



Consortium on  
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## **Rule of Law and Democracy in Russia**

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# *Rule of Law and Democracy in Russia*

## **Rule of Law in Russia: Contemporary Challenges** **Sergey Golubok, LLM, PhD**

Today I would like to address the rather broad topic of rule of law in Russia and the contemporary challenges that this nascent democracy faces. “Rule of law” is one of those terms that everyone has some understanding of, but which does not necessarily have a generally-recognized, defined, conceptual understanding. In the Russian language it is *pravovoye gosudarstvo* which is a literal translation of the German Staatsrecht. This means “state governed by law” rather than “rule of law,” which highlights the special role of state, rather than law itself.

Recently, there were a number of studies trying to highlight different elements of “rule of law.” Perhaps the first writer who introduced this concept into English legal terminology was Albert Venn Dicey, the famous British legal specialist in legal theory in the 19th century. Recently, the late Tom Bingham, Lord Chief Justice of the UK, wrote very powerfully in his book, *Rule of Law*, about the elements of this concept. In 2006, the United Nations Secretary-General produced a report on the elements of the concept of “rule of law.” There is a definition given in this report that I will use for the purposes of this talk: “Rule of law’ is the principle of governance in which all persons, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and principles.” I would say that there are four most important elements here: laws that are publicly promulgated, laws that are equally enforced, laws that are independently adjudicated, and laws that themselves comply with international standards – firstly, international human rights standards. I would like to go into those four elements and suggest some case studies on the challenges in Russia.

### *Laws That Are Publicly sPromulgated*

First, there is the element of “publicly promulgated laws.” That means that not only are laws adopted by the Parliament and made available to everyone, but also that the public participates in the discussion that leads to the adoption of laws, so the public feels that it is part of this process. Indeed, Prof. Amartya Sen said in his very powerful book, *Idea of Justice*, that democracy is firstly about public participation and deliberative processes. In Russia, Parliament has recently been given a label of the “crazy printer,” because laws are promulgated as half-baked cakes and even those who have adopted them don't care really to read them properly. Due to the lack of meaningful public participation in the procedure, it is not unheard of to have a bill introduced and a law adopted just two weeks thereafter, just because someone wants a law in place immediately. The law on how to impute Crimea into Russia is now in the pipeline. Next week, they will bring it into the books. This process is not only unfair, but also very ineffective. It gives birth to laws that are not very well thought-through.

I will give you an example of recent, very controversial legislation, on labeling certain non-commercial non-governmental organizations as “foreign agents.” It is pursued in order to silence

vocal critics of governmental politics and governmental stances in various areas of life. Someone decided to introduce the label or stigma of foreign agents and attach it to any non-governmental organization that receives foreign funding, irrespective of the amount of foreign funding. Foreign funding could be one dollar from a Ukrainian national, even one who is a resident of Russia, if this non-governmental organization tries to influence governmental policies. Another problem here is that in the Russian language, “policy” and “politics” are semantically the same word. It is very hard to distinguish between those who are vying for power and those who just want to try to change legislation on an issue, as it would still be an attempt to influence politics, understood as policy in effect. The case is now pending before the Constitutional Court of Russia and Anton will speak about what the constitutional court is doing and the number of NGOs trying to invalidate these laws as unconstitutional. The interesting thing about this law is that this law does not cover foreign organizations that are active in Russia. It covers only Russian organizations that receive foreign funding. There were very interesting studies comparing this piece of legislation with American FARA, Foreign Agents Registration Act, because the authorities try to portray the Russian legislation as reminiscent of the American one, and the studies showed that there is nothing in common between these two laws, because American legislation concerns commercial transactions, while Russian legislation touches upon non-commercial organizations. The most important point about the Russian legislation is that it does not cover actual foreign organizations. When one tries to have a look at the records of deliberations in the Parliament, it is evident that the members of the Parliament actually forgot about foreign organizations, and forgot to include them in the definition. They thought it would be self-evident that a foreign organization would be a foreign agent but, actually, this definition does not cover real foreign organizations. This is because there is no real deliberation in the process and because the Parliament does not act as it should act. They have not taken into account different views, heard the critics, or heard the opponents of proposed legislation.

### *Laws That Are Equally Enforced*

However, quality of legislation is not the most important issue. The practice of its implementation and the practice of its enforcement are perhaps more important challenges. According to the UN definition of the “rule of law,” laws should be equally enforced. It is evident that arbitrariness in application of law leads not only to chaos and unpredictability in relations within a society, but also to lack of respect for the authorities. Laws eventually lose all of their legitimacy. I would like to look at the ease of pre-trial detention, or detention on remand. I think that is an interesting case study of how the lack of equality in the enforcement of legislation undermines one of the most crucial elements of legal systems of every country's criminal justice. The idea of a pre-trial detention or detention on remand is to ensure that the defendant does not flee when the matter is being investigated, does not try to obstruct the investigation, and does not commit other offenses. There is a concept of the presumption of innocence – that the person should not be arbitrarily detained pending an investigation, unless there is evidence showing that the person can commit one of the deeds that I have enumerated, including influencing the witnesses, trying to flee, or committing other offenses. Normally, bail should be granted, or other measures, such as house arrest, should be taken to ensure the presence of the defendant at trial. Bail is definitely one of the most universally accepted measures. However, not only in Russia, but also in other post-Soviet jurisdictions, bail is understood as a privilege that is granted to the defendant only when he or she is willing to

cooperate. Detention on remand is basically used as preliminary punishment in order to make a person who is not very eager to cooperate with the investigation to think twice. If twice is not enough, the detention on remand can be extended up to eighteen months, in order to allow the person to think thrice, and more times if necessary.

An interesting example of how this materializes involves the criminal persecution of Greenpeace. Members of Greenpeace who were captured by the Russian authorities, when they tried to stage a peaceful protest near Prirazlomnaya oil rig in the Pechora Sea, were initially charged with piracy. In Russian law, piracy is understood as a violent attack with a personal gain against a vessel at sea, a rowing vessel, or a river vessel. Without even considering personal gain or thinking about violent element of the situation, there was an issue with calling this piracy. The problem is that Prirazlomnaya was not and is not a vessel; it is a stationary rig. To charge someone with piracy, even in the case of violent attack against Prirazlomnaya, would be like charging someone with murder when the corpse of a dog or a cat is found. There was no object of the crime. You need to have reasonable suspicion established to justify detention on remand. In Greenpeace's case it was argued on behalf of the defendants from the outside that Prirazlomnaya is not a vessel, hence the piracy charge lacks *conditio sine qua non*. Nonetheless, all further requests of the investigators for detention pending the investigation for two months were granted by Russian courts, and one month into the investigation, investigators and public pressure suddenly realized piracy could not have been committed, because Prirazlomnaya was not a vessel. They made this finding, but they kept it secret and did not communicate it to anyone. It only became available to the defendant two months into the investigation and detention, when the investigators asked for an extension of detention on remand for another three months. At that point in time, they said “look, now we think it is not a piracy. Now it is, perhaps, hooliganism.” Whether it is hooliganism or not, no one knows, because the matter was discontinued due to the amnesty, which was hastily adopted. Bringing it back to the first point, amnesty was actually adopted just within a week, and it is, of course, a decision of the Parliament. The point is that, in this situation, authorities decided to use detention on remand in order to try to influence and exert pressure upon people in detention to cooperate with the investigation and to give testimony – which they did not give. Following two months of public outcry, the investigation just back-stepped.

In other cases, such as in the notorious prosecution of former Minister of Defense, who was accused of high-level corruption but was very well-linked and could have prevented the prosecution from going on, the investigators did not even ask the court for detention on remand. This is because cooperation with them was provided by the defense and there was no need to exert additional pressure.

### *Laws That Are Independently Adjudicated*

Lack of equal enforcement of legislation is definitely linked with a third element and, in my understanding, the most crucial element of the rule of law structure, which is indispensable for the functioning: an independent judiciary. I would like to draw attention to the report by the Commissioner for Human Rights of the Council of Europe for Human Rights, which was published in November 2013 and specifically deals with the state of judiciary in Russia. His conclusions are very unequivocal. He wrote that the system is unfair and should change; judges

are not shielded from undue pressure, including from within the judiciary. I think this is an important explanation of the origins of the lack of independence of the judiciary: the vertical hierarchy within the judiciary. The judge is supposed to receive instructions from the president of the court, who in turn receives instructions from the president of the court of appeals. Something that is not really accepted in many jurisdictions is when the president of the court addresses administrative officers without the authority to give orders to the judges in his or her court. Here, the system is different and underlying the system are traces of that hierarchy of judiciary, which is akin to hierarchy of any other state agencies. The judiciary is not understood as different from groups like law enforcement or tax authorities. It is organized as a hierarchical subordinated system, with lower judges reporting to higher judges. In this situation, the judge has no space to be independent and the judge is no different from a police officer. Ultimately, it leads to the influence of the higher executives on the higher judges.

The career path of judges is another interesting example. For example, there is a big debate between the United Kingdom and the United States, about whether the political appointments to judgeships are appropriate. They like to criticize the United States and the United Kingdom by saying, “how can you really think about rule of law when it is a political issue to appoint a justice of the Supreme Court.” However, it is understood that judges are recruited from other parts of the legal profession to the Supreme Court. They are very often professors of law, or servant judges, but nevertheless judges with the experience of lawyering or teaching. In Russia, as in many other jurisdictions in that part of the world, the legal profession is unfortunately not developed to create a variety of career paths to becoming a judge. Judges are former clerks, working in the registries of their respective courts, and that gives them a professional background of following orders. They are used to following orders as clerks, and they still follow orders when they are judges.

#### *Laws That Are Consistent with International Human Rights Norms and Principles*

So far, so good. There are three elements, all with substantial problems. However, all of those three elements – publicly promulgated and accepted laws, which are equally enforced and independently adjudicated – those are all elements that are about form, not about substance. Normally, these procedures lead to various types of substantial laws that are substantially fair. However, I think that an interesting element here is the compliance of those laws with international standards—first of all, with international human rights standards. For Russia, it is mainly the Council of Europe standards, as well as standards that flow from the judges of the European Court of Human Rights and from the decisions of other Council of Europe bodies.

One can say things have changed, because since the mid-1990s, Russia has become a member of the Council of Europe and now there are thousands of judgments of the European Court of Human Rights that have been pronounced in cases against Russia, but that have yet to be complied with. The problem here is that the European Court of Human Rights is not a court of appeal. The European Court of Human Rights can highlight the problem by saying, “in this case the European Convention of Human Rights has been violated.” However, it is then up to the authorities to implement this judgment, insofar as individual and general measures are concerned. Individual measures are re-trial or other actions to remedy the situation of the successful applicant. General measures are the changes in administrative practices or legislation

to prevent singular violations from occurring in the future. Here, the situation is much more problematic. International law lacks mechanisms that would force individual states to comply with pronouncements of international adjudicative bodies, when the states are not inclined to do that. Ultimately it really is up to the individual state to comply or not. General measures, and even individual measures, require actions on the part of the Parliament and the judiciary, which themselves have problems, as I just explained. Unfortunately, the numerous pronouncements of the European Court of Human Rights have not led to a change in the situation. This is also backfiring against the European Court of Human Rights itself, which receives more and more cases that deal with issues which have already been decided upon in the previous judgment of judges from the European Court of Human Rights.

To try to wrap this up, I ask, what is the source of many issues that I have described? It is the lack of institutions that could have been built but were not built. In some technical areas, these institutions were built. For example, there were no tax authorities in the Soviet Union because there were no private enterprises, but a new tax authority was built. Getting taxes was, of course, technically important for the State to function. However, in terms of Parliament and in terms of the function of the judiciary, new institutions were not formed. In worst case scenarios, Soviet institutions were left intact. In better scenarios, there were minor changes in the institutions that did not change the overall picture. There were nice additions into the system like the Constitutional Court of Russia. However, like the European Court of Human Rights, the Constitutional Court is not empowered to quash the judgment in the individual case. It is only entitled to find whether laws are in compliance with the constitution. Even if the Court says they are not in compliance with the constitution, it is then up to the Parliament to amend it. It is up to the 'crazy printer' to amend it. So, that makes this institution important in terms of the pronouncements it makes, but not very relevant in terms of actual change in the situation. Of course, this institution-building is definitely the task of society within Russia. Only when society genuinely recognizes the need for institution-building will it be possible to make the first steps on this path.

I understand that this is a slightly grim picture and one could say “what's the outcome?” I would say the demand for changes is growing. Recent events in Ukraine show this demand can change the situation rather promptly, when no one really expects these dynamics. However, I would also say before that, one should rely upon miracles, because miracles do happen. Even in these situations, sometimes one can find a publicly promulgated, basically reasonable law, which *can* be equally enforced. Within the judiciary it is more or less possible to find one or two magistrates who will be able to have it enforced in particular cases. Anton is now working with the Kennan Center in DC as a Galina Starovoitova fellow. Galina Starovoitova was a politician who became a victim of a political assassination in 1998 in St. Petersburg. She was a member of the Russian Parliament who really made a law to try to build institutions, which are unfortunately still absent. A monument to Galina Starovoitova is located in the small garden right outside the building of Smolninskiy District Court of St. Petersburg. This is an example of when one miracle happened in one separate case. I just think that's a right moment to pose that miracles do happen, and miracles happen because of individuals – individuals like Galina Starovoitova, whose monument is still in St. Petersburg, and that raises hopes for changes in the future.

**When the Candidates Are the Election Monitors:  
Using Strategic Litigation to Advance Democracy in Russia  
Dr. Anton Burkov, LLM, PhD**

Thank you for the invitation to be here today and share about what we do in Russia, what we do in courts, and how we help general people to defend their rights in court – that's why they call us Sutyajnik.

First, I will just say some words about the organization I have been working with since I was a law clinic student. The name of this organization, “Sutyajnik,” can be translated as 'litigator.' It has two meanings. One is an Old Russian word meaning a person who is going to court to defend his or her rights. The second meaning is usually a contemporary word, used mostly by government officials who dislike us for our activities. It is a medical mental illness term, describing a person who thinks that everybody is against him or her, who looks for remedy in the courts. But, what Sutyajnik has been doing for almost 20 years is litigations for national courts (and for the European Courts of Human Rights, when attempts within the national courts have failed) through teaching human rights, through workshops, through summer schools and winter schools, and also through our members teaching at universities. We also distribute a message about human rights. We organize a special news agency, Sutyajnik Press, which spreads the message about the cases we are litigating, the trainings we are conducting, and the general situation in the legal world in Russia.

**NGO Sutyajnik (Urals Center for International and Constitutional Human Rights Protection)**

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SUTYAJNIK is a non-governmental human rights organization founded in Yekaterinburg, Russia in 1994.

Sutyajnik is a human rights resource center **that helps** citizens and organizations realize rights guaranteed in the Russian Constitution and international treaties by **litigating** public interest cases, **educating** in human rights, and **informing** the public about the mechanisms for human rights protection.



Today, I am going to speak about the technique we use, strategic litigation – what I think in the US is called “cause litigation.” We use this technique in many different ways, in many different cases, and in many different areas. One of these areas is democracy and elections, particularly

election campaigns. I can mention some of the cases that Sutyajnik has handled. For example, in 1999 we won our first case before the Russian Constitutional Court, when we challenged one provision of the code of administrative offenses which did not allow appeals for a person who is accused of a minor offense or crime. Due to this case, Russia's new code of administrative offenses was equipped with this appeal system. Now, everybody can appeal administrative offenses.

We started to do strategic litigation in 2000, when we ran a number of drop-in reception and consultation offices in the small town of Serov, which is to the north of Yekaterinburg, the capital of the Ural region. After a year of doing this, those who approached us in the consultation offices advised our lawyers to run for office – for local offices, city councils, and for mayors of towns. We thought it was very important to respect what people ask you to do. It is not litigating cases, but we thought we should try to do this, not only so we could win the elections and run offices, but also so we could actually observe and monitor what was happening during the elections. It is easy to observe elections when you are a voter – you come to the voting poll, you drop a ballot, and you can try to see what is going on and how it is being counted – but it is much more difficult to see how the process works from the position of the candidate. We decided to run for a number of offices. We faced a number of small and major violations of the right to be elected, one of which I will mention today: the unpublished financial regulation case.

The point of this case was that a number of candidates, including us, were faced with the problem that local election commissions, which supervised the order of running election campaigns, started to charge and persecute some candidates for not following the financial regulation issued by the regional election commission. The financial regulation established how you spend money on an election campaign and how you report this spending to the authorities. We realized later that this regulation was basically not published, and that was why candidates could not follow this regulation. Thus, we decided to challenge this regulation in the court of law.

We initially challenged it at the regional-level court, and then before the Supreme Court. Our major argument was that if this regulation was not published, how could anyone actually follow this regulation? We lost this case. It is actually interesting how we lost this case, because the Supreme Court hearing the appeal decided to accept evidence of publication of this regulation a full month after the date of the elections, which was made two weeks before the hearing, four months after the election, and four months after anyone could actually follow the regulation. It was quite disappointing for the Supreme Court to make this ruling, as before it was the court that could make change. However, we were able to achieve something with this case. When we started to litigate this case, we made use of mass media to spread the message of what was going on and let people know that their selected candidates were being prosecuted for not following an unpublished act. This case actually stopped the prosecution of the candidates. The future financial regulations of the elections are actually published now.

Two or three years after, we moved further in our strategic monitoring of elections processes and pre-election processes. With the help of our labor union colleagues from the Urals, we established a regional branch of the old Russian Labor Party in 2003. Right after the registration and before the first elections, the regional branch of the Ministry of Justice requested that the

party submit applications for the members of the regional branch of the party. Of course, we refused to submit such applications on the grounds that those applications contained members' personal information, such as their names, address, telephone numbers, and email addresses. We also argued that this request interfered with the inner activities of the party and that the Minister of Justice had no authority to make this request and that this interference qualified for a violation of the right to freedom of association, which is outlined in article 11 of the European Convention on Human Rights. We used this argument before the district court and before the regional court. Unfortunately, we lost these cases. The court said that we had to submit those applications.

As a last resort, we went to the European Court of Human Rights. So far, ten years have passed and the European Court of Human Rights is still looking into this case. It started the procedure of communicating this case to the Russian government. The Russian government already responded, but we are still waiting for the judgment on the merit. Despite the fact that it has already been ten years since it happened, the outcome of the case and the judgment of the European Court will probably not help the party, but it will set up a very important precedent for the future to follow. It will impact the non-governmental organizations' ability not to disclose information about their members. Just recently, before going to Washington DC for this fellowship, our NGO received a request from the Minister of Justice to submit the list of members of the organization. So, perhaps again we will refuse and hopefully this year the European Court of Human Rights will deliver the judgment and we will be able to use it in our defense.

You can visit the link [[www.sutyajnik.ru](http://www.sutyajnik.ru)] and access the material of this case and all the cases I refer to today. That is actually part of our strategy: we try to publish all the cases we are litigating online so that other people can access them and can see that there is a possible remedy in their cases.

I recently saw an interesting case in a book Peter Irons published in 1988, *The Courage of Their Convictions*, and found that there are similarities between what was happening in the US in the 1950s and 1960s and what's happening right now in Russia. In this particular case, from 1957, I believe, the head of the Little Rock office of the National Association for the Advancement of Colored People (NAACP), Daisy Bates, refused to provide the list of members of her local branch of the NAACP. She received these requests from the prosecutor because of her active role in implementing the judgment of *Brown versus the Board of Education*, helping black students to attend the formerly segregated Central High School. When Daisy Bates refused to provide the list she was fined \$100, but she won this case before the US Supreme Court, and later on, the regional court ruled that non-governmental organizations are not obliged to provide lists of members.

A more recent example of our strategic monitoring of elections processes is this one from the State Duma elections of 2012, where we monitored the election from the standpoint of the voters. In these elections, monitors recorded a lot of fraud in counting the votes. There were a lot of cases going to district courts where monitors or regular voters brought their case against local election commissions, where they argued that there was fraud during the process of counting the votes.

**Monitoring elections as voters  
(State Duma elections of 2012)**

- Biggest ever threat to democracy – to the right to vote
- All the courts of general jurisdiction up to the Supreme Court, as well as prosecutors, election commissions were of the opinion that the way votes were counted or transferred to the unified system of counting only concerned political parties which participate in the elections, not the voters.
- The courts ruled that individual voters' rights to participate in the election had not been affected by the way votes are counted, as their right to participate only lasts until the submission of their voting ballots to the voting boxes. Consequently, the courts ruled that only the political parties had standing to challenge the election results.
- Together with our colleagues from Voronezh and St. Petersburg we took this case to the Constitutional Court which on April 22, 2013 ruled in favor of voters granting them standing.
- Case's materials <http://sutyajnik.ru/cases/520.html>



All the election commissions, all the courts, and all the prosecutors that were involved in these cases interpreted the civic procedure code and relevant provisions of the federal law and voting rights as saying that regular voters have no standing to bring a case to district courts, because they only have rights until they drop the ballot into the box. They claimed that what happens after is not voters' business, but is only the business of political parties that submit candidates to run for State Duma. It is a very interesting interpretation, which provides the biggest ever threat to democracy in Russia, because they are saying that how they count the votes is none of the public's business. So a number of activists and voters from different regions including Voronezh and St. Petersburg brought this interpretation of the law, not the law itself, before the Constitutional Court of Russia. The hearing was in March 2013, and in April 2013 they delivered the judgment, which gave standing to regular voters, allowing them to bring cases forward if they are not happy about the counting and if they are not happy about the outcome of the elections. Unfortunately, the Constitutional Court did not support the idea that monitors, who were there to supervise after the election, also having standing. They also determined that the members of the local election commissions do not have a standing. Still, I believe it is a very important case.

In recent elections, we participated again as candidates, in the race for mayor of Yekaterinburg, the capital of the Ural region in Russia. Again, our main goal was not to win. It was like an Olympic slogan; we were there not to win, but to participate. We were there to monitor the elections and to find out what violations have occurred. We were faced with one major violation there. When one runs for an office, there are two stages to becoming a real candidate. First, the party advances a candidate to be a candidate for a particular office and then you, as a candidate, collect some documents provided by the election commission. The election commission says 'yes you are qualified' and you go to the people to collect your votes and to advocate for yourself and your program. Yet we realized that some candidates are not being invited to a hearing by the local election commission. This hearing is where the commission actually decides the major questions for a candidate, and whether to register or refuse to register a candidate who is trying

to run for an office. That has happened to us. Our candidate was not invited to this meeting and the draft decision of the election commission was to refuse to register our candidate. It was interesting that all of the other fourteen candidates were invited for this hearing. Only one candidate was ignored and he represented us.

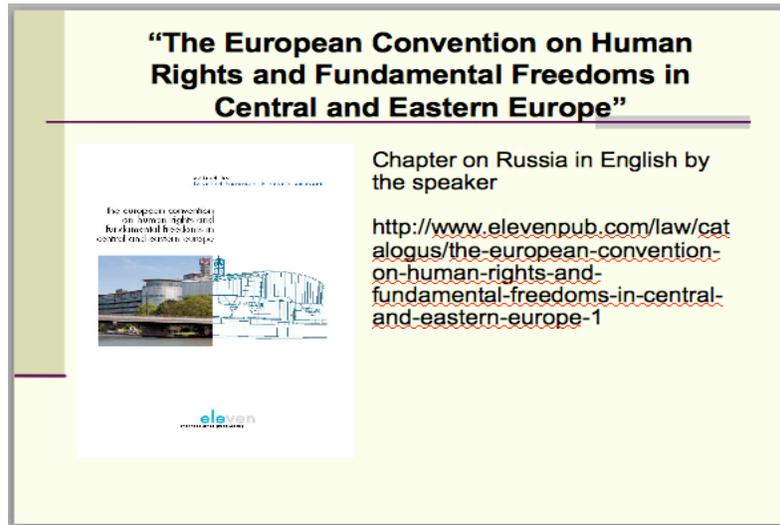
We brought this case to the district court and during the district court litigation we realized that the problem is in the federal law regarding voting rights. The provision of this law is so vague that it gives the power to the head of the election commission to actually decide who will be present at the hearing. There are no criteria for making this decision. Basically, the head of the election commission picks some candidates and invites them and others can be ignored.

Logically, we brought this case to the Constitutional Court of Russia, because the problem is in the law, not in the implementation.

It is interesting how when you conduct a strategic litigation, the victory in the court is not as important as the fact that different outcomes of the case can help the broader audience. In this case, our application was not accepted to be heard due to technical legal issues. The Constitutional Court, however, could not ignore the major argument. The Constitutional Court went into analyzing and interpreting the provision that we were complaining about and provided us with a positive interpretation of this law. This decision of the Constitutional Court will be published in a journal by the Constitutional Court and its position is legally binding for future elections.

During these elections we were promoting one judgment of the European Court of Human Rights, particularly *Anchugov and Gladkov versus Russia*. This is a case about the right of prisoners to vote. I'm sure that in the U.S., felons are completely prohibited from voting for the rest of their lives, but in Europe, the European Court of Human Rights has taken the position that absolute prohibition of a prisoner's right to vote is a violation of the European Convention on the Right to Vote. There should be some sort of criteria as to which prisoners can vote and which cannot. In June 2013, the European Court of Human Rights delivered judgment against Russia in front of the UN Commission on Human Rights, which had delivered a similar opinion two years earlier. So, during this election campaign for the mayor of the city, we used these judgments and opinions to sue the local election commission for not organizing polls at the prisons in the territory of Yekaterinburg. Of course, our goal was not to get these extra votes, but we wanted to spread this message and make this decision of the European Court of Human Rights well-known and actually pose the question: How is this decision of the European Court going to be implemented in Russia? There should be some sort of a federal law to ensure this judgment is implemented.

Now we also are planning on organizing a case before the Constitutional Court of Russia where we will pose this question: when a person is convicted, and is being sentenced to imprisonment, should this person also be aware that in addition to being excluded from the public and being in prison, he is also being refused the right to vote until he is released from prison? Again, all the case materials are in the website.



In sum, my point here was that we use strategic litigation to advance the human rights issues we think are important and that our clients, the victims who turn to us, think are important. Strategic litigation is important because non-governmental organizations have very limited resources. Of course, our resources are limited as well, and you can't really help everybody who turns to you for assistance. So we strategically try to select cases which may have a big impact not just for one person, but for an indefinite circle of people who can benefit from this case in the future. I thank you very much for your attention.

## Discussion

**Q1:** I'm curious whether you've seen any change over time in the political context around the law and whether the Duma is passing laws without reading them. Russians have historically been very skeptical about the law. Are you seeing people willing to work with you to use the courts to try to change some of the laws?

**Sergey Golubok:** As far as perceptions are concerned, there's an enormous lack of trust in the judiciary as it exists nowadays. This is proven by the number of applications to the European Court of Human Rights. Most are inadmissible because the applicants simply try to make the same argument in front of the European Court of Human Rights that they made unsuccessfully in front of domestic courts. Because the domestic courts did not hear them, they retry their arguments in front of the European Court of Human Rights. This lack of trust can be explained because it is very hard to convince people to go to the courts when the courts have failed them so many times before.

I prefer to defend people when they are brought to court. We don't use the courts to change the system, we use the courts to show that the system is flawed. We use courts as a legitimate place to discuss flaws in the system, with the exception of the European Court of Human Rights and the Constitutional Court of Russia, where you can discuss ideas more generally and make attempts to strategically change legislation. The most important point is that there is a lack of trust and a lack of legitimacy in the courts as an authority.

**Anton Burkov:** I've noticed that Russian people like to write letters to the president. I was speaking to a client whose daughter died and her organs were taken without anybody's consent. When I asked the mother what she had done so far, she said she wrote a letter to the president. It is not people's first thought to go to the court.

In general, the public is much more aware of their rights, both in Europe and in Russia. I have many examples of clients who have gone to the court themselves to get advice and have used the Russian Constitution and judgments of the European Court of Human Rights. The situation has changed since Russia joined the European Convention. Courts are using not only the texts of the Convention, but also the judgments of the European Court. This is very unusual because the country is a civil law country, but the situation is changing.

Unfortunately, the Russian authorities have adjusted to the criticism, especially from the European Court of Human Rights. There were a lot of criticisms of the cassation, which is the appeal of the judgment after it enters into force. There is a lot of criticism of the cassation system. Now we can see there is no cassation system. Now we have appeal, but when you go to the court, you realize that this appeal is the old cassation, it just has a different name. The cassation which is in existence right now used to be *nadzor*, so they did not change the cassation system, only the title. Quite often, authorities involve the Council of Europe to justify the change. Recently, the civil procedure code received a new appeal, which introduced a small provision that gave the federal government immunity from being sued in the Supreme Court. This provision was authorized indirectly by the Council of Europe, because it gave 1.5 million Euros to the project to introduce an appeals system in Russia. So, there is a lot of work to do.

**Q2:** I have a question for both of you. I'm someone who went to school to study in the Soviet Union and in a lot of what you said I really hear echoes of the Soviet system. For instance, the judiciary is not independent, judges are used to taking orders for how to rule, and the head of electoral commission who decides based on patronage or some other system. All this sounds very Soviet, but is this because of an enduring legacy or has something happened since then that makes these policies continue?

**SG:** I would say, yes, it is the Soviet legacy. When you look at Soviet examples and compare them with contemporary situations, you get answers to many questions. I was not a lawyer during Soviet times but I've read about it and a lot of what has been happening now can be explained by Soviet experience. Many other areas of life, such as economic structures, have changed, but there were very few institutional changes in the legal system. Yes, the Council of Europe has had an impact and the European Court of Human Rights have rendered judgments that have allowed certain elements to change. However, the structure and institutions in general remain the same, minus ideology. Current attempts to reinvent ideology are attempts to make

necessary steps for the current situation to really seem like the Soviet situation. I think in the 1990s, there was a lot of hope that change would be forthcoming and too much attention was devoted to economic structures, while not enough was devoted to the judiciary or legal system reform. I would say yes, it is very much predicated on Soviet legacy.

**AB:** It is yes and no. I was not a lawyer in the '90s as well, but when I studied practice law, I realized that what I'm doing now, with my colleagues and this NGO, was not even possible ten years ago. It was not possible to go to the Supreme Court and challenge the regulations of the federal government or to the Constitutional Court and challenge laws and provisions. It was not possible to bring reform to administrative justice. Now, we can do it. At the end of the 1990s and the beginning of the 2000s, there was a blooming of these possibilities, but now we can see that the legislation and the judicial practice is cutting it back. It is much more difficult now to reach the Supreme Court or to sue the federal government. There are many small legal tricks that can be used by the judges and you won't be able to reach the court to pursue the case on its merits.

**Q3:** I'm from the eastern part of Ukraine. I was a little surprised that so few people in Russia went to the streets to protest Russian intervention in Ukraine. Is it because of lack of freedom of the press or is it because of limitations to rights to protest? My second question is for Anton. Do you really have to get into politics in order to change system from the inside?

**SG:** I should say I was not surprised to see few people protesting, for reasons of context. I would say there is public dissatisfaction with the results and consequences of protests. After the so-called election in 2012, where the current president returned to power, there were a number of powerful public protests in Moscow and other cities. They led to the criminal prosecutions of several people involved. They were recently convicted and sentenced to medium terms in jail. In many other instances, those who participate in public protests have been prosecuted for misdemeanors and minor crimes. That led to a definite chilling effect upon the exercise of the right to peaceful protest. One can try to place blame or justify this behavior, but this is essentially the result of passive attitudes and a lack of desire to protest, because it can lead to consequences. I would say I'm not surprised, but I would say that this does not reflect the opinions, which may be more nuanced in terms of what is happening in Ukraine now.

**AB:** On to the second question. When we first participated in elections, it was the result of the initiative of the people who approached us for legal advice. We decided to go to the elections to win the trust of the people who turned to us and to continue our litigation work to change law or the practice of laws that violate human rights. Somewhere in the back of our minds, we hoped to win the elections and participate in legislation work at the local level. Unfortunately, it is not that easy to win the elections, even at the local level. In 2000, which was the first election we participated in, we were very close and our candidate got most of the votes, but back then was a provision that allowed people to cast votes against everybody. The results of the election were cancelled because there were more votes against everybody [*than there were for any candidates*]. This "vote against everybody" was often used by those in power to spoil elections and to drop extra ballots in the box for the "against everybody" option. This provision was cancelled because the running party was comfortable with doing so, but now they are changing it back. This legislation is not changing steadily. Still, there are very many examples of active candidates winning at the local level.

**Q4:** If I understood you correctly, there was a moment of hope in the early 1990s, but it sounds like the prospects are somewhat bleaker now. I wanted to know what motivates you now, what keeps you going, and what do you predict will be the situation in the next 5 years?

**AB:** There is hope all the time. In the end of the 1990s there was one type of hope, but now we have a different one. In the 1990s there was so much excitement because we believed that as lawyers, we could bring change to legislation in the entire country. Now, yes, it is more difficult, but since then, we received a new legal tool called the European Court of Human Rights. When I read this book by Peter Irons [*The Courage of Their Convictions*], I thought that this court is very similar to the US Supreme Court. Yes, there are many issues about how to implement their judgments, but they still gave us hope. They still gave us this legal tool. Maybe Sergey can predict the future

**SG:** I want to try to tackle this from the wider perspective and not only from the point of view of the courts. I think in the 1990s, changes happened from above. The government was willing to restructure the state machinery and looked more deeply into economic reforms. The government looked less at the structural changes and there was lack of public understanding that the judiciary was in dire need of change, because people wanted to be fed first. Now, after the several steps that have been taken backwards, what gives me hope is better public awareness that changes are needed in structural areas, like the judiciary. I think that changes in the future will be driven from below, rather than from above. It will take time and require new methods that are dangerous, and not just public protest. I think that there needs to be public demand for justice, not only the right to go to court, but the right to prevail in court when you have a just case. I think that the demand for change to really happen will be driven from below and be driven from public perception of the necessity of change, which is what we are seeing in Ukraine right now. My short-term prediction is very cautious. I do not think changes will happen in five years, but it also depends on oil.

**Q5:** For our first speaker, I was wondering, if you think rights regard “freedom *to*” or “freedom *from*”? For our second speaker, are elections like in the US with the Electoral College or is it different?

**SG:** While we talking about human rights, let’s speak about obligations. Most human rights imply obligations on the part of others vis-a-vis the rights holder. The right to life means there is an obligation of others not to kill. Of course, there are a lot of attempts to portray human rights as arbitrariness on the part of the rights holder. They say, human rights are so oriented on the individual that the wider interests of society tend to be forgotten. This is part of human rights rhetoric, which explains that human rights are not unlimited. However, limitations on human rights depend on the type of right (for example, the right not to be tortured is absolute but the right to freedom of expression is not), and those rights which can be limited are subject to strict conditions. The conditions flowing from rule of law concepts are one of the most important conditions for limitations. For example, limitations should be put on publically promulgated, equally enforced, and independently adjudicated legislation, so I would say it is freedom *to* but also freedom *from*, and those are just two sides of the same coin.

**AB:** To answer your second question, yes, it is always direct elections. In this regard, we are more democratic. There used to be a lot of possibilities to run a referendum and many parties and individuals were actually abusing this, because they would organize a referendum to promote a party agenda or candidate for a future election. Unfortunately, for now the possibility to run referendums has been narrowed down that it is almost impossible to organize it.

**Q6:** How has social media affected the growth of your organization. Has it been helpful or has it made things worse?

**SG:** Social media has definitely contributed to speeding up things. In order to realize something, you need less time. Now, you can't say you don't know. This means changes are very fast. You can have the general perception that you should take part of demonstrations in 2012 and you will have empathy in 2014. No one knows what will happen in 2016 and 2018. I think social media means a new speed of awareness and changes in the mindsets. Whether it is good or bad, I don't know. I just think it is part of the 21<sup>st</sup> century.

**AB:** Before 2002, we would distribute press releases about court hearings or the results of the hearings and would receive instant questions from media asking questions and we would have good attendance of our press conferences. Later on, the media wanted to write mostly about consumer rights protection. I'm not sure why but I can guess. The attention of the media was lower down. Now, social media is the only tool that NGOs have to distribute the message across the population.

**Q7:** Can you comment on membership in the Supreme Court and changes from the 1990s onward?

**SG:** It is enough to say that the president of the Supreme Court used to be a judge of the Moscow city court during the Soviet times and used to pass sentences for those convicted of anti-Soviet propaganda, including Orthodox priests. This is public knowledge. I would not associate myself with Anton's hope that access to the Supreme Court will change governmental regulations. It is great to have the right to sue the government and the Supreme Court, but it is better to have another Supreme Court. The Supreme Court is definitely a Soviet career path for judges.

**AB:** I think you misinterpreted my attitude toward the Supreme Court. Yes, the biggest concern is the age and education of those in the Supreme Court. It is not only the Supreme Court. The region I come from has regional courts and the head judge of this court has held the position since 1988. The head of the Supreme Court has been head since 1986 and is still in power. The head of the regional court only recently changed. I think it is important to stress that the members of the Constitutional Court are mostly professors from different law schools and the members of the Supreme Court are judges who rose from the level of regional court to the Supreme Court. Those who are at the Constitutional Court have more freedom to argue their judgments and cases.

**Q8:** You mentioned that clerks make their way up to judges and are still used to taking orders, but from whom do those orders come? Who do they have to obey?

**SG:** They need to obey more senior judges. There was a recent example of an interesting arbitrary application of law. One of the opposition leaders was convicted and then released on the following day, without his appeal having been determined. This had been unheard of—that someone who was sent to jail can be released pending appeal. There is an interesting joke about that. People say that somewhere in the higher judiciary, messages were mistaken. In the first case against Greenpeace, bail was denied and extension of detention was ruled, but in the second case, which was heard two hours after the first, the judge disappeared just before delivery of judgment, came back, and issued a different sentence. Normally, they take orders from more senior judges and this can cause mixed signals and problems on the lower level. Judges consider themselves to be part of a vertically-oriented hierarchy, like in a corporation, unfortunately.

### **Biographies**

**Anton Burkov**, serves as the chair of the European and Comparative Law Department at the University of Humanities in Yekaterinburg, Russia. He has worked with the Urals Centre of Constitutional and International Human Rights Protection of the NGO Sutyajnik, and is currently serving as a legal representative in a number of cases before the European Court of Human Rights and national courts. He is currently a Galina Starovoitova fellow at the Wilson Center for International Scholars, Kennan Institute in Washington, DC.

**Sergey Golubok**, is an attorney with Semenyako, Grib & Partners in St. Petersburg, Russia. In that capacity he has defended political activists and NGO's in high-profile human rights cases and argued extradition. He also served with the Registry of the European Court of Human Rights in Strasbourg, France from 2008 to 2011. Dr. Golubok received his PhD in International and European Law from the St. Petersburg State University Law School.