provisions leaves too much discretion to police and prosecutors and may therefore be enforced arbitrarily.[832] Additionally, the Venice Commission has held that the provisions under consideration are not formulated with sufficient precision. The scope of terms such as "propaganda" is very wide, ambiguous and vague and fails to reach the standard of "foreseeability".[833] Maria Issaeva, a

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[828] Federal law protecting children from harmful information 2013 (n 814) Article 5(2) subsection 4

[829] Poyasnitel'naya zapiska k proektu federal'nogo zakona "O vnesenii izmeneniy v kodeks Rossiskoy Federatsii ob administrativnyh pravonarusheniyah" <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=93974> accessed on 11 December 2017.

[830] *The Sunday Times v The United Kingdom* (App 6538/74) ECtHR 26 April 1979, para 49.

[831] Article 19 (n 802) 23.

[832] *Ibid.*

[833] Venice Commission, Opinion 707 / 2012. CDL-AD(2013)022: Opinion on the issue of the prohibition of so-called "Propaganda of homosexuality in the light of recent legislation in some Council of Europe Member States, Adopted by the Venice Commission at its 95th

Russian lawyer, agrees that the provisions fail to satisfy the requirement of foreseeability. This entails risks, including arbitrary application and abuse of the law in practice.[834]

Moreover, the provisions do not sufficiently define the circumstances in which they are applied. The scope of the provisions is not limited to sexuality explicit content, but is also applicable to legitimate expressions of sexual orientation. The Venice Commission is of the opinion that the provisions on prohibition of "homosexual propaganda" are not formulated with sufficient precision as to satisfy the requirement "prescribed by law" contained in paragraph 2 of Articles 10 and 11 of the ECHR.[835]

The practice of the Constitutional Court and the Supreme Court of the Russian Federation has not made the issues substantially more clear. In its judgment of 19 January 2010, the Constitutional Court of the Russian Federation, examining the constitutionality of the provisions adopted in Ryazan region, formulated a definition of "propaganda of homosexuality among minors". According to the Constitutional Court, homosexual propaganda is "activity aimed at purposeful and uncontrolled dissemination of information which is able to cause damage to the moral and spiritual development or to the health of minors, inducing them to form warped perceptions that traditional and non-traditional marital relations are socially equal, bearing in mind that minors, due to their age, are not able to estimate such information critically."[836]

The Supreme Court of the Russian Federation[837] has considered that "such prohibition does not prevent holding public events, including public debates on the social status of sexual minorities, without dictating a homosexual lifestyle to minors who are not able to critically estimate such information due to their age.[838] The notion of "propaganda of homosexuality" still remains vague, as the Russian courts have not specified what information "is able to cause damage to the moral and spiritual development or to the health of minors" or "is dictating a homosexual lifestyle to minors". It is thus not clear from the case law whether terms such as propaganda should be interpreted restrictively, or whether they

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Plenary Session (14–15 June 2013) (Strasbourg 18 June 2013) paras 28 and 79 <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29022-e> accessed on 11 December 2017 (hereinafter: Venice Commission, opinion on the propaganda legislation).

[834] Maria Issaeva. 'Russia and universal freedoms: overview of restrictions on LGBT rights' (13 December 2013) Cambridge Journal of International and Compartive Law <http://cjicl.org.uk/2013/12/13/russia-universal-freedoms-overview-restrictions-lgbt-rights/> accessed on 09 December 2017.

[835] Venice Commission, opinion on the propaganda legislation (n 833) paras 28, 37 and 79.

[836] Russian Constitutional Court, N 151-O-O (19 January 2010).

[837] *Ibid.*

[838] Secretariat of the Committee of Ministers, 'Communication from the Russian Federation concerning the case of Alekseyev against Russian Federation. (Application No. 4916/07)' DH-DD(2013)67 (28 January 2013) < https://rm.coe.int/168063c864> accessed on 11 December 2017.

cover any information or opinion in favour of homosexuality or any debate over homophobic attitudes and deeply-rooted prejudices in Russia.[839]

Thus, it can be concluded that the provisions prohibiting "propaganda of non-traditional sexual relations" are not sufficiently clear to enable individuals to regulate their conduct in conformity with the law. Although the legislation does not *expressis verbis* prohibit all information and debate over LGBT issues, as demonstrated above, in practice the provisions have been interpreted in a very broad sense and they have made discussions on LGBT issues virtually impossible in the public sphere or in the media.

Justifications for prohibiting "propaganda of non-traditional sexual relations" in Russia are premised on protecting the rights of others, in particular, children and the protection of public morals. These are legitimate aims in the meaning of Article 10(2) of the ECHR. However, the ECHR does not allow any of the legitimate aims to be invoked to justify discriminatory practices. The restrictions must in any case meet the test of proportionality and be necessary in a democratic society. Where a prohibition singles out expression or assemblies related to homosexuality for differential treatment, clear and objective evidence must be introduced to justify why the same prohibition does not extend to information pertaining to heterosexuality.[840] Moreover, measures, which aim to remove promotion of sexual identities other than heterosexual from the public domain "affect the basic tenets of a democratic society characterized by pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities. Thus, such measures would have to be justified by compelling reasons."[841]

Protecting public morals

An important justification for the anti-homosexual propaganda legislation has been protection of morals, a legitimate aim provided in Article 10(2) of the ECHR. On the one hand, there is no European-wide consensus on the requirements of morals and the classic approach of the ECtHR has been that states have a wide margin of appreciation in assessing measures necessary for protection of morals, as established in *Handyside v. United Kingdom.*[842] However, while states enjoy a margin of appreciation, this discretionary leeway does not permit public morals to be invoked to "justify discriminatory practices" or "to perpetuate prejudice or promote intolerance"[843]. *In Fretté v. France* the ECtHR

839 Venice Commission, opinion on the propaganda legislation (n 833) paras 31 and 34.

840 Article 19 (n 802).

841 Venice Commission, opinion on the propaganda legislation (n 833) para 48.

842 *Handyside v The United Kingdom* (App 5493/72) ECtHR 7 December 1976.

843 *Leo Hertzberg et al. v Finland (*Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985)). Individual opinion by Committee members Opsahl, Lalla and Tarnopolsky (2 April 1982).

explained that the margin of appreciation couldn't be interpreted as giving states *carte blanche* to exercise arbitrary power.[844] A wide consensus exists among CoE countries on the right to freedom of expression to campaign for the recognition of the rights of sexual minorities and consequently the state's margin of appreciation for protection of public morality is narrow.[845]

If measures to implement the legitimate aims provided in Article 10(2) of the ECtHR make a difference in treatment based on sexual orientation, the state's margin of appreciation is narrow and the state must demonstrate that such measures were "necessary", and not "merely suitable".[846] Different treatment based on sexual orientation requires particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons. Different treatment that is solely based on considerations of sexual orientation is unacceptable under the ECHR.[847] Moreover, in its choice of means, the state "must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life"[848].

The Russian Constitutional Court has explained that "In so far as one of the roles of the family is [to provide for] the birth and upbringing of children, an understanding of marriage as the union of a man and a woman underlies the legislative approach to resolving demographic and social issues in the area of family relations in the Russian Federation"[849]. Thus, in the view of the Constitutional Court the law is carried by the idea that the only way to lead one's family is being in a heterosexual relationship and producing children in order to resolve the demographic and social issues Russia is facing. Although Russia is indeed facing a demographic crisis, this interpretation does not recognize the right to freely choose the way how to lead one's family and private life and implies that choices related to family and private life must also be in accordance with certain standards established, not by the individual but by the state.

Standards of private and family life in Russia are greatly influenced by the interpretations of the Russian Orthodox Church, particularly its concept of dignity.[850] The underlying logic of the anti-homosexual propaganda law is that homosexuality is conscious, but an antisocial and an immoral choice that is contrary to the values promoted by the Russian Orthodox Church. However, human rights violations "justified by traditional, cultural or religious values are often targeted against minority or disenfranchised groups that are not in a posi-

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[844] *Fretté v France* (App 36515/97) ECtHR 26 May 2002, para 41.

[845] Venice Commission, opinion on the propaganda legislation (n 833) para 51.

[846] *X and others v Austria* (App 19010/07) ECtHR 19 February 2013, para 140.

[847] *Ibid*, para 99.

[848] *Ibid,* para 139.

[849] Russian Constitutional Court, No. 24-P/2014 (23 September 2014) Section 3.1.

[850] See Section 4.2.1 of this study.

tion to shape the dominant discourse defining the values of the overarching society or community" as highlighted in the report of the United Nations Human Rights Council .[851]

This is clearly the case in Russia, where Russian traditional values, backed by religious arguments, are targeted against the LGBT group who, due to their stigmatized position and the legal prohibition on expressing their position on LGBT topics, are not in a position to shape the dominant (currently homophobic) discourse in Russia. Moreover, tradition is often "invoked to justify maintaining the status quo, failing to take into account the reality that traditions, cultures and social norms have always evolved over time".[852] The contemporary science-based understanding of homosexuality is that it is an orientation that develops due to various biological reasons before birth and is not a matter of conscious choice.[853] Sexual orientation is a fundamental human right protected under Article 8 of the ECHR, so that homosexuality as such cannot be deemed to be contrary to "morals", in the sense of Article 10 § 2 of the ECHR, as on numerous occasions explained by the ECtHR.[854] The ECtHR has also affirmed that the individual and collective exercise of the right to freedom of expression encompasses the right to publicly express one's sexual orientation or gender identity.[855]

The absence of a European consensus on issues such as the right for homosexual couples to adopt a child or to marry, is of no relevance in the context of freedom of expression, because "there is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly" and "demonstrations similar to the ones banned in the present case are commonplace in most European countries" as explained in *Alekseyev v. Russian Fede-*

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[851] United Nations Human Rights Council, *Study of the Human Rights Council Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind* (2012), para 42, <http://www.ohchr.org/documents/HRBodies/HRCouncil/AdvisoryCom/Session10/A.HRC.22.71_en.pdf> accessed on 9 December 2017.

[852] *Ibid* para 40.

[853] See for example: Jacques Balthazart, *The Biology of Homosexuality* (Oxford University Press 2011).

[854] *Fedotova v Russia* (Communication No. 1932/2010) Human Rights Committee 31 October 2012, para 3.5. See also *Kozak v Poland* (App 13102/02) ECtHR 2 March 2010.

[855] *Alekseyev v Russia* (Apps 4916/07, 25924/08, 14599/09) ECtHR 21 October 2010, which concerned a series of refusals to permit pride marches over several years in Moscow. The ECtHR recognised the purpose of the marches and picketing was to promote "respect for human rights … and to call for tolerance towards sexual minorities." It found that the reason the authorities objected to this was "the very fact that [the applicants] wished to openly identity themselves as gay men or lesbians, individually and as a group."

ration.[856] The European Court's case law reflects a European consensus on such matters as abolition of criminal liability for homosexual relations between adults[857], homosexuals' access to service in the armed forces[858], the grant of parental rights[859], equality in tax matters and the right to succeed to a deceased partner's tenancy[860] and equal ages of consent under criminal law for heterosexual and homosexual acts[861]. Accordingly, the existence of an increasing European consensus in these matters is accompanied by a narrow margin of appreciation accorded to member states in restricting the rights and freedoms of LGBT people.[862]

Whereas another popular argument used to justify restricting the rights and freedoms of LGBT people is that the majority of society supports such restrictions, this approach is not in accordance with the underlying values of human rights as well as of democratic society in general. The ECtHR has noted that the predisposed bias of a heterosexual majority against a homosexual minority cannot amount to sufficient justification for interference with freedom of expression or the peaceful assembly rights of LGBT people. It would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. If this were the case, the rights and freedoms of minority groups would be only theoretical opportunities, not enforceable rights, which they are under the ECtHR.[863]

Besides, the Venice Commission notes that the exercise of freedom of speech by sexual minorities cannot depend on the attitudes of public opinion towards homosexuality. Attitudes of other people cannot justify a restriction on the right to respect for the private life of LGBT people nor on their freedom to express their sexual orientation or to advocate for positive ideas in relation to LGBT issues and to promote tolerance.[864] The Committee of Ministers of the CoE finds that neither cultural, traditional nor religious values, nor the rules of a "dominant culture" can be invoked to justify hate speech or any other form of

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[856] *Alekseyev v Russia* (Apps 4916/07, 25924/08, 14599/09) ECtHR 21 October 2010, para 84.

[857] *Dudgeon v The United Kingdom* (App 7525/76) ECtHR 22 October 1981; *Norris v Ireland* (App 10581/83) ECtHR 26 October 1988.

[858] *Smith and Grady v The United Kingdom* (Apps 33985/96, 33986/96) ECtHR 27 September 1999.

[859] *Salgueiro da Silva Mouta v Portugal* (App 33290/96) ECtHR 27 December 1999.

[860] *Karner v Austria* (App 40016/98) ECtHR 24 July 2003.

[861] *L. and V. v Austria (Apps* 39392/98, 39829/98) ECtHR 9 January 2003.

[862] Venice Commission, opinion on the propaganda legislation (n 833) para 43 and 44.

[863] *Alekseyev v Russia* (Apps 4916/07, 25924/08, 14599/09) ECtHR 21 October 2010, paras 86, 97

[864] Venice Commission, opinion on the propaganda legislation (n 833) para 53 and 56.

discrimination, including on grounds of sexual orientation or gender identity.[865] It should also be noted that whereas the majority of Russian people report having homophobic views and there is wide public support for prohibition of "homosexual propaganda" one should not forget the state of freedom of the press in Russia. In Russia the government can influence public opinion and gain support for conservative ideology and legislation carried by the spirit of such conservative ideology with the help of a largely state-controlled mass media.[866] As independent media are almost extinct in Russia, opinions are not formed in conditions of free public debate. Views promoting tolerance towards LGBT people or any open discussions on LGBT issues are absent from the mainstream media.

Thus, the views of people are inevitably influenced by a one-sided media landscape vigorously propagating homophobic views. Making the rights and freedoms of some minority group conditional on acceptance by the majority cannot be acceptable, as in this case the rights of minority groups were only theoretical and could not be enforced in practice, as noted by the ECHR in *Bayev and others v Russia.*[867] This should especially be the case when free public debate is lacking in the country and the attitudes of the majority are to a large extent formed by a state-controlled media landscape and education system. Anti-homosexual propaganda legislation is only increasing the existing widespread homophobia in the country, argues Maria Issaeva, a Russian lawyer. She claims that legislation supports a very negative opinion on the meaning of same-sex relationships and sexuality in general and essentially provokes a very "low" level of public discussion and comments disclosing considerable confusion in the minds of people, such as "saying "gays should be respected" is equivalent to paedophilia".[868]

In some cases the ECtHR has accepted the protection of morals as a justification for prohibitions, for example in cases of graphic demonstrations of obscenity.[869] However, this is already prohibited in Russia and the anti-homosexual propaganda legislation is not limited to prohibition of obscene or pornographic display of homosexuality, or to display of nudity or sexually explicit or provocative behaviour or material. The legislation covers vaguely defined propaganda of non-traditional sexual relations that, as practice has

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[865] Committee of Ministers, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* (31 March 2010 at the 1081st meeting of the Ministers' Deputies) <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)5&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true> accessed 10 December 2017.

[866] Issaeva (n 834).

[867] See: *Bayev and others v Russia* (Apps 67667/09, 44092/12, 56717/12) ECtHR 20 June 2017)

[868] Issaeva (n 834).

[869] *Müller and others v Switzerland* (App 10737/84) ECtHR 24 May 1988.

shown, can cover any LGBT-related information, including for educational and public health purposes. On that basis, public morality as a justification for prohibiting "homosexual propaganda" fails to pass the essential necessity and proportionality tests as required by the ECHR, as derives from analysis by the Venice Commission.[870] In view of the European consensus on the right to freedom of expression, the fact that in Russia there is high intolerance towards homosexuals and it is argued that homosexuality is not part of the Russian traditional value-system does not justify differentiating people on the basis of their sexual orientation.

In *Bayev and others v. Russia* the ECtHR reiterated that it would be "incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention" [871] and on these grounds rejected Russia's claim that restricting public debate on LGBT issues can be justified on the grounds of protection of morals.

Protecting minors

The most important justification for the anti-homosexual propaganda legislation has been the need to protect the health and development of minors. According to the explanatory note to the anti-homosexual propaganda law, it is necessary to establish measures aimed at ensuring the intellectual, moral and emotional security of children and prohibition on performing any act aimed at popularizing homosexuality is one of those necessary measures. Uncontrolled dissemination of information related to homosexuality can harm the health, moral and spiritual development of children, form misconceptions about the social equivalence of traditional and non-traditional sexual relations among people, and deprive children of opportunities to critically evaluate such information due to their age. In this case, restricting freedom of expression cannot be considered a violation of the constitutional rights of citizens, as the explanatory note states.[872]

Enforcement of the anti-propaganda legislation has had a serious effect on public debate in Russia. For example, the Central District Court of Barnaul has ruled that five communities on the social media platform VKontakte, where people discussed various issues related to LGBT issues, shared their ideas and problems they encounter regarding their sexual orientation, contained propaganda of non-traditional sexual relations among adolescents. On the basis of the

[870] Venice Commission, opinion on the propaganda legislation (n 833) para 50, 58.

[871] *Ibid* 70.

[872] Poyasnitel'naya zapiska k proektu federal'nogo zakona "O vnesenii izmenenii v kodeks Rossiskoy Federatsii ob administrativnyh pravonarusheniyah" <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=93974> accessed on 10 December 2017

court ruling, Roskomnadzor placed these social media communities in the register of prohibited information and required removal of all illegal information referring to non-traditional family relations.[873] Dmitri Bartenev, an attorney who represented the applicant in the case *Alekseyev v Russia* concerning the systematic ban on gay parades in Moscow, has argued that whereas technically the law prohibits dissemination of information only in cases when such information can harm the health, moral and spiritual development of minors, it is completely unclear who and on the basis of what criteria can decide that information is harming minors. Whereas sexually explicit information could indeed harm children, the dissemination of such information is already banned. Thus, according to Bartenev it is doubtful whether the true aim of the law really is to protect minors.[874]

Besides, a study by NGO Article 19 notes that the law does not distinguish between obscene expression and other forms of information regarding sex, sexuality, and gender identity. Russian legislation imposes essentially blanket prohibitions on dissemination of information related to LGBT issues and gender identity.[875] Moreover, the drafters of the law have not indicated any evidence in the explanatory note or elsewhere demonstrating that availability of information on LGBT issues in the media or in the public sphere is harmful to children's physical or mental health. The arguments of legislators have remained on the level of speculation and stereotypes.

However, the Russian Constitutional Court has upheld the federal anti-homosexual propaganda law: on 23 September 2014 the Constitutional Court dismissed the complaint of an applicant challenging the compatibility of Article 6.21 of the Code of Administrative Offences with the provisions of the Constitution.[876] In its reasoning, the Constitutional Court closely followed the arguments provided by legislators, particularly the justification of protecting minors. In its judgment the Court emphasized the state's obligation to protect children from all forms of sexual exploitation and sexual perversion and explained that the Russian Federation is entitled to establish specific restrictions on disseminating information if the information is aggressive and importunate in nature and is capable of causing harm to the rights and legal interests of others, particularly minors. According to the Constitutional Court, children must be protected from "information that is combined with an aggressive imposition of

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[873] Federal'naya sluzba po nadzoru v sfere svyazi, informatsionnyh tehnologii i massovyh kommunikatsii, 'Po resheniyu suda v yedinyy reyestr zapreshchennoy informatsii vneseny soobshchestva sotsial'noy seti "VKontakte", propagandiruyushchiye netraditsionnyye seksual'nyye otnosheniya sredi podrostkov' (21 September 2015) <http://rkn.govizmenenii.ru/news/rsoc/news34824.htm > accessed 12 December 2017.

[874] Dmitri Bartenev, 'Perils of a Gay Law That Lacks Definition' (12 March 2012) The Moscow Times <https://themoscowtimes.com/articles/perils-of-a-gay-law-that-lacks-definition-13690> accessed on 9 December 2017.

[875] Article 19 (n 802) 25.

[876] Russian Constitutional Court, No. 24-P/2014 (23 September 2014).

specific models of sexual conduct, giving rise to distorted representations of the socially accepted models of family relations corresponding to the moral values that are generally accepted in Russian society, as these are expressed in the Constitution and legislation..."[877]. Thus, in the view of the Constitutional Court, only heterosexual families are socially accepted and bear the values of Russian society. Other interpretations of family are "distorted" in the Court's view and children should be protected from such "distorted" interpretations of family.

The Court further explained that the aim of the law is to "protect children from the impact of information that could lead them into non-traditional sexual relations, a predilection for which would prevent them from building family relationships as these are traditionally understood in Russia and expressed in the Constitution of the Russian Federation"[878]. Thus, in the interpretation of the Court, information about LGBT topics can transform children's' sexual identity and "lead them into non-traditional sexual relations". Whereas in the Constitutional Court's view homosexuality is like an infection that can be transmitted through exposure to information, the court does not rely on any evidence to support these claims. Moreover, the Court implicitly argues that people should only form family relationships as these are traditionally understood in Russia.

Accordingly, the Constitutional Court does not recognize the fundamental human right for one's private and family life (ECHR Article 8) that all people, regardless of their sexual orientation, are equally entitled to. According to the reasoning of the Constitutional Court, the restrictions are also intended to prevent minors from turning their increasing attention to issues concerning sexual relations, which can significantly deform a "child's understanding of such constitutional values as the family, motherhood, fatherhood and childhood".[879] Thus, as explained by the court, information on "non-traditional" sexual relations is likely to "deform" the understanding of constitutional values such as family, motherhood, fatherhood and childhood. This implies that there only one correct way to interpret constitutional values and an interpretation according to which LGBT people also have a right to family is already "deforming" constitutional values.

The Court also conveyed that information on "non-traditional sexual relations" could adversely affect a child's psychological state, development and social adaptation:

> The imposition on minors of a set of social values which differ from those that are generally accepted in Russian society, and which are not shared by and indeed frequently perceived as unacceptable by parents ... may result in the child's social estrangement and prevent his or her development within the family, especially if one considers that equality of rights as set out in the Constitution, which also presupposes equality of rights irrespective of sexual

[877] Ibid, Section 3.1 (translation provided in *Bayev v. Russia*, ECtHR (20 June 2017) para 25).

[878] *Ibid.*

[879] *Ibid.*

> orientation, does not yet guarantee that persons with a different sexual orientation are actually regarded in equal terms by public opinion; this situation may entail objective difficulties when trying to avoid negative attitudes from individual members of society towards those persons on a day-to-day level.[880]

Thus, the reasoning of the Court implies that all Russian people should adhere to the values "generally accepted in Russian society" and especially that children should adhere to the values of their parents, even if these values are homophobic. Although the Constitution protects all people against discrimination, as *de facto* people with different sexual orientation are not regarded as equal in Russian society, the Constitutional Court recommends avoiding such "social estrangement" and instead to ensure that all children adhere to values "generally accepted in Russian society", even when these values do not promote equality and non-discrimination.

Subsequent to emphasizing that information about non-traditional sexual relations distorts constitutional values; that non-traditional sexual relations can adversely affect a child's psychology, development and social adaptation; that such relations are unacceptable to a majority of people in Russia and children should be socialized into values respected by the majority, the Court argues that the anti-homosexual propaganda law "does not signify a negative appraisal by the State of non-traditional sexual relationships as such, and is not intended to belittle the honour and dignity of citizens who are involved in such relationships" and that it "cannot be regarded as containing official censure of non-traditional sexual relationships, in particular homosexuality, far less their prohibition".[881]

The conclusions of the Constitutional Court are contrary to the established practice of the ECtHR, according to which the predisposed bias of a heterosexual majority against a homosexual minority does not amount to sufficient justification for interference with freedom of expression.[882] The conclusions of the Russian Constitutional Court make exercising rights and freedoms guaranteed under the Russian Constitution and the ECHR conditional on the attitudes of the majority, thus making rights and freedoms of LGBT people only theoretical opportunities, not enforceable rights in Russia. In a democratic society characterized by pluralism, it is normal that people, including in family relations, are confronted with views that are not in accordance with their own convictions. It cannot be expected that parents and children have to be of the same opinion on everything, particularly on such intimate issues as sexuality and children are also entitled to freedom of speech and ideas. As noted by the ECtHR "it would be

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[880] *Ibid.*

[881] *Ibid.*

[882] *Alekseyev v Russia* (Apps 4916/07, 25924/08, 14599/09) ECtHR 21 October 2010, paras 86 and 97.

unrealistic to expect that parents' religious or philosophical views would have to be given automatic priority in every situation, particularly outside school."[883]

In some cases parental views and the rights of third parties (e.g. the right of children to receive sex education) can be in conflict and it cannot be expected that parental views deserve more protection than the rights of children. In particular, when a family holds discriminatory or aggressive views, it is the obligation of the state to protect the child. As held by the ECtHR, all children must be protected from homophobia, have a right to be raised in a safe environment, where there is no violence, bullying, or other forms of discriminatory and degrading treatment, regardless of their sexual orientation or gender identity and all children are also entitled to receive objective information on issues related to sexuality and gender identity in educational institutions.[884] In such sensitive areas where a conflict can arise between parental views and the rights of children, "the authorities have no choice but to resort to the criteria of objectivity, pluralism, scientific accuracy and, ultimately, the usefulness of a particular type of information to the young audience."[885] Ideas on diversity, equality and tolerance contribute to social cohesion and help to diminish discriminatory practices.

Thus, all children are entitled to information on issues related to sexuality, including on LGBT issues, particularly when the information is not sexually explicit, aggressive or inaccurate. Moreover, providing information and holding discussions related to LGBT issues in the media or as a part of sex education in school does not diminish the right of parents to educate and advise their children in line with their own religious or philosophical convictions.[886] "Russian law already provides for criminal liability in respect of lecherous actions against minors and dissemination of pornography to minors, and these provisions are applicable irrespective of the sexual orientation of those involved"[887] The ECtHR held that the Russian Government failed to provide reasons why existing provisions were insufficient and why minors would be more vulnerable to abuse when homosexual relationships rather than heterosexual ones are tackled.[888]

Thus, it can be seen that the approaches of the Constitutional Court and the ECtHR have been diametrically different and the ECtHR has taken the perspective that in order to protect children from homophobic attitudes, to respect their right to be raised in a safe environment and to respect their right to freedom of expression and information, children must be able to receive information and participate in discussions concerning issues related to sexuality and also LGBT topics, even if such discussions are not in accordance with their parents' religious

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[883] *Ibid* para 81.

[884] *Ibid* para 82.

[885] *Bayev and others v Russia* (Apps 67667/09, 44092/12, 56717/12) ECtHR 20 June 2017, para 82.

[886] *Ibid.*

[887] *Ibid* para 79.

[888] *Ibid.*

or philosophical convictions. Views held by parents are not by default higher and more worthy of protection. There is no ground to believe that information about heterosexual relations is somehow more dangerous to children than information about homosexual relations. As demonstrating explicit sexual behaviour and disseminating pornography to minors is already prohibited in Russia, it is difficult to understand in what way the anti-homosexual propaganda legislation really protects the health and spiritual development of children.

In Russia the guiding ideology of the anti-homosexual propaganda legislation derives from the premise that homosexuality and all information connected to it is by default immoral and unacceptable and the aim of all homosexuals is to somehow inject homosexuality into children and corrupt them. "We would be quite unhappy if some inadequate individual were to invade a kindergarten trying to explain to minors that they should identify their sexual identity"[889] as stated by Vitaly Milonov, a deputy of the City of St Petersburg local parliament and one of the main initiators of a local "anti-homosexual propaganda" law. Besides, the case law of the Constitutional Court derives from the premise that homosexuality is *per se* immoral, dangerous and unacceptable in Russian society. However, neither legislators nor the courts that have upheld the prohibition on propaganda of nontraditional sexual relations have provided compelling reasons for establishing such restrictions. The arguments of legislators as well as the court system are based on old stereotypes and prejudices rather on contemporary science-based knowledge. The presumption that "propaganda of homosexuality" by default harms children was rejected by the ECtHR in *Alekseyev v Russia* and in *Bayev and others v Russia*, where the ECtHR held:

> There is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults". On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned. It would also clarify some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily.[890]

In *Alekseyev v Russia* the ECtHR concluded that the authorities' decisions to ban public events aiming at promoting the rights of LGBT people under the pretext of protecting minors "were not based on an acceptable assessment of the

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[889] Stephen Fry, 'Interview with Vitaly Milonov' (2013) <https://www.youtube.com/watch?v=5eI0oYTZL2Q> accessed on 9 December 2017.

[890] *Alekseyev v Russia* (Apps 4916/07, 25924/08, 14599/09) ECtHR 21 October 2010, para 86; *Bayev and others v Russia* (Apps 67667/09, 44092/12, 56717/12) ECtHR 20 June 2017, para 77.

relevant facts".[891] In *Bayev and others v Russia* the Court reiterated that the Russian Government "did not provide any explanation of the mechanism by which a minor could be enticed into "[a] homosexual lifestyle", let alone science-based evidence that one's sexual orientation or identity is susceptible to change under external influence."[892] The Court dismissed these allegations because they lacked an evidentiary basis.

Public health

The third justification for establishing anti-homosexual propaganda legislation has been the need to protect public health and the demographic situation in Russia. In order to justify this aim, measures invoking protection of public health must be "both evidence-based and proportionate to ensure respect for human rights".[893] Neither the explanatory note to the anti-homosexual propaganda legislation nor any other sources provide evidence demonstrating that the availability of LGBT-related information is harmful to public health. Homosexuality was decriminalised in Russia on 3 June 1993. In 1999, Russia adopted ICD-10 standards, which removed homosexuality from the register of officially recognised diseases.[894] However, in popular attitudes homosexuality is still treated as a disease and related to various physical and mental health issues. Old stereotypes related to homosexuality, which have no evidence in modern science, nevertheless wield a strong influence on the people's attitudes. Out-dated classifications regarding homosexuality still influence medical practice in Russia as well as affecting the contents of educational materials in Russian schools and universities.[895]

Banning and hiding information related to LGBT issues most probably has a more negative effect on public health, rather than having such information freely available. Access to health-related information and active discussion over information in society is more likely to bring positive results to public health. It has been demonstrated that limiting the free flow of information relating to LGBT topics and gender identity has harmful consequences for the physical and

[891] *Ibid*, para 86.

[892] *Ibid*, para 78.

[893] United Nations Human Rights Office of the High Commissioner, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.A/66/254* (3 August 2011) para 18 <http://www.ohchr.org/EN/HRBodies/SP/Pages/GA66session.aspx> accessed on 12 December 2017.

[894] Issaeva (n 834).

[895] Council of Europe Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe* (Council of Europe Publishing, Strasbourg 2011) 104–105 <https://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf> accessed on 12 December 2017.

mental health of LGBT people.[896] As noted by the ECtHR in *Bayev v Russia* it is "improbable that a restriction on potential freedom of expression concerning LGBT issues would be conducive to a reduction of health risks. Quite the contrary, disseminating knowledge on sex and gender identity issues and raising awareness of any associated risks and of methods of protecting oneself against those risks, presented objectively and scientifically, would be an indispensable part of a disease-prevention campaign and of a general public-health policy."[897] Thus, there are no plausible reasons to agree that limiting access to LGBT-related information is necessary to protect public health. On the contrary, limiting access to such information can have detrimental effects on public health.

Besides, it remains unclear how suppression of information about same-sex relationships helps to solve Russia's demographic crisis. Factors such as economic prosperity, social-security rights and accessibility of childcare contribute to the demographic situation substantially more than the availability of LGBT-related information in society. Moreover, in every country there exist heterosexual couples who do not wish or are unable to have children and they are not socially rejected. Thus, the issue of having children cannot be a justification for restricting freedom of speech on LGBT issues. [898]

5.4. Limiting freedom of expression vs. protecting the "Motherland", its honour and territorial integrity

5.4.1. Banning public calls to action aimed at violating the territorial integrity of Russia

On 9 May 2014, Victory Day, which is the most patriotic and symbolic day in Russia since the end of World War II, an amendment to the Russian Criminal Code banning public calls to action aimed at violating the territorial integrity of the Russian Federation[899] (Article 280.1 of the Criminal Code) took effect. The law was adopted very shortly after Russia annexed Crimea in early 2014. Under Article 280.1 of the Criminal Code, speech criticizing or questioning Crimea's annexation is a criminal offence, punishable by up to four years of imprisonment, or by up to five years of imprisonment when media or the internet are involved.[900]

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[896] Article 19 (n 802) 25.

[897] *Bayev and others v Russia* (Apps 67667/09, 44092/12, 56717/12) ECtHR 20 June 2017, para 72.

[898] *Ibid,* para 73.

[899] Federal'nyy zakon Rossiyskoy Federatsii ot 29.12.2010 N 433-FZ "O vnesenii izmeneniy v Ugolovno-protsessual'nyy kodeks Rossiyskoy Federatsii i priznanii utrativshimi silu otdel'nykh zakonodatel'nykh aktov (polozheniy zakonodatel'nykh aktov) Rossiyskoy Federatsii".

[900] *See* Art. 280[1] of the Criminal Code of the Russian Federation.

As is the case with other previously analysed Russian laws restricting freedom of expression, this regulation is characterized by very vague wording which enables interpretation of discussions over controversial territorial issues in the media, on one's social media page or in an internet forum as a criminal offence. No violent acts or incitement to violence/separatism are necessary in order to be prosecuted and convicted under Article 280.1 of the Criminal Code.

By the end of 2016, fifteen people had been tried under 280.1 of the Criminal Code and most of the cases concerned Crimea. In 2015 Alex Bubeev was found guilty of posting an article entitled "Crimea is Ukraine!" on his social media, though written by another author. This act was interpreted as "a call on an anonymous group of persons...[to] violate the integrity of the Russian Federation."[901] In another case Tatarstan's Naberezhnochelny City Court found that Rafis Kashapov had used "textual and visual materials...to form a negative attitude toward Russia's actions in Crimea in 2014...through claims about the "occupation" of Crimea and violations of international law." [902]

Besides, several Crimean leaders and activists have been prosecuted and convicted under Article 280.1. Ilmi Umerov, a Crimean Tatar leader and Deputy Chair of the Mejlis (a representative body of Crimean Tatars listed as an extremist organization and banned by the Russian authorities in 2016) was sentenced under Article 280.1 to two years of imprisonment for expressing dissent against the annexation of the Crimean peninsula. However on 26 October 2017 Umerov was released from custody and freed on humanitarian grounds. [903] Another Crimean Tatar leader, Rafis Kashapov, head of the All-Tatar Public Centre, sentenced under Article 280.1 of the Criminal Code has filed a complaint with the Constitutional Court to declare Article 280.1 unconstitutional.

Having a debate on territorial issues, discussing events related to the annexation of Crimea or questioning decisions by the Russian authorities can lead to conviction and up to five years of imprisonment under Article 280.1 of the Russian Criminal Code. This legislation vastly limits the opportunity for public discussion regarding controversial territorial questions and sends a very clear signal that people who do not agree with the official position of the state will be severely punished. "Any citizen discussing any issue related to the loss of Russia's territory risks criminal prosecution" as conveyed by Pavel Chikov, the head of the international human rights group Agora and its lawyer Ramil Akhmetgaliev.[904]

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[901] Pavel Chikov, Ramil Akhmetgaliev, 'How 'separatists' are prosecuted in Russia. Independent lawyers on one of Russia's most controversial statutes' (21 September 2016) Meduza <https://meduza.io/en/feature/2016/09/21/how-separatists-are-prosecuted-in-russia> accessed on 9 December 2017.

[902] *Ibid.*

[903] *Ibid.*

[904] *Ibid.*

5.4.2. Law against rehabilitation of Nazism

Another example of "patriotic" criminalization of free speech is criminalizing attempts to infringe on historical memory in relation to events that took place during World War II (Great Patriotic War) is the law against the rehabilitation of Nazism.[905] Under this law Article 354.1 was added to the Criminal Code that criminalizes denial of facts recognized by the Nuremberg tribunal; approving of the crimes the Nuremberg tribunal judged; and spreading intentionally false information about the Soviet Union's activities during World War II.

Moreover, "artificially creating evidence for the prosecution" was made an aggravating circumstance and "spreading information on military and memorial commemorative dates related to Russia's defence that is clearly disrespectful of society, and to publicly desecrate symbols of Russia's military glory" was criminalized. [906]

Similarly to the legislation analysed above, the language used in the law against the rehabilitation of Nazism is very vague and the scope of the law is very wide. The term "spreading information on military and memorial commemorative dates related to Russia's defence that is clearly disrespectful of society" is completely unclear and could mean almost anything. The term "intentionally false information" is very similar to the language used in the Soviet Criminal Code, which included a provision on the prohibition of "spreading intentionally false information about the Soviet system". This provision was deployed to punish dissidents.

Moreover, how should one ascertain whether information about past events is false information? Inevitably it implies that there must exist "some final historical truth".[907] The Kremlin has taken several steps to skilfully control and consolidate the memory of World War II. Vladimir Putin has initiated a project to create a standard, official version of national history by unifying Russian history textbooks used in Russian schools.[908] In Soviet times the "History of the Communist Party of the Soviet Union: a Short Course" (popularly known as the "Short Course") commissioned by Stalin in 1935 was the most widely disseminated and the most important book elucidating the ideology of Marxism-Leninism. The aim of the book was to erase the role of the Old Bolsheviks in the building of the Communist Party and the Soviet state, and to praise Joseph Stalin as the true successor to Vladimir Lenin. Marxist-Leninist propaganda contained in the book was used to build and maintain a loyal and dedicated

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[905] Federal'nyy zakon Rossiyskoy Federatsii ot 05.05.2014 No. 128-FZ «O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii»

[906] Ivan Kurilla, 'The Implications of Russia's Law against the "Rehabilitation of Nazism": PONARS Eurasia Policy Memo' 331 (August 2014) 2.

[907] *Ibid* 4.

[908] *Ibid* 3.

party and society.[909] Contemporary Russia seems to be walking a similar path. Establishing a state-approved version of history in contemporary Russia resembles the creation of the historical canon in Soviet times.[910] The law against the rehabilitation of Nazism is another pillar to support the construction and maintenance of an official Kremlin-controlled historical narrative. "As the generation of war veterans is fading away, the state is seizing hold of all interpretations of the war in an effort to remain the sole caretaker of national memory."[911]

The law upholds the "facts recognized" by the Nuremberg tribunal but not definitions of war crimes and crimes against humanity. [912] Thus, discussing crimes committed by the Communists that were not recognized by the Nuremberg tribunal as war crimes could lead to criminal punishment. Overall, all viewpoints on the events related to World War II which are not in accordance with the Kremlin-controlled canon of history can be considered as "rehabilitation of Nazism" Hence, in Russia the official, "right", "patriotic" version of history is protected by criminal law and providing an alternative interpretation of historical events is a criminal offence punishable by up to five years of imprisonment. Discussing the crimes of the Communist regime, the role of Stalin, the reasons behind the Molotov-Ribbentrop Pact, for example, could result in criminal conviction when not done in the manner approved by the official ideology. Thus, the law hinders the work of scholars studying the events of World War II and harms public debate, as discussing alternative viewpoints is made illegal. A member of the Presidential Council for Civil Society and Human Rights, Nikolai Svanidze, argues that equating the rehabilitation of Nazism with questioning the legality of the actions of the Soviet leadership during the Great Patriotic War is not rehabilitation of Nazism, but a search for historical truth and equating this with the promotion of rehabilitation of Nazism is not just wrong but malicious.[913] Moreover, the Russian "Free Historical Society," has pointed out that punishing people for the "artificial creation" of historical evidence does not enable scholars to carry out objective research.[914]

Ideologically the law against the rehabilitation of Nazism fits well into the conservative-traditionalist legislative agenda of Russian legislators. Moreover, the law is also in accordance with the Kremlin's tactic to symbolically divide

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[909] Rustem Nureev, 'The Short Course of the History of the All-Union Communist Party: The Distorted Mirror of Party Propaganda' in: Paul R Gregory (ed), *The Lost Politburo Transcripts: From Collective Rule to Stalin's Dictatorship* (Yale University Press 2008).

[910] Kurilla (n 906) 4.

[911] *Ibid* 3.

[912] *Ibid* 4.

[913] Filomonov (n 816).

[914] 'Obrashcheniye chlenov Vol'nogo istoricheskogo obshchestva k Prezidentu, Sovetu Federatsii, Gosdume RF' (24 April 2014) <http://polit.ru/article/2014/04/28/vio_280414/> accessed on 12 December 2017.

Russian society.[915] Anti LGBT legislation, establishing strict punishments for expressing "extremist" or "separatist" views, limiting NGOs and public assemblies, are all examples of dividing Russian society into "us" – patriotic Russian people having traditional values, heterosexual orientation – and "them" – people not fitting into the "norm" fifth columnists, fascists, and "liberasts".

It must also be remembered that the law coincides with the annexation of Crimea and a simultaneous propaganda war against Ukraine. In Soviet propaganda the terms "Nazi" and "fascists" were widely used to demonize political opponents. In the ongoing propaganda war against Ukraine, Russian state television has used the term "Nazis" to label the Ukrainian national movement, providing a pretext for annexing Crimea and justifying further interference in Ukraine. It has been argued that the law against the rehabilitation of Nazism assists in the ongoing propaganda campaign and that it aims to create "a heroic national narrative and legislate away any doubt about the state's historical righteousness". [916]

The Second World War is a powerful symbol in Russia. It is "the focal point of the nation's memory; it plays a socializing role and unifies Russians… Russian identity is centred on the sufferings, martyrdom, and victory of the Great Patriotic War."[917] The legislation in question enables the Russian state to ensure that the most important symbol in Russia's collective memory is interpreted in accordance with the official position of the Kremlin. Inevitably, some Russian people have memories, stories and opinions that are not in accordance with the official narrative. However, in Russia these people are forced into silence or have to risk criminal punishment. In June 2016 Vladimir Luzgin was convicted in Perm regional court under Article 354.1 of the Criminal Code for spreading intentionally false information about Russian history. Luzgin reposted on social media an article claiming that the Soviet Union and Germany were mutually responsible for starting World War II. The Court held that the article in question contained false information about cooperation between Communists and Nazis as it conflicts with the decisions of the Nuremberg tribunal and in the court's view Luzgin intentionally disseminated false information because he supports the ideas of Ukrainian nationalism. Luzgin was convicted under Article 354.1 of the Criminal Code and fined. Luzgin appealed to the Supreme Court of the Russian Federation. Luzgin's lawyer claimed that it remains absolutely unclear how the phrase "Hitler's Germany committed a crime in complicity with the Communists" used in the article posted on the social media page can be interpreted as rehabilitation of Nazism. However, the Supreme Court upheld the judgment of the Perm regional court.[918]

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[915] Kurilla (n 906) 2.

[916] *Ibid* 3.

[917] *Ibid* 4.

[918] SOVA Informatsionno-analiticheskiy tsentr, 'Verkhovnyy sud ostavil v sile prigovor permyaku Luzginu za reabilitatsiyu natsizma' (1 September 2016)

Thus, Article 354.1 of the Criminal Code demonstrates an effort by Russian legislators to control and manage history, to establish a historical canon and to send a clear signal that historical events related to World War II should not be debated. Legislators have not provided any legitimate justification to demonstrate that such a prohibition is necessary in a democratic society. Article 354.1 limits the freedom of expression of the Russian people and makes objective research of historical events nearly impossible. Gleb Bogush has concluded that the amendments to Russian law criminalizing free speech are intended to have a "chilling effect" on debates over controversial issues in Russia and to control public dissent by criminal prosecution.[919]

5.4.3. Classifying injuries and deaths during peacetime as a state secret

Another piece of legislation limiting the right to freedom of expression and information is the decree of the President of the Russian Federation of 28.05.2015 No. 273 "On Amendments to the List of Information Recognized as State Secrets" declaring publishing information about "personnel losses" during "the conduct of special operations during peacetime" a state secret.[920] Thus, in Russia all deaths among the military can be classified as state secrets and not only in time of war (which was also a state secret under previous regulation) but also in peacetime. Under the federal law on state secrets, disclosing Russian state secrets is punishable by up to seven years in prison.[921]

A group of human rights activists and journalists filed a complaint with the Supreme Court of the Russian Federation against the decree of President Vladimir Putin on classifying data on soldiers killed in peacetime. The applicants argued that the decree violates the constitutional right of citizens to receive and disseminate information and that the president overstepped his powers since, according to Russia's Constitution, the constitutional right to freely seek, receive and circulate information can only be restricted by federal law. Thus, the list of information constituting a state secret can only be amended by federal law, not a by presidential decree. The applicants claimed that the decree was directed against investigating the deaths of Russian soldiers in Donbas and aimed at discouraging the relatives of dead soldiers from communicating with journalists and demanding material compensation from the Ministry of Defence. However, on 13 August 2015 the Supreme Court upheld the presidential decree amending the regulation on state secrets. The applicants filed an appeal.

<https://www.sovacenter.ru/misuse/news/persecution/2016/09/d35321/> accessed 12 December 2017.

[919] Bogush, 'Criminalisation of Free Speech in Russia' (n 41).

[920] Freedom House, *Freedom in the World: Russia* (2016) <https://freedomhouse.org/report/freedom-world/2016/russia> accessed on 12 December 2017.

[921] Federal'nyi zakon ot 21.07.1993 N 5485-1 "O gosudarstvennoi taine"

However, the Board of Appeal of the Supreme Court decided on 10 November 2015 that the previous judgment should remain in force. In the view of the Supreme Court, the decree protects information about the deployment, structure and operational situation of the Armed Forces of the Russian Federation, which is a state secret, and does not contradict federal law on state secrets.[922]

Thus, under the new regulation of state secrets the families of dead soldiers are discouraged from disclosing the injuries to or deaths of Russian soldiers and to discuss those issues in public. Whereas according to different sources hundreds of Russian soldiers have died in Ukraine[923], Russia has officially refused to acknowledge the presence of its soldiers in Eastern Ukraine and as such casualties are a state secret in Russia; no official data on Russian casualties in Ukraine or in other conflict zones are made available nor is there any public debate on the death of Russian soldiers in the Russian mainstream media.

5.5. Yarovaya legislation

On 6 July 2016 Vladimir Putin signed Federal Law No. 374-FZ on "Amendments to the federal law on combating terrorism and certain legislative acts of the Russian Federation with respect to establishing additional measures for combating terrorism and ensuring public safety".[924] The package of "anti-terrorist" laws is popularly known as the "Yarovaya legislation". The package was nicknamed after deputy Irina Yarovaya, the initiator and strong advocate of the legislation.

As laconically stated in the explanatory note, the aim of the law is to provide additional measures to protect the citizen and society from terrorism and to prevent such crimes. [925] The Yarovaya legislation introduces changes to twenty-one laws, including the Russian Criminal Code. Changes to the Criminal Code include expanding criminal liability for children starting from fourteen years of age, criminalizing failure to report a non-committed crime (205.6 of the Criminal

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[922] Russian Supreme Court, No APL 15-474 (10 November 2015).

[923] See for example: Paul Roderick Gregory, 'Russian Combat Medals Put Lie to Putin's Claim of No Russian Troops in Ukraine' (6 September 2016) Forbes <https://www.forbes.com/sites/paulroderickgregory/2016/09/06/russian-combat-medals-put-lie-to-putins-claim-of-no-russian-troops-in-ukraine/#3026377b3809> accessed on 9 December 2017.

[924] Federal'nyy zakon ot 06.07.2016 N 374-FZ "O vnesenii izmeneniy v Federal'nyy zakon O protivodeystvii terrorizmu i otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v chasti ustanovleniya dopolnitel'nykh mer protivodeystviya terrorizmu i obespecheniya obshchestvennoy bezopasnosti" (the Yarovaya legislation).

[925] Poyasnitel'naya zapiska k proektu federal'nogo zakona "O vnesenii izmenenii v otdel'nye zakonadatel'nye akty Rossiiskoy Federatsii v chsti ustanovleniya dopolnitel'nyh mer protivodeistviya terririzmu i obespecheniya obshestvennoi bezopasnosti" <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=144433&rnd=259927.2930420274#0> accessed on 15 December 2017.

Code) and substantially increasing penalties for various crimes related to vaguely-defined extremism and terrorism. In accordance with the amended Criminal Code, fourteen year-old children can be prosecuted for crimes such as international terrorism, participating in terrorist communities, terrorist organizations and illegal armed groups, for taking part in terrorist training camps, for participating in mass unrest, for making an attempt on the life of a state official, and for attacking an official or facility that enjoys international protection and for failing to report a crime.[926] Pursuant to Article 205.6 of the Criminal Code a person having reliable information about plans to carry out crimes such as vaguely-defined acts of terrorism, armed mutiny aimed at undermining Russia's territorial integrity and many other crimes and who fails to notify the authorities may be convicted of a criminal offence and imprisoned for up to one year. The Yarovaya legislation also establishes responsibility for failure to assist the authorities. However, as noted by Gleb Bogush, a Russian criminal law scholar, failure to assist a person in a life-threatening condition is not punishable under Russian law.[927] Under another amendment to the Russian Criminal Code (Article 361, acts of international terrorism) causing an explosion, committing arson or other acts endangering the life, health, freedom or integrity of Russian citizens intended to violate the peaceful coexistence of nations and peoples or against the interests of the Russian Federation, as well as a threat to commit such acts outside of Russian territory are punishable by imprisonment from ten to twenty years or life imprisonment.

The minimum sentence for incitement of hatred (Article 282 of the Criminal Code) is two years. The punishment for organizing an extremist community is imprisonment of from two to six years, whereas previously the maximum penalty was a fine of up to 200,000 roubles. Gleb Bogush indicates that whereas organizing an extremist community is punishable by a sentence of six years, the maximum sentence for murder committed in the heat of passion is three years under the Russian Criminal Code.[928] The law also increases penalties for people who incite terrorist activity and justify terrorism on the internet. The maximum penalty for these crimes will be seven years of imprisonment and a ban on various professional activities for five years. With this legislation, individuals who post materials on the internet will be subject to the same penalties as are imposed on media outlets. Overall, under amendments to the Criminal Code the

[926] See for an overview of most important amendments in English: Meduza, 'Russia's State Duma just approved some of the most repressive laws in post-Soviet history' (24 June 2016) Meduza < https://meduza.io/en/feature/2016/06/24/russia-s-state-duma-just-approved-some-of-the-most-repressive-laws-in-post-soviet-history> accessed on 9 December 2017.

[927] Gleb Bogush, '"Zakony Yarovoi" i ugolovnoe pravo' (1 July 2017) Legal Report <https://legal.report/author/zakony-yarovoj-i-ugolovnoe-pravo> accessed on 15 December 2017.

[928] Gleb Bogush, 'Killing Russian Criminal Law' (7 July 2016) Carnegie Moscow Center <http://carnegie.ru/commentary/2016/07/07/killing-russian-criminal-law/j2tn> accessed on 9 December 2017.

punishments for vaguely defined "extremist" or "terrorist" crimes are substantially more severe than those for violent crimes, such as certain types of murder, which seems highly unreasonable.

Gleb Bogush argues that the Yarovaya legislation undermines the core principles of criminal law, as adopting the Yarovaya laws has brought back notorious Soviet legal principles such as holding people criminally responsible for withholding information. The amendments "erode the criminal law that an entire generation of Russian lawyers has come to know and practice. With key principles of the Criminal Code stripped bare – principles such as the inability to hold someone criminally responsible for their thoughts and beliefs and the primacy of individual rights – legal textbooks will soon have to be rewritten", Bogush notes. [929] However "[d]espite this alarming symptom of the degradation of the rule of law, politicians and lawyers alike remain unconcerned, seemingly viewing criminal law as nonessential". [930] Bogush predicts that application of the "nonsensical and brazenly repressive" law will be selective and further hinders political activity by Russia's people. [931]

The Yarovaya legislation also establishes new requirements for communication and internet operators such as telephone and mobile service providers, operators of informational systems, owners of websites, and hosting providers, taking effect on 1 July 2018. Companies are obliged to store recordings of their customers' text messages, voice information, images, audio, video, electronic communications and other activities by users of communication and internet services on Russian territory. The content of these messages must be stored for six months. Companies also have to store metadata concerning all messages sent and received between users (the time of the communication, the participants) for three years and must provide information to authorized Russian government bodies conducting executive or investigative activity or providing national security without a court order. These government bodies include the Federal Security Service (FSB), the Foreign Intelligence Service and investigators within executive investigative authorities. [932]

Aiming to "combat extremism", the Yarovaya legislation also substantially restricts religious groups' opportunities to practice their religion. Under Article 8 of the Yarovaya legislation, various amendments were made to the federal law "On Freedom of Conscience and on Religious Associations". The Yarovaya legislation defines missionary activity as "activity by a religious association aimed at disseminating information about its doctrine among persons who are not participants (members, followers) of that religious association, in order to involve these people as participants (members, followers) of that religious association, as conducted directly by the religious association or by citizens

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[929] *Ibid.*

[930] *Ibid.*

[931] *Ibid.*

[932] See Article 15 of the Yarovaya legislation. See also: Meduza (n 926).

and/or legal entities it has authorized to do so publicly, with the help of the mass media and internet information and telecommunications network, or by other lawful means."[933] Missionary activity is allowed only in places identified by law (e.g. premises or land in the ownership of a religious organization or at cemeteries). However, it is not permitted in public places or premises of other religious organizations. A person performing missionary activity has to carry at all times a decision of a religious organization officially registered in Russia authorizing the person to conduct missionary activity. Details of registration must be visible on the decision. The law also prohibits conducting missionary activities when these violate public safety and public order, when extremist activity is carried out; when missionary work is directed at enforcing family breakup; when missionary activities infringe on a person, or the rights and freedoms of citizens, damage the morality and health of citizens, are carried out while using drugs or other illegal substances or prompt citizens to refuse to execute obligations established under the law. The law also prohibits offices of foreign religious organizations that are registered in Russia to carry out missionary activities in Russia and establishes various punishments for breaching the new requirements. [934]

The provisions introduced by the Yarovaya package have been used to press charges against yoga instructor Dmitry Ugai, who gave a lecture on yoga philosophy, as arguably he carried out illegal missionary activities; to press charges against a Hare Krishna follower in Cherkessk when, according to a complaint to the authorities, he stood on a street and told someone about his faith, although both were later dropped. However, in October 2016, an American was fined for conducting Baptist services in his apartment. In December 2016, a Vladivastok court ordered an international Christian organization, "The Salvation Army", to destroy forty copies of the Bible as they breached the rules for labelling religious materials.[935]

The new law sends a variety of important ideological messages to Russian society. It has been argued that the Yarovaya package allows the law enforcement authorities to demonstrate effective combating of terrorism.[936] As the terms "terrorism" and "extremism" are very widely defined indeed, almost any activity can be placed under the umbrella of "combating terrorism and extremism". Yoga instructors, Baptists, Jehovah's Witnesses: all are treated as a potential threat to the Russian state and Russian citizens. Another important

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[933] The International Center for Not-for-Profit Law, 'Overview of the Package of Changes into a Number of Laws of the Russian Federation Designed to Provide for Additional Measures to Counteract Terrorism' (21 July 2016) 10 <http://www.icnl.org/research/library/files/Russia/Yarovaya.pdf> accessed on 9 December 2017.

[934] *Ibid.*

[935] Dar'ya Litvinova, 'Primenenie "Zakona Yarovoi": sposob delat statistiku?' 2 (2017) Pravovoi Dialog <http://legal-dialogue.org/ru/russias-anti-terrorist-yarovaya-law-controversially-implemented-spotlight> accessed 10 December 2017.

[936] *Ibid.*

message the law sends to society is the glorification of the Russian Orthodox Church and discrediting of smaller religious groups such as Jehovah's Witnesses, Mormons, and some evangelical sects. Whereas the religious freedom of Russian Orthodox believers is protected, the Yarovaya legislation allows significant limitations on the already limited religious freedom of other religious groups. On 20 April 2017 at the request of the Ministry of Justice the Supreme Court declared the Jehovah's Witnesses Administrative Centre an extremist organization and demanded Jehovah Witnesses as an extremist organisation to close down all their activities in Russia. As a result, Jehovah's Witnesses are no longer allowed to congregate for worship at their churches or anywhere else in Russia. People involved with Jehovah's Witnesses in Russia face criminal prosecution and punishments ranging from fines of 300,000 to 600,000 roubles to a maximum of ten years in prison. The Ministry of Justice has noted that since 2007 the Russian courts have banned the activities of eight Russian Jehovah's Witnesses organizations and ninety-five pieces of literature have been prohibited and included in the federal register of banned extremist materials.[937] Hence, the Russian court system has interpreted the faith and activities of Jehovah's Witnesses as extremist, meaning highly dangerous to the Russian state and citizens and accordingly, worthy of severe punishment.

Overall, the Yarovaya package attempts to equate criticizing the authorities with terrorism, and at the same time to place the Russian Orthodox Church at the apex of other faiths and religious practices, as assessed by Alexey Kozlov.[938]

5.6. Analysis and conclusions

As explained in Section 1.4.1 of this study, an important precondition for compliance with the ECHR is effective incorporation of the ECHR into the national legal order. Only when the legal order provides basic guarantees can civil society demand their rights, as derives from Section 1.4.1 of this study. Local people must have not only the motive but also the means to demand protection of their rights as reflected in international treaties.[939] In this chapter I analysed how the right to freedom of expression is incorporated in the Russian legal order and implemented in practice. I also focused on the interplay between legislative amendments and the situation of civil society. I argue that the legislative amendments analysed in this chapter demonstrate that the right to freedom of expression guaranteed under Article 10 of the ECHR is not effectively incorporated in the Russian legal order and there are widespread

[937] Human Rights Watch, 'Court Bans Jehovah's Witnesses' (20 April 2017) <https://www.hrw.org/news/2017/04/20/russia-court-bans-jehovahs-witnesses> accessed on 9 December 2017.

[938] Alexey Kozlov, 'Freedom of Assembly in Russia in 2016. Review of Legislation and Law Enforcement' 3(2017) Legal Dialogue.

[939] *Ibid* 17

problems with implementing it. Russian legislators view the right to freedom of expression essentially as a harmful phenomenon that should be limited on as many grounds as possible. This inevitably limits the effect of the ECHR on the Russian legal order and hinders the opportunities of Russian civil society to raise important issues and to demand their rights, creating a further obstacle to cooperation between Russia and the CoE.

In the first section of this chapter I provided an overview of the right to freedom of expression in the Russian legal framework. The right to freedom of expression is a constitutionally protected right in Russia. Article 29 of the Russian Constitution guarantees the right to freedom of thought and expression, as well as freedom to freely seek, receive, transfer and spread information by any legal means. Pursuant to Article 55 of the Constitution, rights and freedoms may be restricted by federal laws for the protection of constitutional principles, public morals, health and the rights and lawful interests of others, and to ensure the defence and security of the state. All people in Russia are entitled to equal access to the right to freedom of expression. Article 19 of the Russian Constitution guarantees equality of rights and freedoms to everyone, irrespective of, in particular, sex, social status or employment position. The Constitutional Court of the Russian Federation is well aware of the ECtHR's interpretation of the right to freedom of expression.[940]

It was revealed from my analysis that, although the Constitution and federal laws in principle provide protection for freedom of expression, a wide discrepancy exists between the norms established by the Constitution and the "reality on the ground". Following Russia's independence from the Soviet Union, the advance of free expression in Russia "has been episodic at best" and even that limited progress is now threatened.[941] In Russia the state authorities have an expansive view of restrictions on speech and a cramped view of freedom itself, claims Jeffrey Kahn. Due to widespread limitations imposed on freedom of expression, the constitutional provisions protecting freedom of expression are now merely "a wonderful set of promises" in Russia.[942]

The second section of this chapter focused on freedom of expression on the internet. When Russian civil society started to make demands and to disseminate their ideas in various popular internet resources, the civil society became a real threat to the authorities, argues Yelena Lukyanova. A defensive reaction of the state followed, aimed at eliminating the diversity of information and the diversity of meanings from the public sphere. In her view it is not by chance that conversations about Russia's uniqueness sounded with renewed vigor after

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[940] Russian Constitutional Court, No. 1053-O (2 July 2013). Referring to cases*: (Handyside v The United Kingdom* (App 5493/72) ECtHR 7 December 1976; *Otto-Preminger-Institut v Austria* (13470/87) ECtHR 20 September 1994; *Wingrove v The United Kingdom* (App 17419/90) ECtHR 25 November 1996 etc.).

[941] Ahdieh and Flemming (n 272) 32.

[942] Kahn, 'Freedom of Expression in Post-Soviet Russia (Contribution to the Symposium Building BRICS: Human Rights in Today's Emerging Economic Powers)' (n 293) 10–11.

the protest movement. In her view, arguments about civilizational and cultural uniqueness are just propaganda tools used by the government and have little substance in reality. Lukyanova predicts that as long as the government aims to exercise the supreme power in Russia, civil society will meet resistance on behalf of the government. [943]

My previous analysis shows that the law on blacklists, the law on arbitrary blocking of extremist materials and the law on bloggers have established severely restrictive regulation for disseminating information on the internet. Whereas for many years the sphere of internet-media was largely ignored by the authorities, "one day Russians woke up and found they could not open any of the main opposition news outlets or blogs" – the government had shut them down.[944]

The protest movement incentivized the Russian authorities to limit civil rights and freedoms, including the right to freedom of expression. Not surprisingly, the backlash on freedom of expression on the internet started after the protest movement threatened the positions of the ruling elite at the beginning of Putin's third term as president. Freedom of speech can be politically very "costly" in totalitarian regimes. The government understood that freedom of expression in the social media is too powerful a tool in the hands of Russia's developing civil society. The protest movement demonstrated that free speech can threaten the Russian political arrangement, where power is consolidated in the hands of a very few. Accordingly, the need to secure the position of official Kremlin-controlled information space and systemic order was another incentive to limit the opportunities of opposition-minded people to spread their ideas freely over the internet.

Traditionally, the majority of Russians have gained their information from the television, which is under the strict control of the Kremlin. Data from the Levada Center research agency shows that television is a major source of news for 88 percent of Russians.[945] The Kremlin has direct control over the television and over most of the "traditional" information landscape. The state owns, either directly or through proxies, all five of the major national television networks, as well as national radio networks, important national newspapers, and national news agencies.[946] The internet provides a broad range of alternatives to the state-controlled messages disseminated via television. "[B]logging reflects the regime's loss of its ability to sustain the Kremlin-centred symbolic order, to

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[943] Lukyanova, 'O prave nalevo' (n 329).

[944] The Washington Post 'Vladimir Putin stamps on his citizens again, this time with Internet censorship' (14 March 2014) The Washington Post <http://www.washingtonpost.com/opinions/vladimir-putin-stamps-on-his-citizens-again-this-time-with-internet-censorship/2014/03/14/ 7058331c-ab93-11e3-adbc-888c8010c799_story.html> accessed on 9 December 2017.

[945] Levada Center 'Otkuda rossiyanie uznajut novosti' (8 July 2013) <http://www.levada.ru/08-07-2013/otkuda-rossiyane-uznayut-novosti.> accessed on 9 December 2017.

[946] Freedom House, 'Freedom of the press: Russia' (2014) <https://www.freedomhouse.org/report/freedom-press/2014/russia#.VKkTMoqUfHQ> accessed on 9 December 2017.

generate socially appealing meanings and to control the discursive space which became more and more fragmented and thus competitive", as argued by Nicole Bode and Andrey Makarychev.[947] Thus, in order to sustain the Kremlin-centred systemic order, it has been pertinent to limit freedom of expression in social media channels.

It was also revealed from my analysis that laws restricting freedom of expression on the internet do not meet the ECtHR's test of proportionality. The explanatory notes to the laws analysed refer to the need to protect the health and development of children (the law on blacklists), to protect Russian citizens from threats related to extremism (law on arbitrary blocking of extremist materials) and to protect the rights and freedoms of Russian citizens and regulate dissemination of information in the internet (law on bloggers). At first sight, all of those aims seem plausible and indeed many countries have adopted laws to achieve similar aims. It is difficult to argue that countries should not combat child pornography or other activities harming children and indeed it is the duty of every country to protect children from harm. However, it is very difficult to agree that the restrictions in Russia correspond to those needs or are proportionate responses to those needs or are supported by relevant and sufficient reasons presented by the authorities.

The ideological undertones of these laws are very different from the official aims declared. In Russia the law on blacklists – officially aimed at protecting children from harmful influences – has been used for many other "informal aims" neither enacted in the law nor explained in the explanatory note. The law on blacklists, the law on arbitrary blocking of extremist materials and the law on bloggers are all characterized by very vague definitions, leaving it to the relevant authorities to interpret these laws. Prohibited material is very vaguely defined in the law on blacklists and, as a result, not only sites potentially dangerous for children, but all sorts of websites, mainly operated by opposition-minded citizens, are at risk of being taken offline. It is not defined in the law on arbitrary blocking what constitutes "extremist activities" or "illegal activities and participation in public events held in violation of the established order".

According to ECtHR case law, in order to comply with the requirements of Article 10 of the ECHR, a restriction must be prescribed by law and must be formulated with sufficient precision to enable individuals to regulate their conduct.[948] Whereas the restrictions provided in the law on arbitrary blockings clearly do not meet those criteria and do not enable individuals to effectively regulate their conduct, in the view of the Constitutional Court it is not necessary to enact clear criteria for defining extremist activities and extremist materials – indeed, such concepts should be comprehensible for Russian citizens even

[947] Nicole Bode and Andrey Makarychev, 'The New Social Media in Russia: Political Blogging by the Government and the Opposition' (2013) 60 Problems of Post-Communism 53–62.

[948] *Ahmet Yıldırım v Turkey* (App 3111/10) ECtHR 18 December 2012.

without clear criteria.[949] Such vagueness of terms is not in accordance with the ECHR and in practice has resulted in disproportionate over-blocking of legal content.

Moreover, the law on blacklists, the law on arbitrary blocking of extremist materials and the law on bloggers provide very wide discretion to government agencies and the General Prosecutor's Office and undermine the role of the courts. The ECtHR has stressed the importance of judicial review, aimed to strike a balance between different interests, and argued that a framework establishing precise and specific rules regarding the application of preventive restrictions on freedom of expression is vital to strike this fair balance.[950] In Russia it is in the discretion of Rozkomnadzor and other authorized bodies to decide if websites should be blocked, although this should be the task of the Russian courts. The staffs of agencies such as Rozkomnadzor are hardly competent to strike a balance between different interests and to avoid abuse of freedom of expression. The law on arbitrary blocking of extremist material enables the General Prosecutor's Office to assess whether the content is calling for riots, extremist activities, and participation in mass events. The powers of the Prosecutor General in fact substitute judicial procedure for the recognition of materials as extremist. Whereas the authors of the law conveyed that they had full trust that the Prosecutor General would not abuse the powers granted to him, practice has shown that the law has been widely used to silence the voices of political opposition.

As demonstrated above, the majority of blocked websites have nothing to do with aims of the law; rather they have been targeted as political opposition. Instead, a legislative framework designed to restrict freedom of expression on the internet is aiming to "sovereignize" Russia's internet, it has been argued.[951] The justification for all of the laws analysed above has been that information available on the internet is dangerous to Russian society and the Russian state and thus should be controlled and restricted by the relevant Russian authorities. The "sovereignty" of the Russian internet was a key topic at the 2015 Russian Internet Governance Forum, where national security interests were cited as a justification for maintaining control over RuNet.[952] Thus, although the official aim may be to protect the welfare of children or to protect Russia from terrorism, the hidden aim seems to be to secure the position of official rhetoric and to suppress opposition, limiting the spread of "ideologically unfit" information and "sovereignizing" Russia's internet. As a result, millions of Russians are

[949] Russian Constitutional Court, No. 1053-O (2 July 2013).

[950] *Ahmet Yıldırım v Turkey* (App 3111/10) ECtHR 18 December 2012, para 64; *RTBF v. Belgium* (App 50084/06) ECtHR 29 March 2011, para 114.

[951] Julien Nocetti, 'Russia's' Dictatorship-of-the-Law'approach to Internet Policy' (2015) Internet Policy Review.

[952] *Ibid.*

deprived of their constitutional right to express, disseminate and receive information.

The third section of this chapter focused on the conflict between freedom of expression and traditional values in Russia. It can be concluded that, despite constitutional claims of equality and non-discrimination and the constitutional guarantee to protect the right to freedom of expression, criminalizing public acts, expressing vaguely-defined "obvious disrespect to society, committed in order to insult the religious feelings of believers" and punishable by up to three years of imprisonment is not in accordance with the standards of the Russian Constitution or the standards of the CoE. Additionally, regional and federal laws prohibiting "propaganda of non-traditional sexual relations" unlawfully restrict the right to freedom of expression in Russia, as indeed was established by the ECtHR in *Bayaev and others v. Russia*. The administrative prohibition of "propaganda" of non-traditional sexual relations, ostensibly aimed at protecting minors, has "effectively criminalized any advocacy of LGBT rights or equality."[953] Legislation has almost eliminated opportunities for the media to shed light on topics covering sexual minorities, especially issues related to discrimination against LGBT people.

The Russian authorities have not provided objective and reasonable explanations to clarify why vaguely defined propaganda of non-traditional sexual relations should be prohibited, whereas propaganda of traditional sexual relations should not. Officially, the restrictions have been framed as an issue of public morality, protection of children and protection of public health. The argumentation of Russian legislators as well as the Constitutional Court implies that homosexuality and all information related to it is by default immoral and dangerous and can somehow inject homosexuality into children and corrupt them. However, this approach has no factual basis. The ECtHR has rejected the presumption that any information or public debate on LGBT issues could harm minors on numerous occasions, including in *Alekseyev v Russia* and in *Bayev and others v Russia.*[954]

The Russian Government has failed to explain how a minor could be enticed into a homosexual lifestyle or to provide any evidence that external influences such as information from the media could change anyone's sexual orientation.[955] Sexual orientation is a fundamental human right protected under Article 8 of the ECHR and thus homosexuality as such cannot be deemed to be contrary to "morals" in the sense of Article 10 § 2 of the ECHR, as has on numerous occa-

[953] Freedom House, *Freedom in the World: Russia* (n 920)

[954] See *Bayev and others v Russia* (Apps 67667/09, 44092/12, 56717/12) ECtHR 20 June 2017, para 86.

[955] *Ibid* para 78.

sions been explained by the ECtHR.[956] Although the overall attitude towards homosexuals is very negative in Russia, the exercise of Convention rights by a minority group cannot be made conditional on its being accepted by the majority. In this case, LGBT people or other representatives of minority groups could not effectively exercise their rights, which remain mere theoretical opportunities. This result is not in accordance with the ECHR, as explained by the ECtHR in *Bayev and others v. Russia*. Considering that in Russia free public debate is lacking and the attitudes of the majority are to a large extent formed by a state-controlled media landscape and education system, this is an especially serious issue.

The argument of protecting traditional values is often invoked to justify maintaining the status quo. However, traditions, cultures and social norms are not fixed facts but have evolved over time and continue to evolve.[957] In Russia, traditional values, backed by the Russian Orthodox Church, are targeted against the LGBT group who – due to their stigmatized position and a legal prohibition on expressing their position – are not in a position to shape the dominant (homophobic) discourse in Russia. The arguments of legislators as well as the court system are based on old stereotypes and prejudices rather than on contemporary science-based knowledge and as such, are not sufficient to justify a clear breach of freedom of expression.

It can be concluded that in the case of Russian anti-homosexual propaganda legislation, there is no reasonable relationship between the means employed (prohibition of vaguely-defined propaganda of non-traditional relations) and the aims sought to be realised (protection of children; protection of morality and public health).

In my view the laws aimed at protecting traditional values have an important "hidden" aim: to discredit the liberal approach to human rights, to discredit the concept of dignity and morality that underlies international human rights treaties and to discredit the Western value system as such. Protecting LGBT rights in Western countries is constantly ridiculed by Russian politicians, the media and also in academia. Another "hidden" aim of "morality-driven laws" is to discredit Russian people who want to protect, develop and exercise freedom of expression and other human rights in Russia. Labelling these Russian people as a "liberasty"[958] and interpreting advocating the rights and freedoms of gay people as something dirty and obscene marginalizes this socially and politically active part of Russian society.

Legislation is used to paint a picture for Russian people that LGBT people are socially inferior individuals who entail terrible threats to Russian children

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[956] *Fedotova v Russia* (Communication No. 1932/2010) Human Rights Committee 31 October 2012, para 3.5. See also for example *Kozak v Poland* (App 13102/02) ECtHR 2 March 2010.

[957] United Nations Human Rights Council (n 851), para 40.

[958] A calembour equating liberalism with obscenity.

and all efforts should be made to protect children from their gross influence. Thus, the main focus of the legislation seems to be to stigmatize LGBT people, to belittle LGBT topics in the eyes of the Russian people, further contributing to existing widespread homophobia and violence against all Russian minorities. It is widely argued that the homophobic rhetoric deployed in favour of anti-homosexual propaganda laws has contributed to legitimising discrimination and violence against LGBT people and human rights activists in general.[959]

It has been argued, "Homophobia is state policy in Russia, a kind of new sexual sovereignty defending Orthodox Christian morality against the corrosive influence of Western decadence."[960] Russian legislators and the Russian court system interpret the concepts of morality and dignity in the same meaning as interpreted by the Russian Orthodox Church[961] – that only those who are "approved by society" are dignified, are moral and hence worthy of protection. Accordingly, it derives from such interpretation that those who fall outside those brackets defined by the Orthodox Church, for example those born gay, do not deserve to exercise rights and freedoms on an equal footing with "normal" members of society.

Russian legislators have skilfully tied the concepts of morality and dignity as understood by the Russian Orthodox Church to the interpretation of these legislative moves. Additionally, the media has supported the interpretation of these laws as a quest for a higher morality inherent to the Russian people and essentially missing in the Western value system. For example, the debate on the Pussy Riot case as well as the debate on the anti-homosexual propaganda law – debates inherently influencing the rights and freedoms of the Russian people – are not discussed in the language of rights and freedoms, but in the language of threats to Russian state and society.

In Section 4 of this chapter I scrutinized Russian legislation aimed at protecting the Motherland, its honour and territorial integrity. The amendment to the Criminal Code banning public calls to action aimed at violating the territorial integrity of the Russian Federation; the law against the rehabilitation of Nazism, criminalizing denial of facts recognized by the Nuremberg tribunal, approving of the crimes that the Nuremberg tribunal judged and spreading intentionally false information about the Soviet Union's activities during World War II; and the decree of the president according to which all deaths among the military can be classified as state secrets not only in time of war but also in peacetime, demonstrate that protecting the prevailing ideology and the interests and the actions of the ruling political elite are the guiding aims of law-making in Russia. "The government has long used the "fight against terrorism and extremism" to justify repressive laws, no matter how obviously senseless they may be. As a result, Russia's statutory framework can now be effectively used to

[959] Filomonov (n 816); Article 19 (n 802) 7, 8.

[960] Guillory (n 685).

[961] See Section 4.2.1 of this study.

target not only credible extremist threats, but also political opponents of the state" decries Gleb Bogush, Associate Professor at the Department of Criminal law and Criminology at Lomonosov Moscow State University. Laws officially aimed at protecting Russian security and territorial integrity directly reflect an emerging Russian mythology of the unique Russian value-system. Protecting the heroism of the Red Army, highlighting the victory in World War II and labelling all alternative viewpoints as fascism or extremism: arguments prevalent in prevailing political rhetoric are now codified in Russian criminal law.

Bogush has also noted that justifying repressive laws "no matter how obviously senseless they may be" with the argument of combating terrorism and extremism has been a long-standing strategy for the Russian government. Consequently, legislative amendments enable Russia's statutory framework to be used to target political opponents, not just credible extremist threats. As a result, laws have contributed to further depoliticizing the Russian population: "The copious prohibitions contained in the legislation inundate citizens, suppressing their political activity and forcing them into self-censorship and social passivity. This is less a result of the substance and severity of the new prohibitions than of their number and scope" argues Bogush.[962]

All legislative acts analysed in this chapter have certain characteristics in common. Firstly, the key terms of the laws are very vaguely defined and they are not sufficiently clear to enable individuals to regulate their conduct in conformity with the law. This unclarity has led to arbitrary application – websites of opposition-minded people are blocked and people sharing articles on their social media on politically sensitive issues in Russia are punished for disseminating "extremist" materials. An important problem related to vaguely defined regulations is that when laws are not clear enough in order to allow people to regulate their conduct, this can easily lead to self-censorship. When no one knows what kind of speech is punishable, it is safer not to express oneself at all. That being so, pluralism – already lacking in Russia and one of the building blocks of a democratic society – simply cannot exist at all.

The legislative acts restricting freedom of expression analysed in this chapter also allow a very wide discretion to government agencies and the General Prosecutor's Office to interpret and enforce vaguely defined provisions. Moreover, they also undermine the role of the courts, whose tasks are assigned to government agencies and to the General Prosecutor.

Another common feature characterizing the laws analysed in this chapter is that they fail to meet the proportionality test established by the ECtHR, which is very similar to the proportionality test deployed by Russian courts.

The messages that the legislation carries mirror the positions taken by the executive branch towards human rights and freedoms. Russian president Vladimir Putin has emphasized that freedom of speech and normal political activity must be distinguished from "illegal instruments of soft power…which are used

[962] Bogush, 'Killing Russian Criminal Law' (n 928).

all too frequently to develop and provoke extremist, separatist and nationalistic attitudes, to manipulate the public and to conduct direct interference in the domestic policy of sovereign countries".[963]

Widespread restrictions on freedom of expression have made proper public debate on various politically sensitive questions virtually impossible. The legislation restricting freedom of expression has been used to further curb the voice of opposition-minded people and to limit the development of civil society in Russia. Free and open debate, which is an essential component of a democratic society, is lacking in Russia but instead is criminalized.

[963] The Washington Post (n 944).

VI IMPLEMENTING THE RIGHT TO FREEDOM OF ASSOCIATION IN RUSSIA

6.1. Overview of the legal framework

The right to freedom of association has been regarded by the Venice Commission as "a barometer of the general standard of the protection of human rights and the level of democracy in the country". [964] The right to freedom of association is a prerequisite for other rights and freedoms such as freedom of religion, the right to privacy and the right to equal treatment and is also essential for the development of civil society. Freedom of association, together with freedom of expression, enables people and groups to peacefully pursue their aims without arbitrary intervention by the state. NGOs and other associations allow citizens to associate and on that basis to better promote and pursue their agendas.[965] The ability to function without arbitrary interference by the state, for example, is pivotal for NGOs to be able to function properly. NGOs working in the field of human rights advocacy can be particularly vulnerable to various pressures and thus need enhanced protection by states as well as by the international community.[966]

Freedom of association is protected under Article 30 (1) of the Russian Constitution, stating that everyone shall have the right to association, including the right to create trade unions for the protection of their interests.[967] Freedom of association is also protected in various human rights instruments that are binding on Russia. Under Article 11(1) of the ECHR, everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of their interests. However, the right to freedom of association is subject to a number of

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[964] Venice Commission, *Opinion on the compatibility with human rights standards of the legislation on nongovernmental organisations of the Republic of Azerbaijan' 636/2011. CDL-AD(2011)035* (Strasbourg 2011) para 41 <http://www.venice.coe.int/webforms/documents/CDL-AD(2011)035-e.aspx> accessed on 13 December 2017.

[965] Venice Commission, *Opinion on federal law no. 129-fz on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations), 814/2015. CDL-AD(2016)020-e:* (Strasbourg 2016) paras 6–7 <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)020-e> accessed on 13 December 2017 (hereinafter: Venice Commission, Opinion on federal law no. 129-fz); Norwegian Helsinki Committee*, Russia's Foreign Agent law: Violating human rights and attacking civil society* (2014) 6 <http://nhc.no/filestore/Publikasjoner/Policy_Paper/NHC_PolicyPaper_6_2014_Russiasforeignagentlaw.pdf> accessed on 13 December 2017.

[966] Venice Commission, Opinion on federal law no. 129-fz (n 965) para 9.

[967] Konstitutsija Rossiiskoi Federatsii ot 25 dekabrja 1993 goda, s izmenenijami ot 30 dekabrja 2008 goda. (Constitution of the Russian Federation of 25 December 1993). See for the text of the Constitution in English: <http://www.constitution.ru/en/10003000-02.htm> accessed on 1 December 2017.

exceptions enshrined in Article 11 (2) of the ECHR. Article 11(2) states that no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.[968]

Apart from the Constitution, in Russia mainly two federal laws regulate the activities of the NGOs: the 1995 Law on Non-Commercial Organisations[969] and the 1995 Law on Public Associations.[970] Non-commercial organisations following under the Law on Non-Commercial Organisations are defined as "not having profit-making as the main objective of their activity and not distributing earned profit among the members". Public associations[971] falling under the Law on Public Associations are defined as "voluntary, self-governing, non-profit formations, set up at the initiative of individuals who have united on the basis of the community of interests to realize common goals, indicated in the charter of the public association".[972] Subsequently I will focus on legislative amendments adopted since 2012 that have considerably influenced exercise of the right to freedom of association in the Russian Federation.

6.2. Law on foreign agents

On July 20, 2012, less than three months after President Putin's inauguration, the Russian State Duma adopted Law No. 121-FZ "On Making Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Functions of Foreign Agents" commonly known as the "Foreign Agents Law".[973] Under the Foreign Agents Law, organizations that receive foreign funding and engage in "political activities" are obliged to register as "foreign agents". "Foreign agents" are subject to strict controls, including extensive annual audits, quarterly financial reporting and voluminous reporting on all activities every six months. Organisations falling into the category of "foreign agents" are obliged to label

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968 European Convention on Human Rights, Council of Europe, CETS No. 5.

969 Federal'nyi zakon ot 8.12.1995 N 7-FZ "O nekommercheskih obedineniyah".

970 Federal'nyi zakon ot 14.04.1995 N 82-FZ "Ob obshestvennyh obedineniyah".

971 About 50% of noncommercial organizations operating in Russia are public associations (Venice Commission, Opinion on federal law no. 129-fz (n 965) para 13).

972 See Article 5 of federal law N 82-FZ (translation in Venice Commission, Opinion on federal law no. 129-fz (n 965) para 13).

973 Federal'nyy zakon ot 20.07.2012 No 121-FZ "O vnesenii izmeneniy v nekotoryye zakonodatel'nyye akty Rossiyskoy Federatsii po regulirovaniyu deyatel'nosti nekommercheskikh organizatsiy, osushchestvlyayushchikh funktsii inostrannykh agentov" <http://www.rg.ru/2012/07/23/nko-dok.html> accessed on 15 December 2017. (Hereinafter: law on foreign agents).

all materials and resources such as publications, letters and electronic material as material produced by a "foreign agent".

The official justification for the Foreign Agents Law is that Russia has to protect itself from external actors trying to intervene in Russian internal matters and threaten Russian sovereignty by providing funds for NGOs working in Russia. Russian President Vladimir Putin has noted:

> The civilized work of non-governmental humanitarian and charity organizations deserves every support. This also applies to those who actively criticize the current authorities. However, the activities of "pseudo-NGOs" and other agencies that try to destabilize other countries with outside support are unacceptable…I'm referring to those cases where the activities of NGOs are not based on the interests (and resources) of local social groups but are funded and supported by outside forces.[974]

The Foreign Agents Law has been criticised for its vague terminology. Lack of clarity in terminology makes the law a perfect tool "to stifle criticism by weakening the capacity of organizations that challenge state policies and practices, hampering their freedom of expression", as noted by the Norwegian Helsinki Committee.[975] According to the Presidential Council on Human Rights, the use of terms like "foreign agents" in Russian legislation may have a negative impact on the effectiveness of NGOs' work as well as on their collaboration with state bodies.[976] The term "foreign agents" is derived from Soviet terminology, labelling civil society organizations as "suspects, as enemies and as targets." [977] In 1924 Stalin specifically defended the retention of "organs of suppression" on the ground that "as long as there is capitalist encirclement there will be a danger of intervention with all the consequences that flow from that danger… In accordance with that theory… all internal opposition forces in Russia have consistently been portrayed as the agents of foreign forces of reaction antagonistic to Soviet power" as explained by George F. Kennan seventy years ago.[978]

Arguments used to defend the Foreign Agents Law very much resemble the Soviet rhetoric. NGOs are considered to be a threat to the Russian state and society and hence their activities must be kept under close scrutiny. While addressing the State Duma with a speech celebrating the annexation of Crimea

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[974] Vladimir Putin, 'Russia and the changing world' (27 February 2012) Ria Novosti <https://www.rt.com/politics/official-word/putin-russia-changing-world-263/> accessed on 15 December 2017.

[975] Norwegian Helsinki Committee (n 965).

[976] Russian Constitutional Court, No. 10-P/2014 (8 April 2014).

[977] Johann Bihr, 'Two Media Support NGOs Classified as "Foreign Agents"' Reporters Without Borders (25 November 2014) <http://en.rsf.org/russie-two-media-support-ngos-classified-25-11-2014,47276.html> accessed 15 December 2017.

[978] Kennan (n 279).

in March 2014, Vladimir Putin used the terms "fifth column" and "disparate bunch of national traitors" to describe people and organisations who did not belong into the "absolute majority" who supported Russia's actions in Crimea.[979] The language of fifth column and national traitors has become commonplace to describe NGOs and civil society as such. NGOs are pictured as dangerous agents of influence that deserve to be controlled and, if needed, then also punished.

Introduction of the law has resulted in the closure of a significant number of human rights organisations in Russia, either because of their unwillingness to be referred to as a "foreign agent" or due to failure to meet the obligations the law imposes upon them. The first organization sued by the Ministry of Justice for failure to register as a foreign agent was Golos, an organization focusing on election observations.[980] In March 2013 the Russian government launched inspections of hundreds of NGOs deemed to be "foreign agents" to pressurise them to register as such. At least fifty-five groups received warnings and at least twenty groups received official notices of violation requiring them to register as "foreign agents". Several NGOs refused to register because they did not want to follow various bureaucratic requirements and considered the term "foreign agent" slanderous. The prosecutor's office and Ministry of Justice filed at least twelve administrative cases[981] against NGOs for failure to abide by the "foreign agents" law and at least six administrative cases against NGO leaders[982]. Several

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[979] Vladimir Putin, 'Vladimir Putin Adresses the State Duma Deputies, Federation Council Members, Heads of Russion Regions and Civil Society Representatives. Transcript of the Speech' (18 March 2014) <http://en.kremlin.ru/events/president/news/20603> accessed on 13 December 2017.

[980] Norwegian Helsinki Committee (n 965) 4.

[981] Administrative cases were filed against the Association of NGOs in Defense of Voters' Rights "Golos" (Moscow), who lost the suit; Kostroma Center for Support of Public Initiatives (Kostroma), who lost the suit; Anti-Discrimination Center "Memorial" (St. Petersburg), who won two administrative cases, but later lost a similar civil suit by the prosecutor's office and chose to shut down; Coming Out (St. Petersburg), who won the administrative case but later lost a similar civil suit by the prosecutor's office; Side by Side LGBT Film Festival (St. Petersburg), who won the suit; Regional Public Association in Defense of Democratic Rights and Freedoms "Golos" (Moscow) – who lost the suit; Center for Civic Analysis and Independent Research GRANI (Perm), who won the suit; Perm Civic Chamber (Perm), who won the suit; Perm Regional Human Rights Center (Perm), who won the suit; Women of Don (Rostov region), who lost their suit; Ecozachita! – Zhensovet (Kaliningrad), who lost the suit and the Association "Partnership for Development", who lost the suit. See: Human Rights Watch, 'Russia: Government vs. Rights Groups. The Battle Chronicle' (8 September 2017) <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle> accessed on 13 December 2017.

[982] The leaders of the following 6 NGOs faced administrative charges personally: Anti-Discrimination Center "Memorial" (St. Petersburg), won the suit but the organization chose to shut down when it lost a "foreign agent" civil suit to the prosecutor's office; Side by Side LGBT Film Festival (St. Petersburg), won the suit; Coming Out (St. Petersburg), won the suit; Association "Partnership for Development", lost the suit; Kostroma Center for Support

organizations that won their administrative case also had to go through a civil law suit, as prosecutors brought an almost identical civil case against them. The prosecutor's office won civil suits against six NGOs[983], arguing that their failure to register as "foreign agents" harmed the public interest. Following relevant court rulings, the NGOs were required to register as "foreign agents" within two weeks or were shut down.

By October 2014 at least six groups chose to shut down rather than register as foreign agents, including the Anti-Discrimination Center (ADC) Memorial in Saint Petersburg, two Golos election watchdogs (Golos Association and Regional Golos), JURIX (Lawyers for Constitutional Rights and Freedoms) and Side-by-Side LGBT.[984] Additionally, one of the most prominent human rights organisations, HRC "Memorial", which received the Sakharov Prize for Freedom of Thought awarded by the European Parliament to individuals or organisations that have made an important contribution to the fight for human rights or democracy, was added to the list of foreign agents. HRC "Memorial" was investigated by the Prosecutor's Office, who concluded that HRC "Memorial" was engaged in "political activity", due to its human rights work and was receiving foreign funding. The Prosecutor's Office issued an order on 29 April 2013 and required HRC "Memorial" to register as an organisation performing the functions of a foreign agent, in accordance with the Foreign Agents Law. On 23 May 2014, the Zamoskvoretsky district court of Moscow dismissed the appeal of HRC Memorial.[985]

On the same day as the rejection of the appeal, the Russian Parliament voted in favour of an amendment to the Federal Law "On NGOs" which provided the Ministry of Justice with the power to include on the register of non-commercial organisations NGOs that are acting as "foreign agents" and have failed to register as such. On June 4, 2014, President Vladimir Putin signed amendments to the law, granting the Ministry of Justice full powers to register NGOs as "foreign agents" itself, without a court decision and without the consent of the NGO concerned. The Ministry can act on the basis of information collected by itself or sent by its local departments, as well as by state bodies, local

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of Public Initiatives (Kostroma), lost the suit; Association of NGOs in Defense of Voters' Rights "Golos" (Moscow), won the suit. See Human Rights Watch (n 981).

983 These organisations included: Anti-Discrimination Center "Memorial" (St. Petersburg), who lost the suit and shut down; Coming Out (St. Petersburg), who lost the suit and shut down; Women of Don (Rostov region), who lost the suit and was registered as a "foreign agent"; Center for Social Policy and Gender Studies (Saratov), who lost the suit was registered as a "foreign agent"; Youth Humanistic Movement (Murmansk), who lost the suit and is appealing the ruling; Association "Partnership for Development" (Saratov), who lost the suit and was registered as a "foreign agent"

984 Human Rights Watch (n 981).

985 Front Line Defenders 'Rejection by Court of Human Rights Centre Memorial's appeal against order to register as 'foreign agent'' (27 May 2014) <http://www.frontlinedefenders.org/node/26032#sthash.Oqzmlm4q.dpuf> accessed on 15 December 2017.

authorities, organisations or citizens. A decision to include an organisation as a "foreign agent" on the register of non-commercial organisations can be appealed in court. Many NGOs sent a joint open letter[986] to President Putin condemning the law as the concept of a foreign agent is only linked to the source of funding, without any acknowledgment of the nature of the activities carried out by the organization; the definition of political activities is vague and broad, allowing for arbitrary and selective use of the law and that the law establishes excessively strict control over activities of "foreign agents", with additional audit and reporting requirements.[987] By the end of 2015 the Ministry of Justice had included one hundred and eleven Russian organizations on its list of "foreign agents".[988]

On 8 April 2014 the Constitutional Court upheld the Foreign Agents Law.[989] The provisions of the Foreign Agents Law proceed from the presumption of legality and the conscientiousness of the activities of non-commercial organizations, argues the Constitutional Court. The Foreign Agents Law was directed at ensuring the transparency of activity of NGOs that receive monetary means and other property from foreign sources and participate in political activity carried out on the territory of the Russian Federation, with the aim of influencing decisions taken by state bodies and state policy conducted by them. Such organisations influence the rights and freedoms of all citizens as they can use foreign funding in the interest of the sponsor, as noted by the Constitutional Court.[990] The Constitutional Court also tried to specify the definition of "political activity". The Court stated that whether an organisation is engaged in political activity or not should be assessed on the basis of the work of the organization, not on the basis of the actions of its individual members. The Court noted that a NGO is taking part in political activities "if, irrespective of its aims as written in its statute, it participates (including by providing financial support) in the organisation and holding of political actions aimed at influencing decisions of state bodies or changing state policies or aimed at influencing public opinion with the above mentioned objectives".[991]

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[986] 'Open Letter to Members of the State Duma of the Russian Federation on Introducing Amendments to Legislative Acts of the Russian Federation in Part Regulating Activities of Non-commercial Organizations, which Carry Functions of Foreign Agents' (06 July 2012) <http://www.nhc.no/no/nyheter/2012/Draft+law+on+foreign+funded+civil+society+raises+concern.b7C_wlbM4d.ips>.

[987] If a registered organization fails to comply, its executive manager can be subject to a 300.000 RUR (7.500 EUR) fine or up to three years in prison.

[988] Freedom House, *Freedom in the World: Russia* (n 920).

[989] The Constitutional Court received five complaints on the law. They were filed by the Russian Human Rights Ombudsman Vladimir Lukin, by the Kostroma Centre of Civic Initiatives, and by human rights defenders Sergey Smirensky, Victor Yukechev and Ludmila Kuzmina. The Court decided to consider all the complaints together.

[990] Russian Constitutional Court, No. 10-P/2014 (8 April 2014).

[991] *Ibid.*

Examples of political activities include reunions, meetings and demonstrations, rallies and pickets, electoral or referendum campaigns, public appeals, including appeals to state institutions, disseminating information (including through the use of modern technologies) evaluating decisions of state bodies or their policies. The Court concluded that any such list would necessarily not be comprehensive.[992] The Constitutional Court also assessed in its ruling of 8 April 2014 that there was no legal basis to argue that the term "foreign agent" had a negative connotation from the Soviet era and noted that the term "foreign agent" was intended to discredit Russian NGOs.[993]

According to the standards of the ECHR, restrictions on freedom of association may be imposed only in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and for protection of the rights and freedoms of others. The "prescribed by law" test requires analysis whether a legal provision is sufficiently precise to enable the citizen reasonably to foresee the consequences, which a given action may entail.[994]

While discussing the constitutionality of the Foreign Agents Law, the Constitutional Court did not follow the guidelines established by the ECtHR. Although the Constitutional Court aimed to clarify the term "political activity", the explanations provided were very vague. Activities such as influencing state policies or public opinion leave too much space for arbitrary interpretation, making it impossible for citizens to regulate their conduct. The judgment of the Constitutional Court did not provide sufficient clarity so as to enable NGOs that receive foreign funding to know how to comply. The Constitutional Court also did not focus its attention to the issue whether the law provided effective safeguards against arbitrary interference with the respective substantive rights, most importantly the right to freedom of association. The ECtHR has stated that the "in accordance with the law" test implies that there must be a measure of legal protection in domestic law against arbitrary interference by public authorities and that it would be "contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power… the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."[995]

The wide discretion given to the Prosecutor's office was untouched by the Constitutional Court. Overall, it remained unresolved by the Constitutional

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[992] *Ibid.*

[993] *Ibid.*

[994] *The Sunday Times v The United Kingdom* (App 6538/74) ECtHR 26 April 1979, para 49.

[995] *Malone v The United Kingdom* (App 8691/79) ECtHR 2 August 1984, para 82.

Court whether the restrictions were necessary and proportionate to a legitimate aim in a democratic society. [996]

On 20 April 2016, the State Duma of the Russian Federation adopted a draft law modifying the law "On Non-Commercial Organisations" where the concept of "political activity" introduced by the Foreign Agents Law in 2012 was further elaborated. According to the law all NGOs except political parties are recognized as participating in political activities carried out in Russia if, regardless of the purposes and tasks specified in its constituent documents, the organisation carries out activities in the fields of state construction; protection of the foundations of the constitutional system of Russia; the federal structure of Russia; protection of sovereignty and ensuring the territorial integrity of Russia; protection of lawfulness, the legal order, state and public security, national defence and foreign policy; protection of the socio-economic and national development of Russia, development of the political system, activities of state bodies and/or local government bodies; is carrying out activities related to legislative regulation of human rights and freedoms with the aim of influencing the development and implementation of state policy or is carrying out activities related to the formation of state and local government bodies and their decisions and actions. [997]

Under the new regulation, the specified political activity can be carried out in the forms of:

1) participating in the activities of the organization and holding public events in the form of meetings, rallies, demonstrations, processions or picketing; or in various combinations of these forms, organization and conduct of public debates, discussions, speeches;
2) participation in activities aimed at obtaining a certain result in elections, referendum, participation in monitoring elections, referendums, formation of

[996] However, the Constitutional Court held that it is for the prosecution to prove that the organisation intends to take part in, or has carried out, political activities and has failed to register. In the case of doubt on whether the activities or goals of an NGO are political, a presumption that the organisation is acting in accordance with the law and in good faith should apply. The Court also ruled that the mandatory minimum fines for individuals and organisations that fail to register (set in the law at 100,000 and 300,000 rubles) should be amended to give the courts discretion to apply lower fines, and ordered that the relevant provisions of the Code of Administrative Procedure be amended accordingly. See further: Russian Constitutional Court, No. 10-P/2014 (8 April 2014). Note that amendments to the law, which give the Ministry of Justice power to register organizations as "foreign agents" without their consent shifts the burden of proof as NGOs have to turn to the court in order to prove that they are not "foreign agents" instead of prosecutors having to prove that they are. Registered organizations will have to comply with the extra reporting requirements for "foreign agents" until an eventual victory in court leads to de-registration. See: Norwegian Helsinki Committee (n 965).

[997] Federal'nyy zakon ot 02.06.2016 N 179-FZ "O vnesenii izmeneniy v stat'yu 8 Federal'nogo zakona Ob obshchestvennykh ob" yedineniyakh i stat'yu 2 Federal'nogo zakona O nekommercheskikh organizatsiyakh" (Article 2).

electoral Commissions, referendum commissions and the activities of political parties;
3) public appeals to state bodies, local government bodies, their officials, as well as other actions that affect the activities of these bodies, including those aimed at adopting, amending, repealing laws or other normative acts;
4) distribution, including by use of modern information technologies, opinions on the state decisions and policies pursued by them;
5) formation of socio-political views and beliefs including conducting public opinion polls and publicizing their results or conducting other sociological research;
6) involvement of citizens, including minors, in the specified activities; and
7) financing the specified activities. [998]

The law also established that political activities did not include activities in the sphere of science, culture, art, health, health promotion and disease prevention, social services, social support and protection of citizens, protection of motherhood and childhood, social support for disabled people, promotion of a healthy lifestyle, physical culture and sports, protection of plants and animals, charity work. As can be seen from the extensive list, a very broad range of activities is included under the definition of political activity. Basically all activities that influence the actions of government in the sphere of human rights legislation and implementation are considered as political activities. Accordingly, potentially all organisations advocating human rights fall within the category of foreign agents and have to meet the strict requirements imposed on them. The same applies to all NGOs that engage in organizing some sort of public events or who engage in vote monitoring. As a result, in contemporary Russia NGOs cannot fulfil the role of "watchdogs" as their activities are severely restricted. The right to freedom of association, especially in the sphere of NGOs, has been rendered almost non-existent. NGOs and people involved in their work are characterized as enemies of the country, as spies and traitors.

6.3. Law on undesirable organisations

In addition to legislation focusing on limiting the activities of Russian NGOs labelled as "foreign agents", on 23 May 2015 a law popularly known as the Law on Undesirable Organisations[999] took effect. The law amended the Criminal Code, the Criminal Procedure Code, the Code of Administrative Offences, Law No. 272-FZ on Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation and Law No. 114-FZ on

[998] *Ibid.*

[999] Federal'nyy zakon ot 23.05.2015 N 129-FZ "O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii".

the Procedure for Exit from the Russian Federation and Entry to the Russian Federation.

According to the Law on Undesirable Organisations, the Prosecutor General, in agreement with the Ministry of Foreign Affairs, can declare a foreign firm or NGO "undesirable" when the activities of a foreign or international NGO threaten the foundations of the constitutional order of the Russian Federation, the country's defence capability or the security of the state. As a result, the organization has to cease its activities in Russia, is banned from holding public events, from distributing information and from all cooperation with other organisations in Russia. Individuals and organisations also face having their accounts frozen, and individuals who do not comply with the requirements may face administrative and criminal proceedings, with penalties of up to six years in prison. [1000]

In similar vein to other laws infringing upon the rights to freedom of expression and freedom of association, the Law on Undesirable Organisations is characterized by vague definitions, excessive powers of the Prosecutor's Office and undermines the role of the courts in Russia. The Venice Commission has assessed that the Law on Undesirable Organisations infringes upon the freedoms of association, assembly and expression, as well as the right to an effective remedy. The Venice Commission noted the lack of clear criteria for the inclusion of organisations among undesirable NGOs and recommended that such clear criteria be created. Moreover, the Venice Commission emphasized that judges, not the Office of the Prosecutor General, should be the ones to decide whether an NGO should be declared "undesirable" in Russia and that detailed explanations should also be provided to the NGOs concerned.[1001]

According to the explanatory note to the Law on Undesirable Organisations, the legislation is aimed at defending Russia from various external threats, including the threat of terrorism and "colour revolutions". It is noted that political, military and international conflicts have enabled the development of destructive organisations that are the carriers of terrorist, extremist and nationalist ideas, pursue criminal goals and cause significant harm to the world community. The explanatory note states that it should be one of the priorities of the Russian authorities to prevent the penetration of these organizations into the territory of the Russian Federation in order to protect the foundations of the constitutional order, morality, rights and legitimate interests of Russian citizens, the defence and security of the Russian state and public order. It is necessary to prevent foreign organisations from threatening the fundamental values of Russia. According to the explanatory note, implementation of the proposed measures will make it possible to increase the effectiveness of impeding the activities of foreign structures that pose a threat to the security of the state, form the threat of

[1000] *Ibid.*

[1001] Venice Commission, Opinion on federal law no. 129-fz (n 965).

"colour revolutions" or contribute to the emergence of hotbeds of tension on an inter-ethnic and inter-confessional basis.[1002]

However, in practice the law has been used to ban the activities of foreign and international organisations working in the field of human rights, rule of law and democracy. Under the Law on Undesirable Organisations, entities such as the National Endowment for Democracy, the OSI Assistance Foundation, the Open Society Foundation, the US-Russia Foundation for Economic Advancement and the Rule of Law, the National Democratic Institute for International Affairs, the International Republican Institute (IRI) and the Media Development Investment Fund (MDIF) have been declared "undesirable" in Russia. According to a statement posted on the website of the Prosecutor General's office, the International Republican Institute (IRI) and the Media Development Investment Fund (MDIF) pose "a threat to the foundations of the constitutional order and national security," although it remains unclear how exactly these organisations threaten Russia's constitutional order and national security. Declaring such organisations as undesirable organisations is "designed to send yet another unmistakable message: Russian NGOs and independent media should steer clear of foreign funders – and foreign funders should steer clear of Russia," as argued by Sergei Nikitin, Director of Amnesty International Russia.[1003]

6.4. Analysis and conclusions

This chapter examined how the right to freedom of association is incorporated into the Russian legal order and implemented in practice and how relevant legislation has influenced the opportunities of Russians to exercise their right to freedom of association guaranteed under the ECHR as well as the Russian Constitution.

I found that the Foreign Agents Law adopted in 2012 and amended in 2014 empowering the Ministry of Justice to register organizations as "foreign agents" without their consent and without a court ruling demonstrates that the right to freedom of association is not effectively incorporated into the Russian legal order. These legislative amendments have significantly hindered implementation of the right to freedom of association in Russia and restricted the opportunities for civil society to exercise and demand their rights. Russian NGOs are not able to peacefully pursue their aims without arbitrary intervention by the

[1002] Poyasnitel'naya zapiska k proekty federal'nogo zakona "O vnesenii izmenenii v nekotorye zakonadatel'nye akty Rossiiskoy Federatsii" <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=125865&rnd=261745.22399963#0> accessed 15 December 2017.

[1003] Amnesty International, 'Russia declares two more non-profits as undesirable' (18 August 2016) <https://www.amnesty.org/en/latest/news/2016/08/russia-declares-two-more-non-profits-as-undesirable/> accessed on 18 December 2017.

state. The independence and everyday activities of Russian NGOs are significantly limited.

As effective incorporation of the Articles of the ECHR into the national legal order and their enforceability is an important precondition to effective compliance with the ECHR, it can be concluded that the legislative amendments strictly limiting exercise of the right to freedom of association is another obstacle hindering effective compliance with the ECHR.

Moreover, when the legal order does not provide basic guarantees, when exercising one's rights and freedoms is not encouraged, but on the contrary, discouraged as a result of strict regulations and punishments, civil society does not have the means to demand their rights, as noted in Section 1.4.1 of this study. Legislative amendments restricting the right to freedom of association further weaken civil society in Russia, also obstructing effective compliance with the ECHR.

In 2011 and 2012 a protest movement spread across the country and provided another important impetus for restricting the activities of NGOs in Russia, as the danger of a Russian "colour revolution" became increasingly real. Whereas in 2006 various amendments had already started to curb foreign support for NGOs, legislative changes since 2012 have had especially dramatic consequences for NGOs in Russia. Following the "Colour Revolutions" in Ukraine, Georgia and Kyrgyzstan, the Russian state began to view NGOs, especially those financed from overseas, as a challenge to its sovereignty.[1004]

Whereas the aim of the law has been to ensure transparency of NGOs, in practice the measures enacted by the law have disproportionately hampered the activities of NGOs, especially NGOs dealing with human rights, democracy and the rule of law.[1005] The Foreign Agents Law and the law on undesirable organisations have reduced the impact of Russian and international NGOs on Russian society to a minimum. Russian NGOs have to deal with registrations, inspections and court proceedings instead of focusing on their main tasks. The activity of the majority of NGOs is disabled and many NGOs have had to cease their activities altogether.[1006]

Influencing public opinion and policies is considered by the ECtHR to be a legitimate role of NGOs. In a democratic society, the public authorities are to be

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[1004] Jo Crotty and others, 'Post-Soviet Civil Society Development in the Russian Federation: The Impact of the NGO Law' (2014) 66 Europe-Asia Studies 1253–1269, 1256.

[1005] Venice Commission, *Opinion on federal Law N. 121-FZ on Non-Commercial Organisations ('Law on Foreign Agents'), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code ('Law on Treason') of the Russian Federation, Adopted by the Venice Commission at its 99th Plenary' 716-717/2013. CDL-AD(2014)025* (Strasbourg 2014) <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)025-e> accessed on 18 December 2017.

[1006] Crotty and others (n 1004) 1259.

exposed to permanent scrutiny,[1007] including by NGOs, who are social "watch-dogs"[1008] and must be able to carry on their activities effectively and be able to rely on a high level of freedom of expression due to strong public interest.[1009] In Russia, the role of watchdog is not a legitimate role. Instead, the activities of NGOs are construed as socially and politically dangerous and traitorous. The Foreign Agents Law has been used to limit the opportunities of the opposition to be heard. Many activists have been severely punished, which has sent a clear signal to the Russian people that they should not overstep the boundaries established by the state or otherwise they, too, will be punished. Thus, the liberally minded politically active part of Russian society advocating compliance with the ECHR and other international human rights law is placed in a highly disadvantageous situation.

The Foreign Agents Law and its application by prosecutorial services and courts forms part of a wider picture of introducing restrictive legislation and practices since Vladimir Putin started his third term as Russia's president, as assessed by the Norwegian Helsinki Committee.[1010] The wider picture also includes restricting freedom of expression and freedom of assembly by imposing harsh administrative as well as criminal punishments for exercising civil and political rights. All of these laws are aimed at consolidating the power of the ruling elite and limiting opportunities for Russian society to choose some other path in the course of its development.

[1007] *Vides Aizsardzības Klubs v Latvia* (App 57829/00) ECtHR 27 May 2004. See also *Tatár and Fáber v Hungary* (Apps 26005/08, 26160/08) ECtHR 12 June 2012.

[1008] See *Társaság a Szabadságjogokért v Hungary* (App 37374/05) ECtHR 14 April 2009, para 27; *Riolo v Italy* (App 42211/07) ECtHR 17 July 2008, para 63; *Vides Aizsardzības Klubs v Latvia* (App 57829/00) ECtHR 27 May 2004, para 42.

[1009] See for example: *Women on Waves v Portugal* (App 31276/05) ECtHR 8 August 2011; *Hyde Park and others v Moldova* (Apps 6991/08, 15084/08) ECtHR 14 September 2010; *Schwabe and M.G. v Germany* (Apps 8080/08, 8577/08) ECtHR 1 December 2011; *Tatár and Fáber v Hungary* (Apps 26005/08, 26160/08) ECtHR 12 June 2012; *Kudrevičius and others v. Lithuania* (App 37553/05) ECtHR 15 October 2015; *Taranenko v Russia* (App 19554/05) ECtHR 15 May 2014.

[1010] See Norwegian Helsinki Committee (n 965) 6.

VII IMPLEMENTING THE RIGHT TO FREEDOM OF ASSEMBLY IN RUSSIA

7.1. Overview of the legal framework

The right to freedom of assembly is one of the foundations of a democratic society. The Constitutional Court has established that the right to freedom of assembly enshrined in Article 31 of the Russian Constitution is "one of the fundamental and inalienable elements of the legal status of a person in the Russian Federation as a democratic State ruled by law and is among the recognized fundaments of the constitutional structure that include ideological and political pluralism and a multi-party system"[1011].

The Constitutional Court has also explained that freedom of assembly together with other civil and political rights enacted in Articles 29, 30, 32 and 33 of the Constitution "guarantees citizens the real possibility of influencing the action of public authorities through the holding of public events … and thereby fostering sustained peaceful dialogue between civil society and the State." [1012] The Constitutional Court has emphasized the need for special protection of freedom of assembly as a universally recognized democratic value "as it is through this means that the opinions and demands of diverse political forces and public groups are formed and expressed and that the necessary prerequisites are created for a two-way relationship between citizens … and public authority institutions."[1013] The Constitutional Court has stressed that the right to peaceful assembly ensures a possibility to influence the organization and exercise of public authority and to maintain a peaceful dialogue between civil society and the state, including criticism of the actions and policies of state powers.[1014] The Court has explained that public events may be held to criticize the actions and decisions of state and local authorities and stressed that a public authority's reaction towards public events must be neutral and "irrespectively of the political views of their initiators and participants" [1015] ensure lawful exercise of the freedom of assembly that does "not extend beyond the framework of admissible restrictions of citizens' rights and freedoms within a democratic society ruled by law".[1016]

[1011] Russian Constitutional Court No. 4-P (14 February 2013) Section 2. English translation of extracts from the judgment provided by the Venice Commission. Available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)012-e); See also Russian Constitutional Court, No. 2-P (10 February 2017) Section 2.

[1012] Russian Constitutional Court No. 4-P (14 February 2013) Section 2.

[1013] *Ibid* Section 2.4.

[1014] Russian Constitutional Court, No. 2-P (10 February 2017) Section 2

[1015] Russian Constitutional Court No. 4-P (14 February 2013) Section 2.

[1016] *Ibid.*

When public assemblies meet the fundamental criterion of "peacefulness", the state authorities have a positive obligation to guarantee the right to freedom of assembly. As explained by the Venice Commission, the criterion of "peacefulness" is met when "organisers have professed peaceful intentions and the conduct of the assembly is non-violent. The term "peaceful" should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties."[1017] Evidently the right to freedom of assembly is not an absolute right. Nevertheless, restrictions "must be narrowly interpreted and the necessity for any restrictions must be convincingly established", as stressed by the ECtHR.[1018] It is necessary to strike a balance between legitimate aims and the "right to free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places".[1019] When participants or organisers "have violent intentions, incite to violence or otherwise deny the foundations of a "democratic society[1020]", the guarantees of Article 11 do not apply and interference with the right to freedom of assembly is justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others.[1021] In the case of sporadic violence or other unlawful acts committed by others, an individual remaining peaceful and not participating in such acts still cannot be deprived of the right to peaceful assembly[1022]. It has been established by the ECtHR that a demonstration as such does not fall outside the scope of Article 11 § 1 even when there is "a real risk of a public demonstration resulting in disorder as a result of developments outside the control of those organising it" and

[1017] Venice Commission, *OSCE/ODIHR/-Venice Commission Guidelines on Freedom of Peaceful Assembly* (Venice 4 June 2010) <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)020-e> accessed on 15 December 2017.

[1018] *Frumkin v Russia* (App 74568/12) ECtHR 5 January 2016, para 93; *Barraco v France* (App 31684/05) ECtHR 5 March 2009, para 42.

[1019] *Ibid,* para 95; (see also *Ezelin v France* (App 11800/85) ECtHR 26 April 1991, paras 37, 52; *Barraco v France* (App 31684/05) ECtHR 5 March 2009, para 27; *Fáber v Hungary* (App 40721/08) ECtHR 24 July 2012, para 41; *Taranenko v Russia* (App 19554/05) ECtHR 15 May 2014, para 65.

[1020] See *Stankov and the United Macedonian Organization Ilinden v Bulgaria* (Apps 29221/95, 29225/95) ECtHR 2 October 2001, para 77; ECtHR 2001-IX; *The United Macedonian Organization Ilinden and Ivanov v Bulgaria* (App 44079/98) ECtHR 20 October 2005, para 99; *Kuznetsov v Russia* (App 10877/04) ECtHR 23 October 2008, para 45; *Alekseyev v Russia* (Apps 4916/07, 25924/08, 14599/09) ECtHR 21 October 2010, para 80; *Fáber v Hungary* (App 40721/08) ECtHR 24 July 2012, para 37.

[1021] *Frumkin v Russia* (App 74568/12) ECtHR 5 January 2016, para 98.

[1022] *Ibid*, para 99; see also: *Ezelin v France* (App 11800/85) ECtHR 26 April 1991, para 53; *Ziliberberg v Moldova* (App 61821/00) ECtHR 1 May 2005; *Primov and others v Russia* (App 17391/06) ECtHR 12 June 2014, para 155.

restricting such assembly must be in accordance with the terms of Article 11 § 2. [1023]

In the Russian legal order the right to freedom of assembly is guaranteed by the Constitution and federal laws. Article 31 of the 1993 Constitution states that citizens of the Russian Federation shall have the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets. As seen from the wording of Article 31, the Russian Constitution makes the right to freedom of assembly dependent on citizenship, an approach criticized by the Venice Commission as deriving from international standards, so that all people regardless of their citizenship should enjoy right to freedom of assembly.[1024] The Federal Law of the Russian Federation No. 54-FZ of June 19, 2004 "On Rallies, Meetings, Demonstrations and Picketing"[1025] (hereinafter: Law on Public Assemblies) specifies that the regulation of Article 31 of the Constitution is the central piece of legislation applicable to the preparation and conduct of public assemblies. A "public event" is defined in the Law on Public Assemblies as "open, peaceful action accessible to everyone that is implemented as an assembly, meeting, demonstration, march or picketing or by using various combinations of those forms that is undertaken at the initiative of citizens of the Russian Federation, political parties, other public or religious associations".[1026] Public events without the objective enacted in the Law on Public Assemblies are out of its scope, although they can qualify as a mass simultaneous presence and/or movement, which can constitute an administrative offence under Art. 20.2.2 (1) of the Code of Administrative Offences introduced in 2012.[1027] The president, the government and the authorities of the subjects of the Russian Federation can introduce legal acts pertaining to specific conditions for holding a public event[1028] such as determining specially designated sites for

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[1023] See *Schwabe and M.G. v Germany* (Apps 8080/08, 8577/08) ECtHR 1 December 2011, para 92.

[1024] Venice Commission, *Opinion on federal law no. 65-fz of 8 June 2012 of the Russian Federation amending federal law no. 54-fz of 19 June 2004 on assemblies, meetings, demonstrations, marches and picketing and the code of administrative offences. Opinion 686/2012. CDL-AD(2013)003* (Strasbourg 2013) para 13 <http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2013)003-e> accessed on 19 December 2017 (hereinafter: Venice Commission, Opinion on federal law no. 65-fz).

[1025] Federal'nyy zakon Rossiyskoy Federatsii ot 19.06.2004 N 54-FZ "O sobraniyakh, mitingakh, demonstratsiyakh, shestviyakh i piketirovaniyakh (hereinafter: law on public assemblies).

[1026] Article 2(1) of the law on public assemblies. Translation by the Venice Commission: Venice Commission, *Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing No.54-FZ of 19 June 2004 of the Russian Federation as amended by Federal Law No.65-FZ of 8 June 2012' CDL-REF(2012)029* (7 August 2012).

[1027] Anne Peters and Isabelle Ley, *Comparative Study: Freedom of Peaceful Assembly in Europe: Study Requested by the European Commission for Democracy through Law-Venice Commission* (2014) 79.

[1028] Art. 1 (1) of the law on public assemblies (n 1025).

public events. The Law on Public Assemblies also allows these authorities to refuse to agree to the holding of a public event, to suspend and to terminate a public event.[1029]

7.2 Amending the legislation on public assemblies

After the elections to the Russian parliament in 2011, the Russian people actively exercised their constitutional right to freedom of assembly. People's discontent with politics had been constantly rising after Dmitry Medvedev declined to participate in presidential elections and supported Vladimir Putin as the new president of the Russian Federation. This so-called "*рокировка*" (castling) insulted many people and disappointed hopes for change. Disappointment increased after the elections to the Duma, where massive electoral fraud took place. On 5 December the "Solidarnost" movement organised a registered meeting in Moscow at Chistiye Prudi, where a couple of thousand people participated. After this event, a series of demonstrations and meetings took place in Moscow and elsewhere in Russia gathering tens of thousands of participants. Protest activities continued throughout the winter and spring, numerous events were held in June and September 2012.[1030] During and after the wave of protests, the Investigative Committee launched a series of criminal proceedings against opposition leaders and regular participants at these assemblies. The officers of the Investigative Committee raided the homes of opposition leaders, arguably looking for evidence for a criminal case related to the opposition rally on 6 May 2012. [1031] The Investigative Committee warned: "Those who think they can with impunity organize riots, plan and prepare terrorist attacks and other acts that threaten the lives and health of Russians, you underestimate the Russian special services' professionalism".[1032] Charges were filed against some two hundred individuals for demonstrating on Moscow's Bolotnaya Square on 6 May 2012, the day before Putin's inauguration. On 24 May 2013 the first criminal case against twelve persons suspected of participation in a mass riot was taken to the Zamoskvoretskiy District Court of Moscow and on 21 February 2014 eight persons were found guilty of participation in mass disorder and of violent acts against police officers and sentenced to between two to four and half years' imprisonment. The judgment was upheld by the Moscow City Court. On 24 July 2014 the Moscow City Court found

[1029] Peters and Ley (n 1027) 81, 82.

[1030] Volkov (n 34).

[1031] The Economist, 'Building up the Castle Wall' (13 June 2012) <http://www.economist.com/blogs/easternapproaches/2012/06/protest-russia> accessed on 19 December 2017.

[1032] Reuters, 'Navalny: Jailing of protester underlines harsh Russia crackdown' (10 November 2012) <http://www.reuters.com/article/2012/11/10/us-russia-navalny-idUSBRE8A909H20121110> accessed on 19 December 2017.

Mr Udaltsov and Mr Razvozzhayev guilty of organising mass disorder on Bolotnaya Square on 6 May 2012 and sentenced them each to four and a half years of imprisonment. The Supreme Court of the Russian Federation upheld the judgment on 24 July 2014. Several other cases followed finding people guilty of participating in mass disorder and of committing violent acts against police officers during the demonstration on 6 May 2012.[1033]

Following the wave of protests in 2011 and 2012, Russian president Vladimir Putin initiated a series of changes in the legislation on public assemblies. One month after Vladimir Putin's inauguration, Federal Law no. 65-FZ introducing amendments to the law on public assemblies and to the Code of Administrative Offences[1034] (hereinafter: law on public assemblies) was brought to the State Duma and came into force on 9 June 2012. The new Law on Public Assemblies significantly increased the fines for violating rules on holding public events and imposed restrictions on organizers and participants of public protests. The amendments provide a blanket ban on organising public events by persons who have been convicted of serious crimes against the constitutional order and state security as well as by persons who have committed certain administrative breaches more than once.[1035]

The amendments also impose strict obligations on the organizer(s) of public events. For example, an organiser has to indicate the expected number of participants in a public event in the notice to the authorities[1036] and has to take measures to prevent the number of participants indicated in the notice from being exceeded, where exceeding that number creates a threat to public order and/or public safety, the safety of participants or other persons or risks damage to property.[1037] Moreover, organisers are liable for damage caused by participants if they fail to fulfil certain obligations enacted in the Assembly Law. [1038]

Whereas pickets by one person are exempt from the prior notification procedure, the Law on Public Assemblies provides that single picketers must keep a distance of no more than fifty meters and the Russian courts can retrospectively decide that the sum of single picketers "united by a single concept and overall organisation" constituted a public event.[1039] In this case the event is

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[1033] See for information regarding the Bolotaya protests at: http://bolotnoedelo.info/. See for an overview of investigation of the Bolotnaya case and court proceedings: *Frumkin v Russia* (App 74568/12) ECtHR 5 January 2016.

[1034] Federal'nyy zakon ot 8.06.2012 No. 65-FZ "O vnesenii izmeneniy v Kodeks Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh i Federal'nyy zakon "O sobraniyakh, mitingakh, demonstratsiyakh, shestviyakh i piketirovaniyakh" (hereinafter: law amending the law on public assemblies).

[1035] Article 5.2.1.1 (coupled with new para. 3 of Article 12) of the law amending the law on public assemblies (n 1034).

[1036] *Ibid*, Article 7 para 3.5.

[1037] *Ibid*, Article 5, para 4.7.1.

[1038] *Ibid*, Article 5, para 5.

[1039] Ibid, Article 7, para. 11.

covered by the same regulations as public assemblies, meaning for example that the absence of notification is a breach of the Law on Public Assemblies and the organisers and participants can be held administratively liable for various breaches. The Law on Public Assemblies also prohibits campaigning for a public event starting from the time of submission of the notice until the time of reaching an agreement between the organiser and the authorities regarding the place and/or time for holding the public event. Moreover, the Law on Public Assemblies provides for "specially designated places" where public events must be held, designated by local authorities. However, in exceptional cases holding a public event elsewhere is possible if the organisers request it. Such a request may be refused only under specific circumstances,[1040] notably when organising the event at a specific site is prohibited.

The amendments to the Code of Administrative Offences[1041] significantly increased the upper level of fines for violating rules on holding public events from 5,000 to 300,000 RUR for citizens and from 50,000 to 600,000 RUR for officials and introduced community work as a new type of sanction and created a new offence: organising a mass simultaneous presence and/or movement of citizens in public places resulting in a breach of public order.

Officially, the law on public assemblies aims to protect society from radicalism. According to the explanatory note to the law on public assemblies, the aim of the law is to strike a necessary balance between the right to freedom of peaceful assembly guaranteed to organisers and other participants at public assemblies, and the constitutional rights of other citizens who can experience various harms and difficulties as a result of public assemblies.[1042] Restricting freedom of assembly is ideologically justified as "protecting" society from various harms and dangers and protestors are construed as radicals endangering the wellbeing of society.

Various international fora focusing on human rights law and constitutional law have expressed concerns about the legislation. In the assessment of the PACE, the Law on Public Assemblies is regressive in terms of democratic development.[1043]The Venice Commission has recommended that Russia should allow peaceful spontaneous assemblies and urgent assemblies as well as simultaneous and counter demonstrations as long as they do not pose direct threats of violence or serious danger to public safety. In their assessment, the grounds for restrictions on assemblies should be narrowed to allow application of the principle of proportionality in order to bring them in line with Article

[1040] When the organiser cannot act as organiser and when the chosen venue is prohibited under the law (*Ibid*, Article 12 para. 3).

[1041] *Ibid*, Article 1.

[1042] Poyasnitel'naya zapiska k proyektu federal'nogo zakona "O vnesenii izmeneniy v Kodeks Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh i Federal'nyy zakon "O sobraniyakh, mitingakh, demonstratsiyakh, shestviyakh i piketirovaniyakh".

[1043] Parliamentary Assembly. Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights* (n 27).

11(2) of the ECHR. The Venice Commission has noted that the reasons for suspension and termination of assemblies should be limited to public safety or a danger of imminent violence. The Venice Commission recommended that the obligations of organisers be reduced to exercising due care and to narrow blanket restrictions on the time and place of public events. [1044]

However, contrary to those recommendations, Russian legislators have further harshened the legislation pertaining to the right to freedom of assembly. In July 2014 the Russian Criminal Code was amended and repeated violation[1045] of the rules on public assemblies was criminalized. Pursuant to Article 212.1 of the Russian Criminal Code, repeated violations of the established rules for organizing or holding public gatherings, meetings, rallies, marches, and pickets are punishable by up to five years' imprisonment. This amendment has received widespread criticism among human-rights defenders both in Russia and abroad. Article 212.1 of the Criminal Code violates the constitutional right to freedom of assembly as it establishes criminal prosecution not only for acts of violence and other illegal acts, but also for legitimate exercise of the right to freedom of assembly, claims Amnesty International.[1046] According to Amnesty International, many of the "established rules" for organizing public assemblies such as the requirement to notify the authorities and to receive their approval before the assembly or establishing administrative punishments for failure to notify or gain approval "are inconsistent with the freedom of peaceful assembly and expression *per se* and hence non-compliance with them should not be regarded and penalised as an administrative violation."[1047] Article 212.1 of the Criminal Code has been used to prosecute several opposition members and civil society activists and has been upheld by the Constitutional Court, although the Constitutional Court has offered its clarifications for implementing this provision.[1048]

7.3. Assembly regulations in the interpretation of the Russian Constitutional Court

The Constitutional Court of the Russian Federation has upheld the majority of the amendments made to legislation restricting the right to freedom of assembly in 2012 and 2014. However, it has also provided some meaningful analysis and clarifications lacking in the very vaguely drafted legislation.

[1044] Venice Commission, Opinion on federal law no. 65-fz (n 1024).

[1045] More than three violations within 180 days.

[1046] Amnesty International, 'Russian Federation: Constitutional Court ruling – an opportunity to annul criminalisation of "unauthorised" peaceful protest' (23 January 2017) <https://www.amnesty.org/en/documents/eur46/5542/2017/en/> accessed on 19 December 2017.

[1047] *Ibid.*

[1048] See Section 7.2 of this study.

In its judgment of 12 May 2012 the Constitutional Court analysed the constitutionality of several provisions of the Code of Administrative Infringements and the Law on Public Assemblies enacting new obligations for the organizers of public events. Russian citizen S.A. Katkov, an organizer of a public event in Tula, was fined for breach of the established procedure for holding public events as he allowed 300 people to participate instead of 150, which he proposed in the notification submitted to the administration of the city of Tula in accordance with the requirements of the Law on Public Assemblies. Referring to the aims of establishing civil peace and consent proclaimed in the preamble to the Constitution of the Russian Federation, the Constitutional Court stressed that as public events can touch upon the rights of a broad spectrum of persons, state protection is guaranteed only to holding peaceful public gatherings and this right may be restricted by federal law in accordance with criteria predetermined by the requirements of Article 17 (part 3), 19 (part 1 and 2) and 55 (part 3) of the Constitution, on the basis of the principle of legal equality and the principle of proportionality, i.e. to the extent that this is necessary in order to protect the fundamentals of the constitutional order, morality, health, the rights and lawful interests of others, national defence and state security.[1049] The court held that the contested provisions were in accordance with the Constitution as the non-concordance of the actual number of participants with the number initially proposed can be a ground for the administrative liability of the organizer only when non-concordance arising through the fault of the organiser constituted a real threat to public order and/or public safety and to the security of participants and non-participants as well as damage to the property of individuals or corporate entities.[1050] However, the Court did not explain what the real threat was in the current case.

In his dissenting opinion, Judge V.G. Yaroslavtsev argued that whereas the organiser of a public event undoubtedly must thoughtfully and in a balanced manner determine the potential number of participants, despite all the conscientious efforts of the organiser, the number of participants may still increase due to various factors, including ill-considered actions and careless statements by state authorities.[1051] Moreover, he stressed that the mere fact that the proposed number of participants is exceeded does not in itself constitute a real threat to lives, health or property, when public authorities take adequate measures for the public event to take place and do not counteract. Judge Yaroslavtsev argued: "Otherwise, we would have to conclude that the people, the country's citizens peacefully participating in a public event, are themselves a real threat to the State and society". According to Yaroslavtsev's position, the contested provisions from the outset place organisers and participants in the position of guilty

[1049] Russian Constitutioal Court, No. 12-P/2012 (12 May 2012) Section 2.

[1050] *Ibid*, Section 1 of the resolutive part.

[1051] Dissenting opinion of Judge V.G. Yaroslavtsev to the judgment of the Constitutional Court No. 12-P/2012 (12 May 2012).

party, which violates citizens' constitutional right to legal protection (Article 46 paragraph 1 of the Russian Constitution) and is unconstitutional.[1052] The words of Judge Yaroslavtsev were in many ways prophetic, as during the past few years there has been a wave of arrests and convictions of peaceful protesters, as they have been considered a threat to the state and society.

Another case was brought to the Constitutional Court by a group of deputies of the Russian State Duma who challenged the constitutionality of Federal Law no. 65-FZ of 8 June 2012 due to flaws in its adoption procedure, such as violations of established timeframes and other substantial infringements[1053] as well as due to the unconstitutional content of several provisions. The deputies argued that a number of provisions were unconstitutional as they provided for extreme increases in the amounts of administrative fines for infringing the established procedure for organising and holding public events; enacted extremely lengthy administrative punishments in the form of compulsory community work; provide for imposing on the organiser of a public event obligations that are impossible to fulfil in practice (taking measures to prevent the anticipated number of participants announced in the notice of holding of the event from being exceeded) and for the organiser's liability for not fulfilling this obligation, the establishment of which furthermore entails the danger that the announced number of participants in a public event may be exceeded as a result of provocation by those opposing the holding of the event; make the organiser of a public event liable for damage caused by participants, essentially shifting onto that person the entire responsibility for any excesses during the holding of the public event without taking account of the fact that upholding order during assemblies, rallies, demonstrations, marches and picketing requires the special/specific knowledge, skills and powers intrinsic to police work; establish a ban on organising public events on an individual who has been prosecuted in a court on two or more occasions for administrative infringements related to organising and holding public events.[1054]

In its judgment The Constitutional Court extensively referred to the case law of the ECtHR emphasizing freedom of assembly as a fundamental right and a

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[1052] *Ibid*.

[1053] The deputies argued that the draft law was not sent for comment to the legislative/representative and highest executive authorities of Russian Federation constituent entities; the bill passed at its first reading, underwent a fundamental revision at its second reading; the procedure for examining the draft was violated as during the second reading the period of speaking time for the authors of amendments was shortened twice and at its third reading the draft law was adopted without presenting the final text to deputies. Due to violations of established timeframes the entire legislative procedure in the State Duma took 26 days instead of the set minimum of 112 days. See further: Russian Constitutional Court, No. 4-P (14 February 2013), Section 1.1.

[1054] Russian Constitutional Court, No. 4-P (14 February 2013) Section 1.1.

basis of a democratic society[1055], explaining the state's obligation to refrain from arbitrary measures capable of interfering with the right to assemble peacefully[1056] and the need to express tolerance towards public assemblies even when they cause disturbances such as traffic problems "since the freedom of assembly would otherwise be made devoid of substance".[1057] The Constitutional Court expressed that interference with the freedom of peaceful assembly violated article 11 of the ECHR unless it was prescribed by law, had one or more legitimate aims and was necessary in a democratic society. The Court also noted that states have positive obligations to secure effective enjoyment of the right to freedom of assembly.[1058] Referring to the ECtHR[1059] the Court emphasized that the special importance of the right to participate at peaceful public assemblies implies that participants may not be punished, even in the mildest form, for participating in a public event that was not banned, provided that they themselves did not commit any culpable actions. The Constitutional Court also highlighted the principle of inadmissibility of engaging the liability of organisers of public events for the actions of participants, which is enacted in the OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly.[1060]

The Constitutional Court also stressed that although exercising the right to freedom of assembly is linked with various risks, which are likely to materialize when organisers of public events fail to fulfil their obligations, due to the

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[1055] See: *Kokkinakis v Greece* (App 14307/88) ECtHR 25 May 1993; *Djavit An v Turkey* (App 20652/92) ECtHR 20 February 2003; *Kuznetsov v Russia* (App 10877/04) ECtHR 23 October 2008.

[1056] *Barankevich v Russia* (App 10519/03) ECtHR 26 July 2007.

[1057] Russian Constitutional Court, No. 4-P (14 February 2013) Section 2. Referring to: *Galstyan v Armenia* (App 26986/03) ECtHR 15 November 2007; *Akgöl and Göl v Turkey* (Apps 28495/06, 28516/06) ECtHR 17 May 2011; *Berladir and others v Russia* (App 34202/06) ECtHR 10 July 2012.

[1058] Russian Constitutional Court, No. 4-P (14 February 2013) Section 2. Referring to: *Wilson, National Union of Journalists and others v The United Kingdom* (Apps 30668/96, 30671/96, 30678/96) ECtHR 2 July 2002; *Ouranio Toxo and others v Greece* (App 74989/01) ECtHR 20 October 2005; *Alekseyev v Russia* (Apps 4916/07, 25924/08, 14599/09) ECtHR 21 October 2010

[1059] *Ezelin v France* (App 11800/85) ECtHR 26 April 1991; *Kuznetsov v Russia* (App 10877/04) ECtHR 23 October 2008.

[1060] According to the Guidelines (see: Venice Commission (n 1017) the organisers should not be liable for the actions of individual participants or for the actions of non-participants or agents provocateurs. Instead, there should be individual liability for any individual who personally commits an offence (para 5.7); organisers should not be liable for the actions of individual participants or of stewards, who must bear individual liability if they commit an offence or fail to carry out the lawful directions of lawenforcement officials (para 197); if an assembly degenerates into serious public disorder it is the responsibility of the State – not the organisers or event stewards – to limit the damage caused. In no circumstances should the organisers of a lawful and peaceful assembly be held liable for disruption caused to others (para 198).

fundamental importance of freedom of assembly, the state must refrain from introducing sanctions against the organisers obliging them to bear civil liability for damage caused by other participants of a public event regardless of the presence (or absence) of the organiser's guilt in causing such damage. [1061] It can be seen from the judgment that in its judgment the Russian Constitutional Court the Court extensively referred to the standards established by the ECtHR. However, despite mentioning the case law of the ECtHR, these references had no influence on the Court's argumentation in analysing whether the contested provisions were in accordance with the Constitution.

The Court held that banning individuals prosecuted in an administrative court on two or more occasions for administrative infringements – during a period when that person was subject to administrative punishment from organizing public events – was in accordance with the Constitution. In the Court's opinion "it does not prevent such persons from requesting other citizens, political parties and public associations to organise such events and does not deprive them of the possibility of participating in public events".[1062] While analysing the 14 February 2013 judgment of the Constitutional Court, the Venice Commission noted that organizing public assemblies constituted an important part of the right to assemble peacefully and as a result, depriving a person of the right to organize public events must be justified by "compelling reasons".[1063] In the assessment of the Venice Commission, considering breaches of administrative provisions as a ground for such a blanket ban is a disproportionate restriction of the right of freedom of assembly. In their opinion, the reasoning of the Constitutional Court does not meet the requirements of Article 55(3) of the Russian Constitution as no distinction is made between severe and minor offences.[1064] The Venice Commission concluded that such a blanket ban is not a legitimate restriction under the terms of article 11(2) ECHR.[1065]

The Constitutional Court also held that that the provision banning promotion[1066] of a public event from the time of submitting notice until the time of

[1061] Russian Constitutional Court, No. 4-P (14 February 2013) Section 2.4.

[1062] Russian Constitutional Court, No. 4-P (14 February 2013) Section 1 of the resolutive part.

[1063] Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 11.

[1064] *Ibid*, para 16–18.

[1065] *Ibid*, para 19.

[1066] The Court draws a line between "informing" and "promoting". Promoting was interpeted by the Constitutional Court in Judgment no. 15-P of 30 October 2003 as pursuing the aim of inciting citizens and their associations to take part in a public event. Informing is interpreted as enabling organisers "to provide timely information to potential public event participants on a planned rally, demonstration, march or picketing and also, where necessary, on the process of its agreement. In providing such early warning, the organiser of a public event is entitled to disseminate information through any means on the aims, form and announced place and time of the event, the anticipated number of participants and other details of the public event; however, that information must not contain invitations or incitements to take part in it".

reaching an agreement with the authorities regarding the place and/or time for holding the public event, does not contravene the Constitution as it does not introduce an authorisation procedure for organising public events, nor does it prevent informing potential participants of the "proposed aims, form, place, time and other conditions relating to the holding of it prior to agreement on the place and/or time for holding the event"[1067]. The Venice Commission has held that this interpretation is problematic, as enabling promotion only after agreement is reached with the authorities enables the authorities to hamper the campaigning and organizing process by delaying its decision and it is possible that in many cases there is not sufficient time to promote the assembly effectively[1068] Moreover, the distinction between informing and promoting is not defined in the law and such vagueness may lead to arbitrary decisions limiting the capacity of organisers to advertise their events. [1069]According to the Venice Commission the "notice" procedure is in substance a request for authorisation or permission giving the authorities wide discretion to restrict public events.[1070]

In the assessment of the Constitutional Court, obliging the organiser of a public event to take measures in order to prevent exceeding the number of participants initially announced, when exceeding that number creates a threat to public order and/or public safety, the safety of the participants or other persons or a risk of damage to property, and establish the liability of the organiser for the failure to do so[1071] were in accordance with the Constitution. According to the Court's explanation, these provisions assume that the organiser of a public event uses all the means available to ensure that the number of participants in the public event corresponds to the number of participants announced in the notice of holding the event and that the organiser can be held liable only when exceeding the number of participants initially announced and the creation thereby of a threat to public safety and order were caused directly by the organiser's actions or failure to act [1072].

The Venice Commission considers it unrealistic to assume that an organiser could foresee the number of participants and finds that it is disproportionate to require the organiser to take measures, especially when it is unclear what measures, to prevent exceeding the proposed number of participants or to punish the organizer for failing to do so. Liability should only follow when the organizer intentionally provided false information when estimating the possible number of participants or impeded the authorities from taking measures "in order to keep the number of participants within the holding capacity of the place

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[1067] Russian Constitutional Court, No. 4-P (14 February 2013) Section 2 of the resolutive part.

[1068] Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 34.

[1069] *Ibid,* para 35.

[1070] *Ibid,* para 36, 37.

[1071] Law amending the law on public assemblies (n 1034) Article 1, para 7; Article 1, para 2 в.

[1072] Russian Constitutional Court, No. 4-P (14 February 2013) Section 3 of the resolutive part.

of the assembly during the event and that this caused a threat to public order."[1073] The Venice Commission recommended excluding responsibility of the organiser for the number of participants at a public event.[1074]

Obliging one-person picketers to have a minimum of fifty metres distance between them and establishing a possibility to declare individual picketing actions "united by a single concept and overall organization" by a court ruling as a public event[1075] were also declared constitutional. The Court found that such regulations "are intended to prevent abuses of the right not to notify the public authorities of the holding of a one-person picket, they do not rebut the presumption of lawfulness of the actions of a citizen observing the established procedure for holding a one-person picket, and they intend the sum total of individual pickets to be declared as one public event only on the basis of a court decision and only where it is established by the court that these pickets were from the outset united by a single concept and overall organisation and do not amount to a coincidental coming together of actions of individual pickets".[1076] The Venice Commission criticized that conclusion, because when a person is conducting a single-person picket, he or she cannot possibly assess whether their *a priori* lawful conduct (picketing without prior notice) amounts to an administrative offence in the assessment of the court. In the assessment of the Venice Commission, the interpretation of the Constitutional Court is incompatible with the requirement of legality of interference with fundamental rights and freedoms.[1077]

The Constitutional Court also held that the provisions establishing administrative liability for violating the procedure for organising or holding a public event, when it results in a breach of public order and damage, were constitutional.[1078] The Court explained that these provisions imply that administrative liability is incurred only where there is a causal link between the unlawful actions or failure to act by the organiser of a public event or other mass event resulting in a breach of public order and damage.[1079] However, these conclusions are problematic for several reasons. The Venice Commission noted that it is inevitable that a mass presence of people entails some consequences, such as harm to green spaces or disturbing the traffic or the movement of pedestrians.

[1073] Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 24.

[1074] *Ibid*, final recommendations.

[1075] Law amending the law on public assemblies (n 1034) Article 7 para. 1.

[1076] Russian Constitutional Court, No. 4-P (14 February 2013) Section 5 of the resolutive part.

[1077] Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 31.

[1078] Law amending the law on public assemblies (n 1034)), Article 1, para 7 and 8. Examples of these events are sport events, concerts, flash mobs. See also: Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 56.

[1079] Russian Constitutional Court, No. 4-P (14 February 2013) Section 10 of the resolutive part.

Sanctioning organization of a public event which results in some harm to green spaces or that disturbs traffic is a disproportionate interference with the right to freedom of assembly and deters people from organizing activities in matters of public interest.[1080]

Establishing administrative fines of up to three hundred thousand roubles for citizens and up to six hundred thousand roubles for officials for the administrative infringements[1081] were held as conforming to the Constitution. However, provisions establishing the minimum amount of fines for administrative infringements at ten thousand roubles for citizens and fifty thousand roubles for officials were declared unconstitutional, as such a minimum in many cases exceeds the average monthly wage and the provisions "do not make it possible to take the fullest account of the nature of the infringement committed or the material circumstances of the offender, as well as other circumstances of essence to the individualisation of liability and thereby to guarantee the imposition of fair and commensurate punishment."[1082] The Venice Commission noted that the Court should have clearly demanded lowering the minimum and maximum amounts substantially.[1083] Whereas states have the right to require authorization of public assemblies and they may sanction those who do not comply with the requirements, the sanctions must be foreseen by the law, and be proportionate to the legitimate aim pursued.[1084] Dramatically increased fines can severely affect the revenue of the individual concerned, as the average income in 2011 was of RUR 20 702,721 and the new maximum fines correspond to 14,5 and 29 times the average monthly income respectively, as noted by the Venice Commission.

The Constitutional Court also declared some other provisions of the Law on Public Assemblies unconstitutional. The Court held that making the organizer of a public event liable for damage caused by participants was unconstitutional as this provision implied that the organiser of a public event incurred civil liability for damage caused by participants irrespective of demonstrating due care for upholding public order and irrespective of lack of fault. An obligation to indemnify damage even when the organiser's actions or failure to act was not linked to causing the damage is not in accordance with constitutional principles of legal liability, including fairness, adequacy and proportionality and it could have a deterrent effect on exercise of the right to freedom of peaceful assembly."[1085] The Venice Commission notes that the organizer of any public

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[1080] Venice Commission, Opinion on federal law8no. 65-fz (n 1024) para 57.

[1081] Law amending the law on public assemblies (n 1034) Article 1, paras 3, 6, 7, 8, 9 and 10.

[1082] Russian Constitutional Court, No. 4-P (14 February 2013) Section 7 of the resolutive part.

[1083] Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 49.

[1084] *Ibid,* paras 50, 54. See also: *Berladir and others v Russia* (App 34202/06) ECtHR 10 July 2012, para 41; *Ziliberberg v Moldova* (App 61821/00) ECtHR 1 May 2005; *Rai and Evans v the United Kingdom* (Apps 26258/07, 26255/07) ECtHR 17 November 2009, paras 50, 54.

[1085] Russian Constitutional Court, No. 4-P (14 February 2013) Section 2.4 and Section 4 of the resolutive part.

event has limited powers and cannot be required to exercise police power. Ensuring public order is primarily the duty of law enforcement bodies, not the duty of an organizer, who can only be expected to exercise due care.[1086]

Additionally, allowing the executive to define specially designated sites for holding public events was held unconstitutional as it does not "establish statutory criteria guaranteeing observance of equal legal conditions for citizens' exercise of their right to freedom of peaceful assembly…giving rise to the possibility of differing interpretations and, consequently, arbitrary application".[1087] Considering such specially designated sites in principle permissible, the Court advised that "when determining specially designated sites for the holding of public events, the executive authorities of a Russian Federation constituent entity must take as a premise the necessity for such sites in at least every urban district and municipal district".[1088] According to the reasoning of the Constitutional Court, the provision was unconstitutional because it failed to establish clear statutory criteria for the executive authorities in determining such sites. The Venice Commission has assessed that such designated places are acceptable only when they facilitate the exercise of freedom of assembly, when they clearly provide an additional option for holding public events, not the only option for holding public assemblies.[1089] In the current case, other venues for holding public events are exceptions requiring special justification and such regulation effectively "removes the autonomy of the organiser to choose the location of the public event".[1090]

Another noteworthy case pertaining to the right to freedom of assembly is the case of Ildar Dadin, a Russian civil society activist, who was the first person convicted of participating at public protests. Dadin participated at various rallies and was arrested and fined five times from August 2014 to January 2015. In December 2015 Ildar Dadin was prosecuted and convicted under Article 212.1 of the Criminal Code and sentenced to three years of imprisonment for participating in four unauthorised public assemblies. Later the appellate court reduced the sentence to two-and-a-half years. Dadin was accused of repeatedly breaching the laws regulating the organisation and conduct of gatherings, rallies, demonstrations, marches and pickets. In September 2016 Dadin's lawyers submitted a complaint to the Constitutional Court. They claimed that Article 212.1 of the Criminal Code violated the constitutional right to peaceful assembly and freedom of expression. On 10 February 2017 the Constitutional Court issued its ruling and held that Article 212.1 was in accordance with the Constitution; however, implementation of this provision should be specified and limited. The

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[1086] Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 26.

[1087] Russian Constitutional Court, No. 4-P (14 February 2013) Section 6 of the resolutive part.

[1088] *Ibid.*

[1089] Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 39.

[1090] *Ibid,* para 40.

Court ordered that the criminal case against Dadin be dismissed, and that he be released and granted him the right to compensation.[1091]

The Constitutional Court explained that public authorities have to react to the organization and holding of various assemblies in a neutral way and to provide conditions for realizing the right to peaceful assembly "irrespective of the political views of their organizers and participants."[1092] Legislative, administrative, organizational and other efforts have to be aimed at creating conditions for lawful exercise of rights and "must not lead to excessive control over the activity of organizers and participants of public events".[1093] Restricting the right to freedom of assembly may not "encroach upon the very essence of this constitutional right" and may not "hinder open and free expression of citizens' views, opinions and demands", as noted by the Constitutional Court.[1094] Moreover, the federal legislator "must avoid excessive use of criminal-law repression".[1095] The Court referred to the practice of the ECtHR, explaining that an unlawful situation does not necessarily justify use of punitive measures by the authorities and that peaceful demonstrations in principle do not fall under the threat of criminal sanction. Even when the actions of participants or organisers of public assemblies are formally unlawful, measures applied to them "must not pursue the object of averting the wider public from visiting assemblies and demonstrations and thereby from open political discussion."[1096]

However, the Court found that introducing criminal liability for multiple breaches of the established order or organizing or holding public assemblies "if equivalent to the character and degree of public danger of an action falling under it" does not constitute excessive criminal coercion and does not overstep the discretionary powers of the federal legislator.[1097]

Thus, in the interpretation of the Constitutional Court, Article 212(1) of the Criminal Code does not contradict the Constitution of the Russian Federation. Although the Constitutional Court found that Article 212.1 of the Criminal Code is not unconstitutional, it stressed that breaching the established order for organizing or holding a public assembly and having been punished administratively at least three times during one hundred and eighty days is not sufficient ground for criminal liability under Article 212.1 of the Criminal Code. A person can be convicted under Article 212.1 only when violations cause "damage to citizens'

[1091] Russian Constitutional Court, No. 2-P (10 February 2017).

[1092] *Ibid* Section 2.

[1093] *Ibid.*

[1094] *Ibid.*

[1095] *Ibid* Section 4.1.

[1096] *Ibid* Section 5. Referring to *Pekaslan and others v Turkey* (Apps 4572/06, 5684/06) ECtHR 20 March 2012; *Yilmaz Yildiz and others v Turkey* (App 4524/06) ECtHR 14 October 2014; *Kudrēvičius and others v Lithuania* (App 37553/05) ECtHR 15 October 2015; *Kasparov and others v Russia (No. 2)* (App 51988/07) ECtHR 13 December 2016.

[1097] Russian Constitutional Court, No. 2-P (10 February 2017) Section 5.

health, property of natural or legal persons, environment, public order, public safety, and other constitutionally guarded values or contained a real threat of causing it." A violation that does not cause a threat or harm to constitutionally protected values also does not represent a criminal public danger so that criminal liability in this case would contradict Articles 17 (1) and (3), 19 (1) and (2), 31 and 55 (3) of the Constitution, the Court explained.[1098] Moreover, the Constitutional Court also noted that there must be a deliberate intention to commit an offence.

Hence, as explained by the Constitutional Court, imposing criminal liability under Article 212.1 requires at least three administrative offences falling under the scope of Article 212.1; the violations must have caused damage to health, property, the environment, public order or public safety. Moreover, there must be a deliberate intention to commit an offence.

7.4. The right to freedom of assembly in Russia as interpreted by the ECtHR

The ECtHR has stated that the mere existence of a risk is insufficient for banning a peaceful assembly: the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes.[1099] Several people convicted of participating in the mass disorders at Bolotnaya square have turned to the ECtHR, which delivered its first judgment in a case related to the Bolotnaya demonstration on 15 September 2015 in the case of *Kovyazin and Others v. Russia.*[1100] The case concerned the arrest and pre-trial detention of three applicants: Leonid Kovyazin, Artem Savelov, and Ilya Gushchin following their participation in a demonstration on 6 May 2012 at Bolotnaya Square in Moscow against the allegedly rigged presidential elections. All three applicants were charged with participation in mass disorders, the second and third applicants were also charged with having committed violent acts against police officers. According to the facts of the case, the march ("March of millions") followed by a meeting at Bolotnaya Square was registered with the local authorities. However, the police closed off the meeting and several clashes occurred between participants and police. The Investigative Committee of the Russian Federation opened criminal proceedings to investigate the mass disorders and violent acts against the police.[1101] The applicants contested the violent nature of their behaviour, denied

[1098] *Ibid.*

[1099] *Barankevich v. Russia*, Application No. 10519/03, 26 July 2007, para. 33.

[1100] *Kovyazin and others v Russia* (Apps 13008/13, 60882/12, 53390/13) ECtHR 17 September 2015.

[1101] Article 212 para 1 and 2 and Article 318 para 1 of the criminal code.

characterizing the demonstration as mass disorders and considered the charges against them political rather than criminal.

The domestic courts, relying on the gravity of the charges and the likelihood that the applicants would abscond or tamper with witnesses, interfere with the administration of justice and considering certain dangerous features of the applicants' personalities revealed by the very nature of their offences established very lengthy pre-trial detention periods:[1102] one year and three months, one year and six months and one year and eight months. The applicants complained that their detention was not based on a reasonable suspicion of having committed an offence as required by Article 5(1) of the ECHR, that holding them in custody for such lengthy periods had not been justified by relevant and sufficient reasons and that while refusing all their requests for alternative preventive measures the Russian courts had failed to take into account various important facts, such as that the applicants had had no criminal record, had permanent places of residence and stable family backgrounds. The ECtHR emphasized that considering such extended periods of detention "the Russian authorities were required to put forward very weighty reasons"[1103] and that continued detention is justified only if there are "actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention."[1104]

The ECtHR was not convinced by the "gravity argument" and assessed that despite the domestic classification, the behaviour imputed to the applicants during the investigation such as shouting political slogans, breaking through a police cordon or upsetting portable lavatories was not of a kind usually considered so serious as in itself to justify pre-trial detention.[1105] The ECtHR held that while extending the detention periods, the Russian courts ignored relevant facts such as clean criminal record, permanent place of residence and numerous positive references and personal guarantees. There was no evidence of influencing witnesses or intention to abscond and the courts failed to give reasons for dismissing the applicants' requests for an alternative preventive measure.[1106] The ECtHR held that there had been a violation of Article 5 § 3 of the Convention as regards each applicant.[1107]As noted by the ECtHR:

> The domestic courts inferred the risks of absconding, reoffending or interfering with the proceedings essentially from the gravity of the charge against the applicants. By failing to address specific facts underpinning the existence of such risks or consider alternative preventive measures and by relying essentially

[1102] *Kovyazin and others v Russia* (Apps 13008/13, 60882/12, 53390/13) ECtHR 17 September 2015 para 81 and 88.

[1103] *Ibid,* para 80.

[1104] *Ibid*, para 76.

[1105] *Ibid,* para 84.

[1106] *Ibid,* para 91.

[1107] *Ibid,* para 94.

> on the gravity of the charges, the courts extended the applicants' detention on grounds, which cannot be regarded as relevant and sufficient in order to justify the length of the detention; these omissions only aggravated as the proceedings progressed.[1108]

The ECtHR has examined similar problems with the courts' reasoning on numerous previous occasions. The ECtHR observed that while examining previous applications against Russia pertaining to infringements of Article 5(3) of the ECHR the Court has each time noted the failure of Russian courts to provide "sufficient and relevant grounds for applicants' detention"[1109]. The Court referred to several deficiencies in the arguments used by the Russian courts to authorise keeping an applicant in custody, such as:

Reliance on the seriousness of the charges as the primary source to justify the risk of the applicant absconding; reference to the applicant's travel passport, financial resources and the fact that his alleged accomplices are on the run as the basis for the assumption that he would follow suit; a suspicion, in the absence of any evidence, that he would interfere with witnesses or use his connections in state bodies to obstruct justice; and a failure to thoroughly examine the possibility of applying another, less rigid preventive measure, such as release on bail.[1110]

Despite numerous violations of Article 5 § 3 in similar cases, the Russian courts still continue to use a similar pattern of reasoning and still put people in custody without sufficient and relevant grounds. This refers to the reluctance of the courts to follow the standards set by the ECtHR. It is likely that these problems are related to the lack of independence of Russian courts, discussed in Section 2.2 of this study. The majority of the judgments of the Constitutional Court that I have analysed in this study seem to follow the underlying logic of the state institutions, in turn raising strong doubts about the independence of the judiciary. These factors also contribute to lack of trust in the Russian court system and prevailing legal nihilism discussed in Section 4.2.2 of this study.

When in *Kovyazin and Others v. Russia* the ECtHR did not focus on freedom of assembly (as the case focused on Article 5 of the ECHR), the Court analysed the aspects directly related to the right to freedom of assembly in the case of *Frumkin v Russia* of 5 January 2016.[1111] Applicant Frumkin alleged a violation of his rights to peaceful assembly, freedom of expression and liberty and the right to a fair hearing. Frumkin was arrested on 6 May 2012 at Bolotnaya Square in Moscow and sentenced to fifteen days' administrative detention. Frumkin was arrested as arguably he was obstructing the traffic and had disregarded a police

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[1108] *Ibid,* para 93.

[1109] See, for example: *Khudoyorov v. Russia* (App 6847/02) ECtHR 8 November 2005); *Dirdizov v Russia* (App 41461/10) ECtHR 27 November 2012, para 108.

[1110] *Kovyazin and others v Russia* (Apps 13008/13, 60882/12, 53390/13) ECtHR 17 September 2015 para 93.

[1111] *Frumkin v Russia* (App 74568/12) ECtHR 5 January 2016.

order to leave the premises. Frumkin argued that he had peacefully participated in an authorised public assembly and was arrested during the hours of the authorized assembly without any warnings or orders by the police that he could have disobeyed. He claimed that he had been arrested merely for his presence at the site in order to discourage him and others from participating in opposition rallies and complained that the Russian courts had ignored all his arguments and evidence. He considered his arrest as unlawful, lacking a legitimate aim and not necessary in a democratic society, thus in violation of Article 11 of the ECHR.[1112]

Frumkin claimed that he heard police orders issued through a megaphone to vacate the venue, but he was unable to do so due to general confusion and as he was not aware that the meeting was terminated, he remained in the area until 7 p.m., when the meeting was supposed to end. He also claimed that at the time of his arrest there was no traffic at Bolotnaya Square, as traffic was suspended due to the demonstration. The applicant was taken to the Krasnoselskiy District police station in Moscow and on 7 May 2012 the applicant was taken to court, but his case was not examined and he was taken back to Krasnoselskiy District. A new order for the applicant's administrative detention was issued. On 8 May 2012 Frumkin was found guilty of disobeying lawful police orders, and was sentenced to fifteen days' administrative detention. On 11 May 2012 the Zamoskvoretskiy District Court of Moscow examined Frumkin's appeal and examined a witness testifying that at the time when Frumkin had been arrested the premises had been cordoned off but traffic was suspended. The court rejected Frumkin's claims that the time of his arrest was incorrectly marked as well as other materials presented by the applicant and upheld the first-instance judgment. The judgment was also upheld by the Moscow City Court on 11 January 2013.

Applicant Frumkin complained that crowd-control measures taken by the police and altering the original meeting layout without informing the organisers or the public had caused unnecessary tensions between the protestors and the police and that these measures were not aimed at ensuring the peaceful conduct of the assembly, but at limiting and suppressing it. He also argued that the authorities failed to facilitate peaceful co-operation with the organizers and that rising tensions were used as a pretext to terminate the meeting and to disperse it without clearly informing participants of the termination of the event. He also referred to domestic law requiring the police to suspend the assembly first and to give the organisers time to remedy any breach prior to termination.[1113]

Security measures on the one hand restrict exercise of the right to freedom of assembly, but on the other hand the authorities have positive obligations that include ensuring the peaceful conduct of the assembly and the safety of all citizens. The duty to communicate with assembly organisers is an essential part

[1112] *Ibid* para 92.

[1113] *Ibid* para 88–91.

of the authorities' positive obligations, as stressed by the ECtHR.[1114] The Court referred to the Venice Commission Guidelines on Freedom of Peaceful Assembly recommending negotiation or mediated dialogue in order to resolve disputes during the course of an assembly.[1115] In the case at hand the police authorities did not provide for a reliable channel of communication with the organisers before the assembly and failed to respond to real-time developments in a constructive manner. [1116] According to the Court's assessment "the authorities made insufficient effort to communicate with the assembly organisers to resolve the tension caused by the confusion about the venue layout. Failure to take simple and obvious steps at the first signs of conflict allowed it to escalate, leading to disruption of a previously peaceful assembly."[1117] The ECtHR held that as not even the minimum requirements for ensuring safe and peaceful assembly were complied with by the authorities, the authorities did not follow their positive obligation and Article 11 was violated.[1118]

While discussing the applicant's arrest, pre-trial detention and administrative penalty imposed, the ECtHR reasoned that "the severity of the measures applied against the applicant is entirely devoid of any justification" as the measures were grossly disproportionate to the aim pursued. The applicant was not accused of violent behaviour, and there was no pressing social need to arrest him and sentence to a prison term.[1119] The Court also noted that such severe measures deter people from participating in protest rallies and in open political debate and engaging in opposition politics in general, especially as they were taken against a large number of people.[1120] The ECtHR also held that there had been a violation of Article 5 § 1 of the Convention as no explicit reasons were given by the authorities for detaining the applicant for thirty-six-hours pending the hearing of his case by a Justice of the Peace, making the detention unjustified and arbitrary.[1121]

Again, in the case of *Yaroslav Belousov v. Russia* of 4 October 2016 the ECtHR held that Russia violated its obligations under Article 11 of the ECHR and other Articles of the ECHR. Yaroslav Belousov participated at the 6 May 2012 demonstration in Bolotnaya Square, was arrested and found guilty of failure to obey lawful police orders. Belousov claimed that he did not participate in any disorder or clashes with the police, although he threw a small yellow object in the direction of the police. On 18 June 2012 charges were brought against Belousov under Articles 212 § 2 (participation in mass disorder) and

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[1114] *Ibid* 102, 129.

[1115] Venice Commission (n 942) para 5.4.

[1116] *Frumkin v Russia* (App 74568/12) ECtHR 5 January 2016, para 127, 129.

[1117] *Ibid* para 128.

[1118] *Ibid* para 129, 130.

[1119] *Ibid* para 140.

[1120] *Ibid* para 141.

[1121] *Ibid* para 150–151.

318 § 1 (violence against a public official) of the Criminal Code. Belousov was kept in pre-trial detention for more than twenty months and subsequently sentenced to a prison term of two years and three months. Belousov was released on 8 September 2014 after serving his prison term.[1122]

According to the ECtHR there was no "pressing social need" to sentence Belousov to a prison term of two years and three months. Such severe punishments can have a chilling effect on civil society as they discourage the Russian people from attending demonstrations and from participating in open political debate, as emphasized by the Court. The chilling effect can be especially great when the case is widely covered in the media, which was the case with *Belousov v. Russia*.[1123] The ECtHR concluded that the severe sanction imposed on Belousov was "grossly disproportionate to the legitimate aims of preventing disorder and crime and the protection of the rights and freedoms of others, and it was therefore not necessary in a democratic society"[1124]

Despite the rulings of the ECtHR that found several violations by the Russian state in ensuring the right to peaceful assembly, trials against Bolotnaya protestors and other protestors are ongoing. In December 2015 the Zamoskvoretsky District Court of Moscow sentenced another protestor, Ivan Nepomnyashchikh, to two and half years in prison. He was found guilty of participation in mass riots in Bolotnaya and using force against police officers. On 26 April 2016 the Moscow City Court upheld the judgment.[1125]

7.5. Analysis and conclusions

This chapter examined how the right to freedom of assembly is incorporated in the Russian legal order and implemented in practice and what are the implications of the relevant legislative amendments for civil society.

It derives from my analysis that legislation establishing strict rules and administrative and criminal punishments for organising and participating in public assemblies is not in accordance with the standards of the ECHR. The right to freedom of assembly is not effectively incorporated in the Russian legal order. The legislative amendments have further discouraged Russians from participating in open political debate and from demanding their rights. As a result of these legislative amendments, Russians are deprived of one important possibility to influence the Russian authorities and to foster peaceful dialogue between civil society and the state. The political rhetoric used to justify these legislative amendments frames protesting as unpatriotic and dangerous behaviour that

[1122] *Belousov v Russia* (App 2653/13) ECtHR 4 October 2016.

[1123] *Ibid*, para 180–182.

[1124] *Ibid*, para 182

[1125] Freedom House, *Freedom in the World: Russia* (n 920).

should be avoided. Such an atmosphere of fear and humiliation contributes to self-censorship and further weakens civil society in Russia.

The legislative amendments strictly limiting exercise of the right to freedom of assembly in Russia are obstacles hindering effective compliance with the ECHR and do not provide Russian civil society with basic means to protect their rights, which is another obstacle for effective compliance with the ECHR.

On the one hand, practising the constitutional right to freedom of assembly has played an important role in the development of civil society in Russia. Perhaps the most notable advocate of freedom of assembly has been a spontaneous civic movement called Strategy 31[1126], holding protest meetings on Triumphalnaya square in Moscow in the course of many years to support the right to freedom of assembly enshrined in article 31 of the Russian Constitution. However, these peaceful assemblies have been obstructed by the authorities in various ways.[1127]

Amendments introduced to Russian legislation regulating the right to freedom of assembly in 2012 and 2014 have significantly restricted the opportunities of Russian people to exercise the right to freedom of assembly in practice. The amendments are not in accordance with international standards of freedom of assembly and they hinder rather than facilitate exercise of the right to freedom of assembly. The law on public assemblies confers too broad a discretion on the executive authorities to restrict assemblies and does not sufficiently safeguard against the potential risks of excessive use of discretionary power, arbitrariness or abuse, as assessed by the Venice Commission. The law violates the essential principles of "presumption in favour of holding assemblies", "proportionality" and "non-discrimination".[1128]

As a result, the constitutional right to freedom of assembly cannot be freely exercised in Russia.

A vast number of people have been punished for failure to comply with the requirements on public assemblies. Although the amendments to the legislation pertaining to peaceful public assemblies have been challenged in the Constitutional Court on numerous occasions, the Court has upheld the majority of the contested provisions. As noted by Judge Yaroslavtsev in his dissenting opinion

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[1126] They are held on the 31st day of every month which has 31 days and are intended to both promote and defend the right to hold peaceful demonstrations, as enshrined in article 31 of the Russian Constitution

[1127] Various tactics have been devised to stop these demonstrations, from denying applications to riot police, arrests and fencing off the square. See: Maryana Torocheshnikova, 'What is Strategy 31?' (30 July 2010) Open Democracy Russia <http://www.opendemocracy.net/od-russia/maryana-torocheshnikova/what-is-strategy-31> accessed on 20 December 2017; Luke Harding, 'The Russian protesters who won't give up: The 31ers are making their protest global after being fenced out of a Moscow square' (30 August 2010) The Guardian <https://www.theguardian.com/world/2010/aug/30/russian-protesters-31ers > accessed on 20 December 2017.

[1128] Venice Commission, Opinion on federal law no. 65-fz (n 1024) para 44.

to the Constitutional Court judgment of 12 May 2012, there is a threat that the regulation on public assemblies treats people peacefully participating at public events as a threat to the state and society, as guilty from the start[1129]. In my view these words describe quite accurately the implications of the legislative amendments analysed. During recent years there has been a wave of arrests and convictions of peaceful protesters who indeed are considered by the authorities and in most cases also by the court system to be a threat to the state and to society.

However, some positive aspects can be seen in the judgment of the Constitutional Court of 10 February 2017. Although the Court did not declare Article 212.1 of the Criminal Code unconstitutional, the Court ordered that the criminal case against Ildar Dadin be dismissed, that he be released and granted him a right to compensation. The Court explained that criminal punishment for protesting is not acceptable and is also unconstitutional when there is no proven threat or harm to constitutionally protected values and when the administrative punishments were not in force at the time of criminal proceedings. Although during recent years the Constitutional Court has in some cases been highly critical towards the positions of the ECtHR and has denied that enforcement of its judgments is compulsory for Russia, in this case the Constitutional Court extensively referred to the case law of the ECtHR and used the positions of the ECtHR to strengthen their own argumentation. Thus, the case law of the ECtHR still has an impact on judgments of the Constitutional Court and on the construal of rights and freedoms in Russia.

Overall, the legislation restricting the right to freedom of assembly has had a devastating effect on civil society in Russia. Since in Russia civil rights and freedoms have historically been strictly limited, expressing one's views and defending one's rights in public assemblies, demonstrations and pickets has never been commonplace in Russia. With the collapse of the Soviet Union, the Russian people began slowly to discover the power they can have on the policies of the state and the path along which the Russian Federation is evolving. In 2012 leading Russian sociologists considered the protest movement to be groundbreaking and argued that Russian society is moving towards freedom and modernization.

The Moscow protests of the past year have been an intermediate result of phenomenal changes that have been under way since the end of the Soviet Communist system in the part of Russian society that is capable of modernizing. Never before in their history have all Russians been as free and, at the same time, as affluent as in the past decade" argued renowned social scientists Dmitri Trenin, Maria Lipman and others.[1130]

[1129] Dissenting opinion of Judge V.G. Yaroslavtsev to the judgment of the Constitutional Court No. 12-P/2012 (12 May 2012).

[1130] Dmitri Trenin, Alexei Arbatov, Maria Lipman, Alexey Malashenko, Nikolay Petrov, Andrei Ryabov, Lilia Shevtsova, *The Russian Awakening* (Carnegie Moscow Center, 27 November 2012) 5 <http://carnegieendowment.org/files/russian_awakening.pdf> accessed on 20 December 2017.

However, people feeling "free and affluent" were considered a serious threat by the authorities and, as a result of the protest movement, legislators rushed to draft laws to limit exercise of the right to freedom of assembly and to demand changes in the country. The legislative amendments limiting the right to peaceful assemblies and the practice of authorities and courts have "quashed any willingness and readiness to take to the streets".[1131] Increasingly strict administrative and criminal punishments related to public assemblies have created an atmosphere of fear among ordinary Russians. Civil society is very wafer-thin in Russia and as a result of tighter control and strict punishments people are increasingly afraid to subject themselves to risk, thus endangering the development of civil society even further.

"Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of isolation, fear of failure."[1132]

Another important aspect is that protesting or defending one's rights in any other form is framed as unpatriotic and dangerous behaviour in Russia. Such rhetoric is used by the authorities and is disseminated in the state-controlled media, decreasing the popularity of defending civil rights and contesting the policies and actions of the authorities even further. Such an atmosphere of fear and humiliation creates self-censorship and, as a form of self-defence, people start to praise self-censorship as wise and condemn un-censored behaviour. As explained by Aung San Suu Kyi, in many cases fear "masquerades as common sense or even wisdom, condemning as foolish, reckless, insignificant or futile the small, daily acts of courage which help to preserve man's self-respect and inherent human dignity."[1133]

[1131] Peters and Ley (n 1027) 87.

[1132] Aung San Suu Kyi, 'Freedom from fear' (1992) 21(1) Index on Censorship 11–30.

[1133] *Ibid.*

CONCLUSIONS

In this study I scrutinized how the factors facilitating or hindering compliance with the ECHR are manifested in the Russian legal order, aiming to determine the major obstacles that underlie Russia's complex relationship with the CoE and its standards. I have referred to the metaphor of the taming of the shrew when characterizing Russia's interaction with the normative system of the CoE and the ECtHR. The guiding idea of this research was to find out how the strategy of the CoE to "tame" Russia into compliance with its norms and standards has worked in practice, what have been the main obstacles hindering compliance and what conclusions can be drawn about the future interaction of the CoE and Russia. My central conclusion is that "that the taming of the shrew" has not proved overly successful after twenty years of membership in the CoE because of various legal, political and social factors which hamper compliance with the ECHR.

I began my research with analysing the mechanisms and limits of the CoE to facilitate compliance with and implementation of human rights law in its member states, which was my first research question. Based on the theories and studies analysed, I found that the ability of the CoE to influence compliance is limited and three main preconditions underlie successful implementation of human rights treaties on the domestic level. Firstly, domestic institutions – dedicated, endowed with power, able and willing to implement human rights on the domestic level predictably and impartially – are of key importance for human rights implementation. Secondly, it is of crucial importance whether international human rights norms are effectively incorporated into the national legal order. The third important factor is construal of human rights and their place in the social and political context of a country.

The rest of my research focused on analysing these factors in the context of Russia. As a response to my second research question (How does Russia's institutional framework influence compliance with international human rights treaties?) I found that the first central obstacle hindering effective compliance with the ECHR is that Russian domestic institutions do not support compliance with international human rights law. One of the central ideas of this study is that that the CoE can have a meaningful influence on compliance with the ECHR and its other instruments only when domestic circumstances support compliance with international human rights law. One of such pivotal domestic circumstances is a functioning institutional framework, particularly an enforceable constitution, independent courts and other institutions having the power and legitimacy to ensure that the constitution is adhered to. Although the Russian Constitution establishes a formal framework for a liberal rule-of-law state, in practice Russian executive power is almost unlimited and other institutions, most importantly the court system, lack the power, ability and will to implement human rights predictably and impartially. The autonomy and the independence of the Russian court system and individual judges has been substantially

reduced and the opportunities of the executive power to influene the court system have increased, thus hindering the court system's role in securing compliance with international human rights treaties.

While analysing my third research question (How is international human rights law incorporated in the Russian legal order?), I found that the second key obstacle hindering Russia's compliance with the ECHR is that the ECHR is not effectively incorporated into the Russian legal order. I observed that the interpretation concerning the interplay between the Russian Constitution and the ECHR has changed considerably during past twenty years. Whereas the ECHR and the case law of the ECtHR has had a profound impact on Russian legal system and state practice, currently Russian legislation and the practice of the Constitutional Court no longer acknowledge the binding force of ECtHR judgments. The legislation amending the law on the Constitutional Court and the refusal of the Constitutional Court to enforce judgments of the ECtHR has demonstrated Russia's outright rejection of the standards imposed by the ECHR, which contradicts the previous positions of the Constitutional Court and the Supreme Court as well as is in conflict with international obligations that Russia has undertaken. These tendencies inevitably further complicate the interaction between the CoE and Russia. Currently the status of the ECHR in the Russian domestic legal hierarchy is low and the Constitutional Court does not interpret central civil rights and freedoms in the light of the case law of the ECtHR, particularly in politically sensitive cases.

The Constitutional Court does not function only under the constitutional framework, but is very much influenced by the political landscape: the expectations and interests of the government, which inevitably has an impact on the judgments they make. As a result, enforcing the ECHR in Russia is clearly limited and to a great extent depends on the political sensitivity of the case. Whereas the cooperation between Russian courts and the ECtHR is ongoing and many cases still are in accordance with the standards of the ECHR, politically significant cases discussed at the Constitutional Court have an important signalling function to the lower courts and to the legal landscape in general and it is increasingly difficult for independent judges to defend the status of the ECHR in the Russian legal order. Moreover, the legislation analysed in chapters 5, 6 and 7 demonstrates that the central rights of the ECHR: freedom of expression, freedom of association and freedom of assembly are not effectively incorporated into Russian legal order. The legislation and the judgments of the Constitutional Court that have upheld the laws are not in accordance with the ECHR and he case law of the ECtHR. In the circumstances, where the rights and freedoms guaranteed under the ECHR are not effectively incorporated into national legal order, compliance with the standards of the ECHR is impossible.

While discussing the features characterizing construal and the role of human rights in the Russian political and social context (my fourth research question), I found that the third major obstacle obstructing compliance with the ECHR is that the value system cultivated by the Russian government and approved by the practice of the Constitutional Court and other influential actors, such as the

Russian Orthodox Church, is not supportive of human rights. Human rights are not high in the political agenda of the government. Instead, traditional values and interests such as Russian sovereignty, state security and patriotism, are emphasized in Russian legislation, various official state documents, speeches and writings of Russian government officials. Russia's political coalition is currently not committed to compliance with the constituent values of the CoE. Reluctance by the state authorities to acknowledge the value of human rights is a clear obstacle to effective compliance with the ECHR. Furthermore, I argue that the notion of human rights has remained alien to the majority of the Russian people. In Russia, construal of human rights and their underlying values is strongly influenced by the Russian cultural and historical context, including the Russian Orthodox Church, which rejects the idea of inherent human dignity and criticizes human rights and freedoms as sinful and amoral. Moreover, in most cases Russian people do not trust the court system and are not used to defending their rights in courts. Although there is a diversity of opinions in Russian society and there are scholars, human rights NGOs, lawyers and other activists who defend human rights in courts, in universities and other fora, their impact on the overall attitudes and state policies remains low.

Finally I assessed, how core civil and political rights – particularly the right to freedom of expression, the right to freedom of assembly and the right to freedom of association – are implemented in Russia and what influence do these processes have on Russian civil society (fifth research question). I found that the legislation adopted in these spheres in the time period between 2011 to 2017: the law on blacklists, the law on arbitrary blocking of extremist materials, the law on bloggers, the law on protection of the feelings of believers, anti-homosexual propaganda law, the law prohibiting public calls to action aimed at violating the territorial integrity of the Russian Federation, the law against rehabilitation of Nazism, Yarovaya legislation, the law on foreign agents, the law on undesirable organisations and amendments made into the legislation on public assemblies are in conflict with the standards of the ECHR and have rigidly restricted the exercise of civil and political rights in Russia and the impact of the ECHR in Russia.

These legislative amendments have placed Russian sovereignty, security, patriotism and Russian orthodox values in the apex of values, at the same time downplaying the value of individual rights and freedoms. They have targeted politically active Russians who take part in protests, raise critical issues in the media or through their work in NGOs. As a result, the legislation has deterred Russians from speaking up, posing questions and demanding changes in their country, thus further weakening civil society's means and motives to demand compliance with international human rights treaties. Russian people have historically had little experience with human rights and when the legislators and the court system send very clear signals, that exercising one's rights and freedoms can be strictly punished and that values like patriotism, security and Russian orthodox values are more important than individual rights and freedoms, this further decreases the motives and the means of the civil society to mobilize.

However, when the civil society is not active in demanding compliance with human rights from their government an when the legislative framework has made it nearly impossible to participate in public discussions without the risk of strict punishments, effective compliance with the standards of the ECHR is unlikely.

Thus, Russian domestic institutions do not support compliance with the ECHR; the ECHR is not effectively incorporated into the Russian legal order; human rights are not valued and respected in Russia's political and social mainstream; and legislative amendments in the sphere of civil and political rights have hindered the opportunities of Russians to protect and demand their rights guaranteed under the ECHR. As a result, rights deriving from the ECHR cannot be properly implemented in Russia. This threatens the effectiveness of the CoE and creates an even greater stumbling block to dialogue between the CoE and Russia. I argue that unless these conditions change, Russia's effective compliance with the normative system of the CoE is unrealistic.

To sum up the main points in this study: it is my view that international frameworks do not have transformative power when a country (the government) does not want to belong to the international "club", to follow its rules and to reform its legal order accordingly. Compliance cannot be enforced from the outside when the idea of human rights is not entrenched in a country, particularly in its legal and political institutions.

The enlargement process of the CoE followed logic or normative theories proposing that educating, empowering and mobilizing local communities and persuading decision makers to "change their minds" are the mechanisms that eventually lead to compliance with human rights law in domestic arenas. When post-Soviet countries started to ratify human rights treaties and reform their legal orders, it seemed that normative theories indeed worked and that all states would gradually internalize and implement human rights norms. However, it is now clear that not all states have been "good students" as initially hoped and they have not "changed their minds". Russia has not become a democratic, law-bound state adhering to human rights. Formal commitment to international human rights treaties or membership in international organisations have led to uniform implementation of international norms but human rights are not universally upheld close to many homes in the member states of the CoE. So what went wrong?

In my opinion, the inclusive approach of the CoE to facilitate compliance with human rights law in Russia has undermined the limits of external actors to influence the behaviour of states and has undermined specific circumstances, especially the domestic political and social contexts that can facilitate or inhibit implementation of human rights. Norms of the ECHR are not self-executive, they need to be implemented on the national level and the CoE can only have a "back-up" role in the process. Primarily, states have the obligation and the means to ensure compliance with the ECHR. When countries are already in the system but fail to comply, the toolbox of the CoE is very limited. In the CoE, the main mechanism for punishment is "naming and shaming", but when states do not

consider the damage to their reputation high enough, naming and shaming will not work. For Russia the mechanisms of naming and shaming clearly have not been enough to influence Russia into compliance.

Another misinterpretation of normative theories has been their mantra of the universality of international human rights and the premise that all countries can be persuaded to change their practices in accordance with the idea of universal human rights. Theories based on the logic of appropriateness assume that all countries want to identify themselves with these values, want to belong to the club of "civilized nations". They presume that the idea of human rights is a universal, globally appropriate idea, so that states are motivated to reform their legislation and institutions and change their human rights practices. As derived from my analysis in Chapter I, the premise of global appropriateness of human rights is not universally accepted by all states, including Russia. Inevitably, when states do not recognize the value and universality of human rights, they have little incentive to comply with international human rights treaties.

Moreover, the role of several non-Western states in construing and shaping the international legal order in the light of their (legal) culture, civilization and national interests is steadily increasing, whereas Western liberal democracies have ceased to be the yardstick of desirable and civilized countries. If one wants to understand how international human rights law works in practice, it is counterproductive to ignore these regional and culture-specific factors that inevitably and increasingly influence the global normative order and it is also counterproductive to ignore that Western liberal democracies do not occupy the role of authoritative teachers for several non-Western states.

In my view, rational choice models arguing that compliance with international human rights treaties is likely when domestic actors expect to win more than they lose from the process and when certain preconditions are met, is a more plausible approach to explaining compliance with the ECHR than normative models. Rational models claim that the requirements of the ECHR can be quite "uncomfortable" for states. Making reforms and other efforts such as enforcing the judgments of the ECtHR can be politically costly for governments because the aims and interests of governments can be very different. This is particularly the case when a government is inclined to authoritarian practices and advocates anti-liberal and populist ideologies. Rational approaches to human rights have also indicated that domestic institutions are the crucial factor determining the success or failure of compliance with international human rights law. It matters whether the domestic institutional framework is embedded in the principle of the rule of law, whether there are checks and balances ensuring that no branch of government can act arbitrarily and whether, in particular, the court system has the independence and the means to protect fundamental rights and freedoms. Moreover, implementation of international human rights law can be effective only when international human rights norms are incorporated into the national legal order by domestic institutions. Another key issue is how international human rights norms and judgments of international courts are situated within the larger political and social context:

whether there is a reform-minded political climate respecting human rights and enabling citizens to demand their rights and whether the prevalent value-system in society is in accordance with the underlying values of human rights treaties. I applied this theoretical framework to Russia, but it could be used to explain patterns of implementation and compliance with the ECHR in any of the member states of the CoE.

In Chapter II of the study I found that although the Russian Constitution establishes a formal framework for a liberal rule-of-law state, Russia has not become a liberal rule-of-law state. There is a great discrepancy between the "law on the books" and "law in action". Various paraconstitutional institutions and informal networks have further marginalized the already weak checks and balances in the Constitution. Weak constraints on executive power predict *à la carte* compliance with the judgments of the ECtHR, which is also the case with Russia. Russia'n government and the Constitutional Court, influenced by the political motives, have decided to cherry-pick which judgments of the ECtHR are suitable to them and has decided to refuse to enforce those that are too politically costly to enforce.

The principle of rule of law is intimately connected to the separation of powers and the independence of the judiciary. As derives from my above analysis, reform of the Russian court system has substantially reduced its autonomy as an institution as well as undermining the independence of individual judges, whereas the role of the president in the appointment of judges has increased. As a result, the courts are not free from external pressures and are not able to provide a safeguard against abuses of power. Inevitably, in these conditions citizens cannot rely on the court system to defend their rights and freedoms deriving from the ECHR, particularly in politically sensitive cases.

It was revealed from my analysis in Chapter III that whereas formally the ECHR has been incorporated into the Russian legal order and the Constitution highlights protection of rights and freedoms as the highest value, Russian state practice in the form of legislation as well as court practice has moved in quite a different direction. Amending the law on the Constitutional Court and empowering the Constitutional Court to refuse to enforce judgments of the ECtHR demonstrates that the ECHR has been rejected outright in the Russian legal order. Thus, when legislation and court practice are aimed at undermining the ECHR, it cannot be expected that Russia effectively complies with the ECHR.

In Russia, state interests and international law are enmeshed and the doctrine of international law follows Russia's official position. My research shows that in high-profile cases the practice of the Constitutional Court also clearly reflects the political field lines and is used to further legitimize them for the internal audience as well as to demonstrate Russia's intention to isolate herself from external influences that might challenge her political choices. As the independence of the Russian court system has been greatly reduced, the executive power has increasing options to influence the courts to comply with state interests. In all recent Constitutional Court cases that have been politically important, the

interpretation of the Court has directly mirrored the official Russian position, which raises very serious doubts about the independence of the Constitutional Court.

Chapter IV focused on the role and construal of human rights in the Russian political and social context. The collapse of the Soviet Union obliged Russia to redefine its ideological roots. Initially, Russia opened up to European human rights law. However, this did not last long. In contemporary Russia the official rhetoric construes human rights as a negative Western influence causing disastrous effects in Russian society. The political rhetoric of the ruling elite as well as mainstream Russian scholarship support the idea that the task of the individual is to adhere to the dictates of the state. Accordingly, rights should be granted to people who are loyal to the state and its core underlying values: patriotism and traditional values. In the interpretation of the Russian Orthodox Church, only rights that are in accordance with the inner morality of Russian society and other needs of the Russian state, such as national sovereignty, should be respected, whereas others should be neglected.

While in many ways the Russian people are very liberal, overall, the idea of human rights has remained largely alien to a majority of Russian people. On the basis of the material analysed in Chapter IV, three distinct factors can be distinguished. Firstly, Russian society is characterized by legal nihilism resulting from centuries-long abuse of power. The majority of Russians have little trust towards the judicial system, they underestimate the importance of rule of law and are influenced by the doctrine of the Russian Orthodox Church, which considers defending one's rights and freedoms as a sign of avoiding moral responsibility towards society. Russians are not used to demanding their rights, to pick up the torch and to challenge the government, because the political climate has always been so restrictive and institutional support has been lacking, that it has been safer to stay at home and discuss worries at the kitchen table.

Secondly, in Russia the underlying values of human rights, particularly the concept of human dignity, are interpreted very differently. Moreover, this interpretation is greatly influenced by the doctrine of the Russian Orthodox Church. In the interpretation of the Russian Orthodox Church, dignity is not inherent but can be acquired as a result of proper conduct. Accordingly, people whose activities and viewpoints are not in conformity of the moral standards of the Orthodox Church have not acquired dignity. In line with this approach, not all humans and not all human rights deserve to be protected, but only those that fit into the morality framework of the Orthodox Church. The Russian Orthodox Church has skilfully tied its concept of morality to the paramount value in Russian political rhetoric: the Church has equated protecting the values of Russian society with protecting Russian (spiritual) sovereignty. As the Orthodox Church is a very powerful institution in Russia, the messages it conveys are widely distributed and greatly influence the mindset of the Russian people.

Thirdly, on the political level human rights are construed as a dangerous influence from the immoral and decadent West and thus unsuitable for the

Russian state and Russian society. In my view, as a result of this "translation" process the majority of Russians view freedom as an element of threat.

However, although human rights have remained alien to the majority in Russian society so far, this does not necessarily mean that it will always remain like this. One of the aims of the political elite has been to convince the Russian people of the existence of fundamental differences between Russia and the West, especially regarding the values these societies adhere to. However, value-based civilizational differences between Russia and the West are not objective facts. The thesis that Russian society is somehow more righteous than the liberal West, which has been regularly exploited by the Russian political, legal and religious elite, has little proof. In my view, the incompatibility of the Russian value system with Western liberalism is at least to some extent a social construction that could be changed when the social and political milieu in Russia changes. However, as long as the Russian political coalition does not support the idea of human rights, but actively contests it with all means available, little change can be expected.

Chapters V, VI and VII focused on implementation of the right to freedom of expression, the right to freedom of assembly and the right to freedom of association. I found that Russian legislators as well as the court system view the rights to freedom of expression, to freedom of assembly and to freedom of association as essentially harmful phenomena that should be limited on as many grounds as possible. The restrictions have had a particularly chilling effect on Russian civil society, discouraging them from exercising their rights guaranteed under the ECHR.

The legislation analysed in these three chapters had certain characteristics in common. Firstly, the key terms of the laws are very vaguely defined and they are not sufficiently clear to enable individuals to regulate their conduct in conformity with the law. Such unclarity has led to arbitrary application – for example, websites of opposition-minded people are blocked and people sharing articles on their social media on politically sensitive issues such as the status of the Crimea are punished for disseminating "extremist" materials. When laws are not clear enough to allow people to regulate their conduct, this can also easily lead to self-censorship. When no one knows what kind of speech is punishable, it is safer not to express oneself at all. On that basis, pluralism, already lacking in Russia and one of the building blocks of a democratic society, stands no chance. Secondly, undermining the role of the courts and providing very wide discretion to government agencies and to the General Prosecutor's Office to interpret and enforce vaguely defined provisions characterize legislative amendments. Another common feature is that laws restricting core civil and political rights do not meet the proportionality test established by the ECtHR, which is very similar to the proportionality test deployed by the Russian courts. Whereas officially all the restrictions have legitimate aims, the restrictions established do not correspond to the needs they should correspond to; they are not proportionate responses to those needs and are not supported by relevant and sufficient reasoning. In none of the cases have the legislators provided legitimate

arguments to demonstrate that the mechanisms used really help to achieve those aims (e.g. protection of children's health) and that the restrictions imposed are necessary in a democratic society.

In accordance with rational approach models to human rights implementation, I argue that implementing civil and political rights can be very costly, particularly for authoritarian governments and as a result, such governments tend to impose strict limitations on the exercise of civil and political rights. The wave of restricting legislation in Russia, which started in 2011, was a reaction to the protest movement threatening the ruling elite. The government understood that freedom of expression, freedom of association and freedom of assembly are powerful tools in the hands of Russia's developing civil society. The protest movement demonstrated that free speech can threaten the Russian political arrangement, where power is consolidated in the hands of a very few. Accordingly, the need to secure the position of official Kremlin-controlled information space and systemic order was an important incentive to limit the opportunities of opposition-minded people to spread their ideas and to pursue their agendas. I am of the opinion that if Russia continues on an authoritarian course, effective implementation of civil and political rights is unlikely, as it would pose too high a risk for the government and potentially undermine its rule.

In line with rational choice approaches to compliance with human rights, I am of the position that Russia's participation in the CoE is based on cost-benefit analysis and as long as there are more benefits than costs, Russia will participate in the CoE, but only on its own terms. This means that when some obligations are too costly to comply with, Russia refuses to comply. So far it seems that the benefits outweigh the costs. The CoE is an important international forum for Russia, which is motivated to influence processes in the CoE.

One of the underlying tensions in this study consists of the fact that the ECtHR and the current Russian political-legal elite have profound disagreements on the role of human rights, what they mean and how far they reach in the context of state interests and sovereignty. The traditional legal view says that when Russia does not implement a judgment of the ECtHR or does not follow the spirit of the ECHR in certain parts of its legislation, this may not as such even be a "legally" significant problem. In these cases, Russia simply violates international law, its legal obligations under European human rights law. This is not the view taken in this study. If a country of the size and influence of Russia takes a different view from Strasbourg on what human rights mean, it can become a major legal-political problem. Moreover, Russia has not just taken a different view, but the amendments to the law on the Constitutional Court rejecting enforcement of ECtHR judgments and the twofold blanket refusal to implement the judgments of the ECtHR by the Russian Constitutional Court are unprecedented in the CoE. These steps clearly pose a threat to the effectiveness of the ECtHR and to the normative framework of the ECHR. It is increasingly difficult for the CoE to defend its core principles when some member states are in fundamental opposition and in my view the CoE has been overly diplomatic in refusing to criticize Russia too much.

In the absence of international police and enforcement mechanisms by force, compliance with international human rights law is still based on the good will of the actors, and their willingness to implement their international legal obligations in good faith. When willingness to implement human rights obligations diminishes even to the point of not executing ECtHR judgments, it can become a systemic problem that cannot be done away just by qualifying it as a violation of international law (without visible consequences).

My thesis that the "taming of the shrew" has not proved overly successful after twenty years may strike the reader as utterly pessimistic or even partly hopeless. Of course, compliance with human rights obligations comes in shades and is not entirely black or white – for example, even when in many areas Russia is not in compliance with the ECHR, today's Russia's human rights performance is still much better in most areas than it was in the USSR or in other periods of Russian history. However, this was never the standard of the CoE and the ECHR; and it should not be the standard now. Therefore, it will become necessary to work out further mechanisms ensuring that European human rights law and institutions do not become complicit in actual human rights backsliding in CoE member states.

SUMMARY IN ESTONIAN

Tõrksa taltsutus: Euroopa Nõukogu inimõiguste standardite mõju Euroopa inimõiguste ja põhivabaduste kaitse konventsiooni rakendamisele Venemaal

Külma sõja järgses maailmas omistati inimõigustele võtmeroll inimkonna edasise arengu ja rahu tagamisel. Francis Fukuyama väitis, et inimkond on tunnistamas liberalismi lõplikku võitu, pidades liberalismi inimkonna ideoloogilise arengu lõpp-punktiks ning ennustades, et läänelikust liberaalsest demokraatiast saab universaalne valitsemisviis kõigis maailma riikides.[1134] Lääne riigid ei pidanud Venemaad enam oluliseks ohuks. Eeldati, et ideoloogiline võitlus on jäänud minevikku; et Venemaa on pöördunud tagasi läänelike väärtuste ja normide juurde ning on motiveeritud õppima demokraatiat, inimõigusi ja õigusriigi põhimõtet ning neid oma riigis rakendama.

Euroopa Nõukogu keskseks ideeks on olnud rahu ja ühtsuse tagamine Euroopas, tuginedes koostööle sarnaseid põhimõtteid, eelkõige õigusriigi põhimõtet, demokraatiat ja inimõiguste kaitset, jagavate riikide vahel.[1135] Perestroika aastatel sai Euroopa Nõukogust oluline foorum poliitiliseks dialoogiks „Lääne maailma" ning „Nõukogude maailma" vahel. Nõukogude Liidu lagunemise järgselt kujunes Euroopa Nõukogust „uks Euroopasse" ning liikmelisus Euroopa Nõukogus sai taasiseseisvunud Kesk-ja Ida-Euroopa riikide jaoks keskseks poliitiliseks eesmärgiks.[1136]

Politoloogid ja õigusteadlased väitsid 1990ndatel suure enesekindlusega, et inimõigused on rahvusvaheliselt aktsepteeritud standardid ning kui riigid soovivad omada rahvusvahelisel areenil kõrget reputatsiooni, kui nad tahavad kuuluda liberaalsete riikide klubisse, on nad ka motiveeritud rahvusvahelisi inimõiguste standardeid järgima ning vajalikke reforme läbi viima.[1137] Ka Euroopa Nõukogu tugines normatiivsele, idealistlikule lähenemisele, mille kohaselt riigid muudavad oma käitumist, kui neid veenda, et teatud normid või tegevused on õiged ja väärtuslikud.[1138]

[1134] Francis Fukuyama, 'The End of History?' (1989) 3 The national interest 3–18.

[1135] Anna Jonsson Cornell, 'Processes of International and Constitutional Socialization in Russia: Misconceptions and Overestimations' (2014) 14, 16; Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press, USA 2015).

[1136] Angelika Nußberger, 'The Reception Process in Russia and Ukraine' Helen Keller and Alec Stone Sweet (eds)*, A Europe of Rights: the impact of the ECHR on national legal systems* (Oxford University Press, USA 2008).

[1137] Thomas Risse and Stephen C. Ropp, 'Introduction and Overview' in Thomas Risse and others (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013).

[1138] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' [1998] 52 International organization 887–917; Jeffrey T Checkel, 'International

28. veebruaril 1996 ühines Venemaa Euroopa Nõukogu Statuudiga ning ratifitseeris Euroopa inimõiguste ja põhivabaduste kaitse konventsiooni[1139] (EIÕK) 20. märtsil 1998, mis jõustus Venemaa suhtes 1. novembril 1998. Kõigi eelduste kohaselt pidi ka Venemaa järk-järgult lääneliku demokraatia ja inimõigused omaks võtma.[1140]

Venemaa liikmelisust Euroopa Nõukogus on alati iseloomustanud sügavad vastuolud.[1141] Vaieldamatult on liikmelisus Euroopa Nõukogus ning EIÕK ratifitseerimine avaldanud olulist mõju Venemaa seadusandlusele ning kohtusüsteemile. Samas iseloomustab tänast Venemaad kodaniku-ja poliitiliste õiguste laialdane piiramine, mis on päädinud sellega, et sisukas poliitiline dialoog ning arvamuste paljusus avalikus sfääris on peaaegu olematu.[1142] 2015. aastal oli Venemaa rahvusvahelises ajakirjandusvabaduse edetabelis koos Etioopia ja Saudi Araabiaga 180. kohal 199st.[1143] Venemaal on tõsiseid probleeme Euroopa Inimõiguste Kohtu (EIK) otsuste täitmisega. Venemaa on üks kümnest Euroopa Nõukogu liikmesriigist, kes eristuvad täitmata otsuste suure arvu poolest. Probleemid EIK otsuste täitmisega peegeldavad omakorda tõsiseid struktuurseid probleeme Euroopa Nõukogu liikmesriikide õigussüsteemides.[1144] 2016. aasta lõpu seisuga oli Venemaal lõpuni viimata 1573 EIK otsuse täitmisprotsess.[1145]

Institutions and Socialization in Europe: Introduction and Framework' [2005] 59 International organization 801–876.

[1139] European Convention on Human Rights, Council of Europe, CETS No. 5.

[1140] Alexander Lukin, 'What the Kremlin Is Thinking: Putin's Vision for Eurasia' (2014) 93 Foreign Affairs.

[1141] Jean-Pierre Massias, 'Russia and the Council of Europe: Ten Years Wasted?' (2007) Understanding Russia and the New Independent States, IFRI, Paris 103–119.

[1142] Gleb Bogush, 'Criminalisation of Free Speech in Russia' (2017) 69(8) Europe-Asia Studies 1242–1256; Council of Europe Parliamentary Assembly, *The Honouring of Obligations and Commitments by the Russian Federation* (Strasbourg 2012) Doc 13018 para 281 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18998&lang=en> accessed 29 November 2017; *Press Freedom in 2013: Media Freedom Hits Decade Low* (Freedom House, Washington and New York 2014); Yulia Gorbunova and Konstantin Baranov, *Laws of Attrition: Crackdown on Russia's Civil Society after Putin's Return to the Presidency* (Human Rights Watch 2013).

[1143] Freedom House, *Freedom of the Press 2015: Harsh Laws and Violence Drive Global Decline* (Freedom House 2015).

[1144] Need 10 riiki on Itaalia, Venemaa, Türgi, Ukraina, Rumeenia, Ungari, Kreeka, Bulgaaria, Moldova ning Poola. Vaata täiendavalt: Council of Europe Parliamentary Assembly. Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights: 9th report (*Strasbourg 2017). <http://website-pace.net/documents/19838/3115031/AS-JUR-2017-15-EN.pdf/18891586-7d6c-4297-b5f7-4077636db28e>.

[1145] Council of Europe Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights:10th Annual Report of the Committee of Ministers* (Strasbourg 2016). < https://rm.coe.int/prems 021117-gbr-2001-10e-rapport-annuel-2016-web-16x24/168072800b> accessed 29 November 2017.

Keskmiselt võtab Venemaal EIK otsuste täitmine aega 7,9 aastat.[1146] Mõningate EIK otsuste täitmine on Venemaale osutunud poliitiliselt sedavõrd keeruliseks, et Venemaa konstitutsioonikohus on otsustanud, et EIK otsuseid kohtuasjades *Anchugov ja Gladkov v Venemaa*[1147] ning *OAO Neftyanaya Kompaniya YUKOS v Venemaa*[1148] ei ole Venemaal võimalik täita,[1149] keeldudes seega tunnustamast EIK otsuste siduvust Venemaale. 1990ndate aastate nn mesinädalate perioodil sellist stsenaariumi paljud poliitilised liidrid ega teised autoriteedid ei oodanud. Soovisin oma doktoritöös otsida vastust küsimusele, miks asjaolud on selliseks kujunenud ning miks ei ole Euroopa Nõukogul õnnestunud Venemaad „taltsutada" Euroopa Nõukogu standardeid järgima.

Eesmärk ning uurimisküsimused

Minu doktoritöö keskseks eesmärgiks oli selgitada välja peamised tegurid, mis takistavad Venemaal EIÕK efektiivset rakendamist. Selle eesmärgi saavutamiseks uurisin esmalt oma töö teoreetilises osas, kas ja millistel tingimustel saab Euroopa Nõukogu mõjutada EIÕK ja teiste rahvusvaheliste inimõigusalaste konventsioonide rakendamist oma liikmesriikides. Tuginedes varasematele asjakohastele uurimustele, selgitasin välja tegurid, mis hõlbustavad või takistavad rahvusvaheliste inimõigusalaste konventsioonide rakendamist. Seejärel kasutaksin seda teoreetilist raamistikku, analüüsimaks EIÕK rakendamist Venemaal. Ma uurisin, kuidas mõjutab EIÕK rakendamist Venemaa institutsiooniline raamistik, keskendudes eelkõige õigusriigi ning Venemaa kohtute iseseisvuse küsimusele ning analüüsides EIÕK integreerimist Venemaa õiguskorda. Järgmisena käsitlesin ma inimõiguste rolli ja tõlgendusi Venemaa poliitilises ja sotsiaalses kontekstis ning Venemaa õigusaktides, mis reguleerivad sõnavabaduse, ühinemisvabaduse ja kogunemisvabaduse rakendamist.

Püstitasin hüpoteesi, et Euroopa Nõukogu saab mõjutada EIÕK ja muude välislepingute rakendamist oma liikmesriikides ainult siis, kui riigi sisesed tegurid ja protsessid seda toetavad, vastasel juhul jääb mõju väga piiratuks. Täpsemalt väitsin, et kui Venemaa riiklikud institutsioonid ei toeta rahvusvaheliste inimõigusalaste lepingute täitmist; kui EIÕK ei ole Vene õiguskorda tõhusalt integreeritud; kui Venemaa poliitilises ja sotsiaalses kontekstis inimõigusi ei väärtustata ning; kui Venemaa õigusaktid takistavad inimestel EIÕKst tulenevate õiguste realiseerimist, jääb Euroopa Nõukogu mõju EIÕK rakendamisele Venemaal piiratuks ning EIÕK tõhus täitmine Venemaal on vähetõenäoline.

[1146] *Ibid.*

[1147] *Anchugov and Gladkov v Venemaa* (Apps 11157/04 and 15162/05) EIK, 4. juuli 2013

[1148] *OAO Neftyanaya Kompaniya YUKOS v Venemaa* (App 14902/04) EIK, 20. september 2011 ning 31. juuli 2014.

[1149] Venemaa konstitutsioonikohtu otsus nr. 12-P/2016 (19. aprill 2016) ning Venemaa konstitutsioonikohtu otsus nr. 1-P/2017 (19.jaanuar 2017).

Minu doktoritöös oli viis uurimisküsimust:

1) Millised on Euroopa Nõukogu mehhanismid ja piirangud inimõigusalaste konventsioonide täitmise hõlbustamiseks oma liikmesriikides?
2) Kuidas mõjutab Venemaa institutsiooniline raamistik rahvusvaheliste inimõigusalaste konventsioonide rakendamist?
3) Kuidas on EIÕK Venemaa õiguskorda integreeritud?
4) Millised tegurid iseloomustavad inimõiguste tõlgendamist ja rolli Venemaa poliitilises ja sotsiaalses kontekstis?
5) Kuidas rakendatakse Venemaal keskseid EIÕKst tulenevaid kodaniku- ja poliitilisi õigusi ja vabadusi, eelkõige sõnavabadust, kogunemisvabadust ja ühinemisvabadust; ning milline on nende mõju Venemaa kodanikuühiskonnale?

Metoodika

Minu doktoritöö on interdistsiplinaarse lähenemisega, käsitledes rahvusvaheliste inimõiguste valdkonda ning selle seoseid Venemaa konstitutsiooniõiguse ning rahvusvaheliste suhete teooriatega. Uurimismeetodite osas kasutan nii välist *(external)* kui sisemist *(internal)* perspektiivi[1150] rahvusvaheliste inimõiguste rakendamisele Venemaa õiguskorras. Väline perspektiiv väljendub sotsiaalteaduslike, eelkõige rahvusvaheliste suhete valdkonna teooriate kasutamises rahvusvaheliste inimõiguste mõju selgitamiseks, millele keskendun oma töö esimeses peatükis. Minu doktoriöös tõstatatud uurimisküsimustele vastamiseks on paratamatult vajalik uurida inimõigusalaste konventsioonide toimimist poliitilises kontekstis; analüüsida inimõigusalaste konventsioonide eduka täitmise eeltingimusi ning seda takistavaid tegureid. Lisaks, mõistmaks üksikjuhtumite rolli Euroopa Nõukogu kontekstis ning analüüsimaks Euroopa Nõukogu toimimist täna ja tulevikus, samuti väline perspektiiv Euroopa Nõukogu konventsioonidele vältimatult vajalik. Ainult väline perspektiiv võimaldab hinnata, kui edukalt on Euroopa Nõukogu inimõiguste instrumendid praktikas toiminud ning selline hinnang ei ole võimalik ainult traditsiooniliselt õigusteaduses kasutatavate meetodite, näiteks õigusdogmaatika, abil.

Rahvusvaheliste suhete teooriatest on minu doktoritöö enim mõjutatud ratsionaalse valiku teooriatest (*rational choice approaches*), mis väidavad, et rahvusvahelisi konventsioone ratifitseerides ning rakendades lähtuvad riigid eelkõige kulu-tulu analüüsist. Kui ratifitseerimise või konventsiooni rakendamisega seotud poliitilised, sotsiaalsed või majanduslikud tulud on suuremad kui kulud, siis on riigid motiveeritud selliseid samme astuma. Kui aga kulud ületavad tulud,

[1150] Herbert Lionel Adolphus Hart eristas välimist *(external)* ning sisemist *(internal*) perspektiivi oma teoses "The Concept of Law". Vt: Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford University Press 2012, 3rd ed. 1st ed. published in 1961). Vt samuti: Douglas E. Litowitz, 'Internal versus External Perspectives on Law: Toward Mediation' (1998) 26(1) Florida State University Law Review 127–150.

on tulemus vastupidine. Ratsionaalsel valikul põhinevad teooriad toovad välja ka erinevaid konkreetseid eeldusi, mis konventsioonide rakendamist hõlbustavad või takistavad.[1151]

Kasutan doktoritöös ka klassikalisi õigusteaduse uurimismeetodeid, eelkõige analüütilist meetodit, vähemal määral ka võrdlevat ja ajaloolist meetodit. Analüüsin õigusriigi põhimõtte tähendust ja rakendamist Venemaa õiguskorras ning käsitlen seda, kuidas on rahvusvaheline õigus, eriti just rahvusvahelised inimõigusalased konventsioonid, integreeritud Venemaa õiguskorda. Kohtupraktikast kasutan enda töös peamiselt EIK otsuseid ning Vene konstitutsioonikohtu lahendeid. Selgitamaks seda, kuidas Venemaal kodaniku-ja poliitilisi õigus rakendatakse, on vajalik analüüsida asjakohast seadusandlust ja kohtupraktikast nii õiguslikus, poliitilises kui ideoloogilises kontekstis. Keskendun oma doktoritöös Venemaa seadusandlusele sõnavabaduse, kogunemisvabaduse ja ühinemisvabaduse valdkonnas peamiselt ajaperioodil 2011–2017 ning konstitutsioonikohtu praktikale samast ajaperioodist.

Doktoritöö struktuur ning lühiülevaade sisu peatükkidest

Doktoritöö struktuur lähtub püstitatud uurimisküsimustest. Esimese uurimisküsimusega tegelen ma oma töö esimeses peatükis, kus kasutan erinevaid rahvusvaheliste suhete valdkonnast pärinevaid teoreetilisi lähenemisi rahvusvaheliste inimõigusalaste konventsioonide, eriti Euroopa Nõukogu instrumentide mõju selgitamiseks riikide õiguskorrale ja praktikatele. Selgitan välja, millised tegurid hõlbustavad ja takistavad inimõigusalaste konventsioonide rakendamist ning analüüsin, kuivõrd edukalt erinevad teoreetilised lähenemised selgitavad inimõigusalaste konventsioonide rakendamist ning sellega seotud probleeme tänapäeva maailmas. Keskendun ka küsimusele, milline on olnud Euroopa Nõukogu strateegia inimõigusalaste konventsioonide rakendamise hõlbustamiseks oma liikmesriikides ning kas see on end õigustanud.

Töö järgmistes peatükkides analüüsin teooria peatükis selgitatud tegureid Venemaa kontekstis. Teine peatükk keskendub Venemaa institutsioonilisele raamistikule. Alustan õigusriigi põhimõtte analüüsimisega ning selgitan, kas Venemaa põhiseadus loob õigusriigi põhimõtte rakendamiseks vajaliku õigusliku raamistiku ning kuidas seda õiguslikku raamistikku praktikas järgitakse. Õigusriigi põhimõte on tihedalt seotud võimude lahususega ning väga olulist rolli mängib kohtute sõltumatus. Kohtute sõltumatus on vältimatu eeltingimus EIÕK õiguste ja vabaduste rakendamiseks praktikas. Seega keskendub teise peatüki teine osa Venemaa kohtute sõltumatusele. Peatüki lõpus analüüsin, millised on õigusriigi põhimõtte ning kohtute sõltumatusega seotud probleemide tagajärjed EIÕK rakendamisele Venemaal. Allikatest tuginen teises peatükis peamiselt Venemaa asjakohastele õigusaktidele, nii vene kui teiste riikide teadlaste uurimis-

[1151] Vaata täpsemalt doktoritöö I peatükki.

töödele kui Euroopa Nõukogu ja teiste autoriteetsete institutsioonide aruannetele ja uurimustele.

III peatükis selgitan välja, milline on rahvusvaheliste inimõigusalaste konventsioonide positsioon Venemaa õiguskorras. Tuginedes Venemaa seadusandlusele ning selle tõlgendustele Venemaa konstitutsioonikohtu ning õigusteadlaste poolt, analüüsin ma EIÕK ja Venemaa põhiseaduse vastastikmõju, keskendudes EIK ja EIÕK otsuste positsioonile Venemaa põhiseaduse ja teiste seaduste kontekstis. Muuhulgas analüüsin, kuidas on EIÕK roll ja tõlgendamine Venemaal viimase 20 aasta jooksul muutunud.

Seejärel uurin ma inimõiguste tõlgendamist Venemaa sotsiaal-poliitilises kontekstis (IV peatükk). Inimõigusalaseid konventsioone täidetakse edukalt riikides, kus poliitiline ja sotsiaalne kontekst toetab inimõigusi ning keskseid väärtusi, millel inimõigused põhinevad. Rahvusvahelised inimõiguste konventsioonid põhinevad inimväärikuse, võrdõiguslikkuse ja mittediskrimineerimise põhimõtetel. Kõik inimesed sünnivad vabade ja võrdsetena oma väärikuselt ja õigustelt, sätestab ÜRO inimõiguste ülddeklaratsiooni (UDHR) artikkel 1. Igaühel peavad olema kõik UDHRga välja kuulutatud õigused ja vabadused (UDHR artikkel 2). IV peatükis keskendun sellele, kuidas tõlgendatakse inimõigusi ja nende alusväärtusi Venemaa poliitilises retoorikas kui ühiskonnas laiemalt.

V, VI ja VII peatükid keskenduvad sõnavabaduse, ühinemisvabaduse ja kogunemisvabaduse rakendamisele Venemaal. Otsustades, kas inimõigusalaste konventsioonide rakendamine on olnud edukas või mitte, on määravaks teguriks see, kas ja mil määral on rahvusvahelised standardid sisse viidud riigi õigusaktidesse ning mil määral neid praktikas rakendatakse. Seega analüüsin nendes peatükkides Venemaa asjakohaseid seadusi ning konstitutsioonikohtu tõlgendusi, keskendudes eelkõige arvukatele seadusemuudatustele aastatel 2011 kuni 2017.

Olulisemad järeldused

Euroopa Nõukogu laienemisprotsess tugines normatiivsele lähenemisele, mille kohaselt õpetamine, poliitiliste liidrite veenmine ning kodanikuühiskonna mobiliseerimine on peamised mehhanismid, mis toovad kaasa inimõigusalaste konventsioonide eduka rakendamise. Kõik Euroopa Nõukogu liikmesriigid, sealhulgas Venemaa, ei ole siiski osutunud „headeks ja motiveeritud õpilasteks". Venemaa ei ole muutunud demokraatlikuks, inimõigusi järgivaks õigusriigiks. Inimõigusalaste konventsioonide ratifitseerimine ei ole toonud kaasa sealsete standardite ühetaolist rakendamist.

Olen seisukohal, et normatiivsed teooriad ei ole suutnud seletada, miks osad riigid oma inimõigusalastest konventsioonidest tulenevaid kohustusi täidavad ning miks osad riigid seda ei tee. Normatiivsed teooriad on ignoreerinud erinevaid piiranguid, mis mõjutavad konventsioonide rakendamist praktikas. EIÕK norme rakendatakse riiklikul tasandil, riikidel on kohustus ning ka toimivad mehhanismid EIÕK rakendamiseks, kusjuures Euroopa Nõukogul saab olla vaid

toetav roll. Kui Euroopa Nõukogu liikmesriigid võetud kohustusi ei täida, on Euroopa Nõukogu „tööriistakast" riikide mõjutamiseks väga piiratud. Euroopa Nõukogul on teatud hoovad riikide karistamiseks, mis suuremalt jaolt piirduvad poliitilise surve avaldamise ja avaliku häbistamisega. Kuigi ka Venemaa korrale kutsumiseks on kasutatud erinevaid mehhanisme, sh hääletusõiguse peatamine Parlamentaarses Assamblees, ei ole need motiveerinud Venemaad oma kohustusi täitma.

Normatiivsed teooriad on ekslikult eeldanud, et inimõiguste universaalsuse idee on rahvusvaheliselt aktsepteeritud ning et riigid on sellest lähtuvalt motiveeritud reformima oma õigusakte ja institutsioone ning muutma harjumuspärased praktikaid. Paljud mõjukad riigid, sealhulgas Venemaa, ei aktsepteeri inimõiguste universaalsuse ideed ning neil on vähe stiimuleid täitmaks rahvusvahelisi inimõigusalaseid lepinguid, mis sellele eeldusele tuginevad. Lääne liberaalsed demokraatiad ei ole enam autoriteetsete õpetajate rollis ning inimõiguste tõlgendamist ja rakendamist mõjutavad üha enam erinevad kultuurilised ja regionaalsed tegurid.

Rahvusvaheliste inimõigusalaste konventsioonide täitmine, sealhulgas EIÕK täitmine, on riikide jaoks mitmetel põhjustel keeruline. Seaduste ja institutsioonide reformimine ning EIK otsuste täitmine võib valitsuste jaoks olla poliitiliselt väga kulukas, sest valitsuste eesmärgid ja huvid võivad Euroopa Nõukogu standarditest ja ootustest oluliselt erineda. Seda eriti juhul, kui tegemist on autoritaarse riigiga, mille valitsus pooldab anti-liberaalseid ja populistlikke ideoloogiaid.

Minu doktoritöö keskne järeldus on, et Venemaa „taltsutamine" Euroopa Nõukogu normatiivse süsteemi poolt ei ole osutunud edukaks erinevate Venemaa õiguskorrast tulenevate ning poliitiliste ja sotsiaalsete tegurite tõttu, mis takistavad EIÕK efektiivset rakendamist Venemaal. Esimene takistus seisneb selles, et Venemaa institutsioonid ei toeta EIÕK ega teiste rahvusvaheliste inimõigusalaste konventsioonide täitmist. Kuigi Venemaa põhiseadus kehtestab õigusriigi põhimõtte ning õigusriigi põhimõttest lähtuva institutsioonilise ülesehituse, on praktikas Venemaa täidesaatev võim peaaegu piiramatu ja teistel institutsioonidel, eelkõige kohtusüsteemil, puudub võimekus ja sõltumatus inimõiguste rakendamiseks. Kohtusüsteemi autonoomiat on oluliselt piiratud ning täitevvõim omab olulist mõju nii Konstitutsioonikohtu kui teiste kohtute praktikale.

Teine peamine takistus on see, et EIÕK ei ole Venemaa õiguskorda tõhusalt integreeritud. Konstitutsioonikohtu praktika ning Venemaa konstitutsioonikohtu seaduse muudatused, mis võimaldavad keelduda EIK otsuste täitmisest, on otseses vastuolus EIÕK artikliga 46, mis sätestab EIK otsuste siduvuse liikmesriikidele. Konstitutsioonikohtu seaduse muudatus ning samasisuline lähenemine konstitutsioonikohtu poolt raskendab EIÕK täitmist Venemaal. Venemaa on ainuke Euroopa Nõukogu liikmesriik, kes on sellise sammu astunud ning see paratamatult raskendab veelgi Euroopa Nõukogu ja Venemaa koostööd.

Kolmas peamine takistus seisneb selles, et Venemaa ametlik poliitiline retoorika ning Venemaa ühiskondlik arvamus ei toeta inimõigusi ning väärtusi, millel inimõigused baseeruvad. Valitsev poliitiline retoorika rõhutab kõrgeimate

väärtustena suveräänsust, riigi julgeolekut, patriotismi ning Venemaa traditsioonilisi (õigeusklikke) väärtusi, mis peaksid konflikti korral prevaleerima inimõiguste kaitse üle. Venemaa poliitiline ladvik ei ole motiveeritud Euroopa Nõukogu standardeid järgima, mis peegeldub otsustes keelduda täitmast teatud EIK lahendeid, seadusandlikes muudatustes, aga ka erinevates muudes poliitilistes dokumendites, poliitikute kõnedes ja muudes arvamusavaldustes. Inimõigusi tõlgendatakse kui dekadentliku Lääne amoraalseid leiutisi, mis on Venemaa konteksti sobimatud. Lisaks on inimõiguste idee jäänud võõraks ka suurele osale vene ühiskonnast. Venemaa ühiskonda iseloomustab õiguslik nihilism, usaldamatus õigussüsteemi ning ka kohtusüsteemi suhtes ja vähene ajalooline kogemus inimõiguste vallas. Vene õigeusu kirik oma spetsiifiliste tõlgendustega inimväärikusest ning inimõigustest laiemalt omab olulist rolli inimõiguste tõlgendamisel vene ühiskonnas.

Neljandaks oluliseks takistuseks on seadusandlikud muudatused sõnavabaduse, kogunemisvabaduse ja ühinemisvabaduse valdkonnas, mis samuti näitavad, et EIÕK ei ole Venemaa õiguskorda tõhusalt integreeritud. Seadusemuudatused on oluliselt piiranud EIÕK rakendamist Venemaal ning vähendanud veelgi kodanikuühiskonna rolli ning võimekust aidata kaasa EIÕK tõhusale rakendamisele Venemaal.

Seega, Venemaa institutsioonid, eelkõige kohtud, ei ole sõltumatud ega piisavalt võimekad, et tagada inimõiguste rakendamine kohalikul tasandil. Venemaa seadused: nii õigusaktid konstitutsiooniõiguse kui sõnavabaduse, kogunemisvabaduse ja ühinemisvabaduse valdkonnas on suunatud EIÕK mõju vähendamisele Venemaal ning suveräänsuse, riikliku julgeoleku, patriotismi ning traditsiooniliste väärtuste rõhutamisele. Venemaa seadusandlus ning ka valitsuse retoorika keskenduvad inimõiguste pisendamisele, eitamisele ja inimõigustega tegelevate väheste aktivistide ning organisatsioonide õiguste piiramisele ning nende diskrediteerimisele ühiskonna silmis. Sellistes õiguslikes, poliitilistes ja sotsiaalsetes tingimustes ei saa EIÕK tõhusalt rakendada ning Euroopa Nõukogu mõju arengutele Venemaal jääb väga piiratuks.

Kokkuvõttes leian, et Euroopa Nõukogu ega ükski teine organisatsioon ei saa omada olulist mõju protsessidele riiklikul tasandil, kui riik (eelkõige valitsus) ei ole motiveeritud rahvusvahelisi standardeid järgima ning vastavaid reforme ellu viima. Euroopa Nõukogul puuduvad efektiivsed mehhanismid tagamaks EIÕK täitmist oma liikmesriikides ning EIÕK rakendamine sõltub riikide tahtest ja valmisolekust endale võetud kohustusi täita. Kui selline valmisolek väheneb või sootuks kaob, ohustab see kogu süsteemi efektiivsust ja tõsiseltvõetavust. Seega on oluline rakendada olemasolevaid ning arendada välja täiendavaid mehhanisme, mis aitaksid tagada, et Euroopa Nõukogu ei oleks „kaasosaline" inimõiguste taandarengus oma liikmesriikides.

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5. Federal'nyi zakon ot 8.12.1995 N 7-FZ "O nekommercheskih obedineniyah".
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27. Federal'nyy konstitutsionnyy zakon Rossiyskoy Federatsii ot 14.12.2015 No 7-FKZ "O vnesenii izmeneniy v federal'nyy konstitutsionnyy zakon "O Konstitutsionnom Sude Rossiyskoy Federatsii""
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Explanatory notes to Russian legislation

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3. Poyasnitel'naya zapiska k proektu federal'nogo zakona "O vnesenii izmeneniy v kodeks Rossiskoy Federatsii ob administrativnyh pravonarusheniyah"

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5. Poyasnitel'naya zapiska k proektu federal'nogo zakona "O vnesenii izmenenii v otdel'nye zakonadatel'nye akty Rossiiskoy Federatsii v chsti ustanovleniya dopolnitel'nyh mer protivodeistviya terririzmu i obespecheniya obshestvennoi bezopasnosti" <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=144433&rnd=259927.2930420274#0> accessed on 15 December 2017.
6. Poyasnitel'naya zapiska k proekty federal'nogo zakona "O vnesenii izmenenii v nekotorye zakonadatel'nye akty Rossiiskoy Federatsii" <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=125865&rnd=261745.22399963#0> accessed 15 December 2017.
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8. Poyasnitel'naya zapiska k proyektu federal'nogo zakona «O vnesenii izmeneniy v Federal'nyy zakon "O zashchite detey ot informatsii, prichinyayushchey vred ikh zdorov'yu i razvitiyu" i otdel'nykh zakonodatel'nykh aktov Rossiyskoy Federatsii <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=89417-6&02> accessed on 8 December 2017.

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10. Russian Constitutional Court, No. 1053-O (2 July 2013).
11. Russian Constitutional Court, No 27-P (6 December 2013);
12. Russian Constitutional Court, No. 10-P/2014 (8 April 2014
13. Russian Constitutional Court, No. 24-P/2014 (23 September 2014).
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01.01.2011–31.12.2015	Terve Eesti Foundation, Project Manager
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Education

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2009–2011	Tartu University, MA (Law)
2004–2009	Tartu Universtiy, BA (Law and Psychology)
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Language skills

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Kerttu Mäger, Phd student, (sup) Lauri Mälksoo, Kogunemisvabaduse tagamine Vene Föderatsioonis ning selle vastavus rahvusvahelisele kogunemisvabaduse standardile (Freedom of Assembly in Russian Federation and its Compliance with International Standard of Freedom of Assembly), University of Tartu.

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Kerttu Mäger, 'Russia's Illiberal Ideology and Its Influences on the Legislation in the Sphere of Civil and Political Rights' (2016) 15 Baltic Yearbook of International Law Online 148–168.

Projects in progress

IUT20-50 "The Evolution of Human Rights Law and Discourse in the Russian Federation, and its Interaction with Human Rights in Europe and the World (1.01.2014−31.12.2019)", Lauri Mälksoo, University of Tartu, Faculty of Social Sciences, School of Law.

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Kerttu Mäger, magistrikraad, 2015, (juh) Andero Uusberg, PhD; "The contribution of self-compassion into self-esteem", Tartu Ülikool.
Kerttu Mäger, magistrikraad, 2011, (juh) Maarja Torga, McS; "Kohalduva õiguse määratlemine lepinguvälistes võlasuhetes, mis tõusetuvad meedia vahendusel toimepandud eraelu puutumatuse ja muude isiklike õiguste rikkumisest", Tartu Ülikool.
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Publikatsioonid
Kerttu Mäger, 'Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court' (2016) 24 Juridica International 14–22.
Kerttu Mäger, 'Russia's Illiberal Ideology and Its Influences on the Legislation in the Sphere of Civil and Political Rights' (2016) 15 Baltic Yearbook of International Law Online 148–168.

Teadustööga seotud olulisemad projektid
Doktorantuuri raames uurimustöö teostamine: IUT20-50 "Inimõiguste ja nende diskursuse areng Vene Föderatsioonis ning selle koostoime inimõigustega Euroopas ja maailmas (1.01.2014−31.12.2019)".
Lektor Arengukoostööprojekti raames mais 2016 toimuval koolitusel "Strenghtening NGOs' capacity to act for human rights in Tajikistan"

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1. **Херберт Линдмяэ**. Управление проведением судебных экспертиз и его эффективность в уголовном судопроизводстве. Тарту, 1991.
2. **Peep Pruks**. Strafprozesse: Wissenschaftliche "Lügendetektion". (Instrumentaldiagnostik der emotionalen Spannung und ihre Anwendungsmöglichkeiten in Strafprozess). Tartu, 1991.
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4. **Gaabriel Tavits**. Tööõiguse rakendusala määratlemine töötaja, tööandja ja töölepingu mõistete abil. Tartu, 2001.
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26. **Merike Ristikivi**. Latin terms in the Estonian legal language: form, meaning and influences. Tartu, 2009.
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28. **Priidu Pärna**. Korteriomanike ühisus: piiritlemine, õigusvõime, vastutus. Tartu, 2010.
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31. **Urmas Volens**. Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid. Tartu, 2011.
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