UTRECHT UNIVERSITY

European Master's Degree in Human Rights and Democratisation
A.Y. 2015/2016

THE REPRESSION OF THE POLITICAL OPPOSITION IN RUSSIA'S COURTROOMS

The Russian Judiciary and the European Court of Human Rights: A Case Study

Author: Laura Lizzi
Supervisor: Brianne McGonigle Leyh

THE REPRESSION OF THE POLITICAL OPPOSITION IN RUSSIA'S COURTROOMS. THE RUSSIAN JUDICIARY AND THE EUROPEAN COURT OF HUMAN RIGHTS: A CASE STUDY

ABSTRACT

Since the dissolution of the Soviet Union, Russia has made some significant steps in the implementation of the three pillars of the Council of Europe (joined by Russia in 1996). However, Russian opposition politicians seem to be systematically targeted with fabricated criminal charges and administrative harassments aimed at silencing their critics and at discouraging the public in large from engaging in opposition politics. The present research analyses the (mal)functioning of the judiciary in Russia on the basis of the European Court of Human Rights' judgments in the cases Nemtsov v. Russia, Navalny and Yashin v. Russia and Navalny and Ofitserov v. Russia. In the light of the systematic nature of the procedural flaws detected by the Court in the proceedings brought against Boris Nemtsov, Alexei Navalny and Ilya Yashin, all prominent Russian opposition leaders and vocal Kremlin critics, the conclusion is reached that pressure and interferences continue to permeate the Russian justice system and hinder the establishment of an independent judiciary – the prerequisite for implementing the rule of law and building a truly healthy and stable democracy.

TABLE OF CONTENTS

CHAPTER III

RUSSIA'S DICHOTOMY BETWEEN "POLITICIZED" AND "NON-POLITICIZED" CASES. THE RUSSIAN JUDICIARY AND THE EUROPEAN COURT OF HUMAN RIGHTS

INTRODUCTION

In post-authoritarian regimes, the independence of the judiciary from political actors is essential for the establishment of the rule of law and the development of a healthy and stable democracy, where human rights and fundamental freedoms are fully respected[1]. Since the dissolution of the Soviet Union, Russia has made some significant steps in the implementation of the three pillars of the Council of Europe (joined in 1996)[2]. Article 1(1) of the Constitution of the Russian Federation provides expressly that Russia is a democratic state, based on the rule of law[3]. However, whether the courts in Putin's Russia act as neutral arbiters in cases involving political dissenters is controversial[4].

The present dissertation poses and answers the following research question: what does the malfunctioning of the Russian judiciary in cases involving opponents, when looked at as part of a continuous narrative instead of episodically, reveal about the independence of the judiciary in Russia? The aim of the present study is to establish whether the Russian judiciary is entirely free from pressure and interferences by the other branches of government when state interests are at stake.

This research uses a qualitative case study. The European Courts of Human Rights' judgments in the cases *Nemtsov v. Russia*, *Navalny and Yashin v. Russia* and *Navalny and Ofitserov v. Russia* serve as the basis to assess the independence of the Russian

[1] See POPOVA MARIA, *Politicized Judiciary. A Study of Courts in Russia and Ukraine*, New York: Cambridge University Press, 2012, p. 6.
[2] BOWRING BILL, *Russia and Human Rights: Incompatible Opposites?* in *Gottingen Journal of International Law*, Vol. 1, No. 2, p. 33.
[3] See Article 1(1) of the Constitution of the Russian Federation, according to which "The Russian Federation - Russia is a democratic, federal, rule-of-law state with a republican form of government".
[4] International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, Report of the ICJ Research Mission on Judicial Reform to the Russian Federation, 2010, p. 5, at http://icj.wpengine.netdna-cdc.com/wp-content/uploads/2012/05/Russia-indepjudiciary-report-2010.pdf.

judiciary in cases involving opponents. The analysis focuses, in particular, on the braches by the Russian state of Article 6 of the Convention[5].

The limitation of the present research is that it looks at only three cases. However, they are highly significant for the following reasons. First of all, the applicants are prominent Russian opposition leaders who are visible Kremlin critics[6]. Secondly, in all cases the Court held unanimously that the applicants' conviction had been arbitrary and that the proceedings brought against the applicants taken as whole had been conducted by the domestic courts in violation of their right to a fair hearing[7]. Lastly, the Court found a *nexus* between the applicants' opposition activities and their conviction[8].

Chapter I is descriptive in that it reviews the literature on the rule of law in Russia and examines the reports on the Russian judiciary of the International Commission of Jurists and the Special Rapporteur on the independence of judges and lawyers[9]. The literature and the reports on the judiciary in Russia constitute the secondary resources of this study. Chapter II is comparative and evaluative. It compares the cases *Nemtsov v. Russia* and *Navalny and Yashin v. Russia* and examines the case *Navalny and Ofitserov v. Russia*. The three cases constitute the primary sources of this research. Chapter III is evaluative in that it analyses the findings of the Court in the above mentioned cases in the

[5] See ECtHR (31 July 2014) Application No. 1774/11 (*Nemtsov v. Russia*) §94; ECtHR (4 December 2014) Application No. 76204/11 (*Navalny and Yashin v. Russia*) §85; ECtHR (23 February 2016) Application Nos. 46632/13 and 28671/14 (*Navalny and Ofitserov v. Russia*) §120.

[6] Boris Nemtsov was a high profile opposition politician and political activist who was assassinated in Moscow on 27 February 2015. For further information, see REID CHARLES, *Vladimir Putin's Culture of Terror: What is to be Done?* in *University of Saint Thomas Journal of Law and Public Policies*, Vol. 9, No. 2, 2015, p. 282. Alexei Navalny is a prominent opposition leader and a popular blogger. Ilya Yashin is a well known opposition politician and political activist.

[7] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §94; ECtHR (4 December 2014) *op. cit.*, footnote 5, §85; ECtHR (23 February 2016) *op. cit.*, footnote 5, §120.

[8] In the case *Navalnyy and Ofitserov v. Russia,* the Court noted that it was clear that "there [was] a link between the first applicant's activities and the Investigative Committee's decision to press charges against him. It was therefore the duty of the domestic courts to scrutinize his allegations of political pressure. […] Having omitted to address these allegations the courts have themselves heightened the concerns that the real reason for the applicants' prosecution and conviction was a political one", see ECtHR (23 February 2016), *op. cit*., footnote 5, §119.

[9] See, in particular, International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4; International Commission of Jurists (ICJ), *Appointing the Judges: Procedure for Selection of Judges in the Russian Federation*, ICJ Mission Report 2014, at http://www.icj.org/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf; KNAUL GABRIELA, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/26/32/Add. 1 (2014).

light of the literature and reports reviewed in Chapter I and provides the implications of this study's findings.

After examining Russians' attitudes toward the law and the legal institutions and 'the culture of informality' that permeates the Russian justice system[10], this dissertation discusses the state of the judiciary in Russia in the light of European Court of Human Rights' judgments in the cases *Nemtsov v. Russia*, *Navalny and Yashin v. Russia* and *Navalny and Ofitserov v. Russia.* This dissertation contends that the systematic nature of the procedural flaws detected by the Court leads to the conclusion that the malfunctioning of the courts in the above mentioned cases did not occur incidentally and that the judiciary in Russia is not entirely free from pressure by political actors[11]. It follows that in Russia the principle of the separation of powers, according to which the three branches of government should remain separate, is not fully respected[12].

[10] LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia* in MARY MCAULEY, ALENA LEDENEVA and HUGH BARNES, *Dictatorship or Reform? The Rule of Law in Russia*, London: The Foreign Policy Centre, 2006, p. 26.

[11] With regard to the *Yukos* case, Groen reached a similar conclusion, see GROEN LAURENCE A., *The "Yukos Affair". The Russian Judiciary and the European Court of Human Rights* in *Review of Central and East European Law*, Vol. 38, No. 1, 2013, p. 77.

[12] For further information, see GREENFELD MOLLY, *The Asymmetry of the Separation of Powers Doctrine in Australia* in *The Western Australian Jurist*, Vol. 3, 2012, p. 233.

CHAPTER I

RULE OF LAW OR "RULE OF MAN"? THE REPRESSION OF POLITICAL DISSENT IN RUSSIA'S COURTROOMS

1. INTRODUCTION. PUTIN'S RUSSIA: ON THE ROAD TOWARDS… DEMOCRACY OR AUTOCRACY?

In March 2000, the then Prime Minister Vladimir Putin won the Presidency of the Russian Federation[13]. During his first term, in accordance with Russians' vision of democracy – based upon strong state ideals[14] – Putin succeeded in "reinterpret[ing] the [strong state] tradition in a pragmatic and modernizing spirit"[15]. He mixed nationalism with Soviet nostalgia and symbolism[16] and created a sense of "stability and predictability"[17], by reinforcing national economy. In other words, after the dark 1990s, he restored Russia's national pride[18].

After being re-elected President in March 2004 with more than seventy percent of the popular vote, in May 2008 Putin 'passed' the Presidency to Dmitry Medvedev[19] who,

---

[13] CALE WHITNEY, *Through the Russian Looking Glass: The Development of a Russian Rule of Law and Democracy* in *Loyola University Chicago International Law Review*, Vol. 7, No. 2, 2009-2010, p. 119.
[14] HANDELMAN STEPHAN, *Shadows on the Wall: Putin's Law-and-Order Dilemma* in *East European Constitutional Review*, Vol. 9, Nos. 1 & 2, 2000, p. 88, quoting Putin "For Russians a strong state is not an anomaly that should be gotten rid of it. Quite the contrary, they see it as a source and guarantor of order, and the initiator and main driving force of change" (Vladimir Putin, *Rossiya na rubezhe tysyacheletii* [Russia on the Threshold of the Millennium] in *Nezavisimaya Gazeta*, 30 December 1999, available at http://www.ng.ru/politics/1999-12-30/4_millenium.html).
[15] REMINGTON THOMAS F., *Russia and the "Strong State" Ideal* in *East European Constitutional Review*, Vol. 9, Nos. 1 & 2, 2000, p. 69.
[16] BAKER PETER and GLASSER SUSAN, *Kremlin Rising: Vladimir Putin's Russia and the End of Revolution*, New York: Scribner, 2005, p. 65.
[17] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia* in *Georgia Journal of International and Comparative Law*, Vol. 36, No. 3, 2008, p. 554.
[18] BAKER PETER and GLASSER SUSAN, *op. cit.,* footnote 16, p. 38.
[19] CALE WHITNEY, *op. cit.*, footnote 13, pp. 123-124.

in December 2008 signed the federal law extending the presidential term from four to six years[20] (formally, without any abuse of power[21]). In September 2011 Putin became again Prime Minister, the most powerful ever known in Russia[22]. With reference to his tandem arrangement with Putin, Medvedev publicly declared his intention to continue to strengthen their collaboration[23]. In March 2012 Putin won for the third time the Russian Presidential elections[24], stressing that his nomination as party's candidate for presidency by Medvedev in September 2011was the result of an agreement concluded "several years" before[25].

Russia asserts in its Constitution to be a democratic, federal, rule-of-law based state (Article 1)[26]. However, as confirmed by Medvedev and Putin's public statements, in Russia the fate of elections is "decided […] in the Kremlin offices, courtrooms and election commission headquarters"[27] and the electorate is "reduced to the role of having to make formally happen what [has] been agreed by state leaders"[28]. This dissertation will focus on the role played by the Russian courts in Putin's escalation of power, in particular on the repression of the political opposition in Russia's courtrooms, and on the "politicisation" of the judiciary in Russia. Behind the façade of a multi-party democracy, lay a regime where political dissent is heavily repressed through unlawful convictions

---

[20] CHANCE MATTHEW and TKACHENKO MAX, *Russian Parliament Approves Extension of Presidential Term*, 12 November 2008, at http://www.cnn.com/2008/WORLD/europe/11/12/russia.president/index.html. For further information, see CALE WHITNEY, *op. cit.*, footnote 13, pp. 111-112.

[21] See OVERSLOOT HANS, *Crisis and Understanding in Russian Democracy and Politics* in *Review of Central and East European Law*, Vol. 37, No. 4, 2012, p. 474, noting that "Putin has been respecting and disrespecting the Constitution at the same time; or is it: not respecting it and not disrespecting it either?". Indeed, formally speaking, no abuse of power was committed.

[22] BLOMFIELD ADRIAN, *Vladimir Putin Could Reclaim Russian Presidency Within Months*, 6 November 2008, at http/:telegraph.co.uk/news/worldnews/europe/russia/3392827/Vladimir-Putin-could-reclaim-Russian-presidency-within-months.html.

[23] Dmitri Medvedev stated "no one has any doubt that our tandem, our cooperation, will only continue to strengthen", quoted in CALE WHITNEY, *op. cit.*, footnote 13, p. 124.

[24] OVERSLOOT HANS*, op. cit.,* footnote 21, p. 474.

[25] *Ibidem.*

[26] See Article 1(1) of the Constitution of the Russian Federation, footnote 3.

[27] PETROV NIKOLAI, *Regional Elections under Putin and Prospects for Russian Electoral Democracy*, *PONARS Policy Memo*, No. 287, 2003, p. 2, noting that now "the center – instead of the regional authorities controls the courts, courts are ruling in favor of the center, and their decisions are final. […] the court's decisions reflect the will of the center". See also ROSS CAMERON, *Federalism and Electoral Authoritarianism under Putin* in *Demokratizatsiya: The Journal of Post-Soviet Democratization*, Vol. 13, No. 3, 2005, p. 364.

[28] HANS OVERSLOOT*, op. cit*., footnote 21*,* p. 474.

and detentions[29]. The conviction of the well-known oligarch and political activist, Mikhail Khodorkovsky, is referred to as one the most notorious examples of politicized judiciary[30].

Before addressing the research question of the present dissertation – namely, whether or not the Russian courts act as "neutral arbiters" when state interests are a stake – Part II of Chapter I will explore Russians' "unique vision of the rule of law"[31]. In order to assess the situation of the judiciary in Putin's Russia it is, indeed, essential to take into account Russians' negative attitude towards the law and the legal institutions, which is part of the legacy of the Tsarist Empire and the Soviet Union[32]. Part III of Chapter I will examine the state of the judiciary in Russia from a theoretical perspective. As it will be underlined, institutional safeguards (the set of guarantees provided for by the law in order to strengthen the independence of the judiciary) are not in themselves sufficient to ensure a country's judicial independence[33] which is a core prerequisite for the promotion and protection of the rule of law[34]. Part III of Chapter I will focus in particular on the "culture of informality" which permeates the Russian judicial system and hinder the establishment of a fully independent Russian judiciary[35].

2. THROUGH RUSSIANS' EYES: THE RULE OF LAW BETWEEN PAST AND PRESENT

[29] See YAFFA JOSHUA, *Putin's Hard Turn* in *Foreign Affairs*, Vol. 94, No. 3, 2015, p. 129-130. See also POPOVA MARIA, *op. cit.*, footnote 1, p. 165, noting that there is increasing scholarly consensus that under the second Putin administration (since 2004) "Russia has consolidated an authoritarian regime".
[30] See TSCHUDI EDLE A., *Telephone Justice: Khodorkovsky, Magnitsky and Navalny* in *Brown Political Review*, 2013, at http://www.brownpoliticalreview.org/2013/09/telephone-justice-khodorkovsky-magnitsky-and-navalny/ (consulted on 11 July).
[31] CALE WHITNEY, *op. cit.*, footnote 13, p. 98.
[32] *Id.*, p. 99.
[33] POPOVA MARIA, *op. cit.*, footnote 1, p. 11.
[34] See SEIBERT-FOHR ANJA, *Introduction: the Challenge of Transition* in ANJA SEIBERT-FOHR (ed.), *Judicial Independence in Transition – Strenghtening the Rule of Law in the OSCE Region*, Heidelberg: Springer, 2012, pp. 1-2.
[35] LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia*, *cit.*, footnote 10, p. 26.

The rule of law is essential to a consolidated modern democracy[36]. It is a complex and multifaceted concept that incorporates much more than electoral politics, constitutionalism and codification and that cannot be established by "putting a pen to paper"[37]. It could be described as a set of principles[38] reinforcing one main meaning "government under law"[39] that requires the existence of an independent judiciary accessible to all citizens[40].

What is clear from numerous Russian folk sayings and proverbs is Russians' historical "negative myth" of the rule of law[41]. Such discontent and scepticism towards the law and the legal system have not disappeared over time; they are still present and further exacerbated by state practices[42]. Indeed, when judgements seem to be dictated not by law, but by the preferences of the political power, the memories of the Soviet era are recalled[43] and Russians' legal nihilism is reinforced[44]. Over the course of history, in Russia, the rule of law has always been characterized by a paternalistic tone which has prevented or obstructed "the development of an independently thinking populace"[45].

---

[36] BOLT ROBERT, *A Man for All Seasons*, Act II 152-153, New York: Random House, 1962.
[37] KAHN JEFFREY, *The Search for The Rule of Law* in *Georgetown Journal of International Law*, Vol. 37, No. 2, 2006, p. 358.
[38] See *Black's Law Dictionary* 1332 (6th ed. 1991) according to which the rule of law is "a legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or legal proposition. Called a 'rule', because in doubtful or unforeseen cases it is a guide or norm for their decision. The rule of law, sometimes called 'the supremacy of law', provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application". See KAHN JEFFREY, *The Search for The Rule of Law, cit.,* footnote 37, pp. 363-366, who mentions three main principles: *nullum crimen sine legem*; law applies equally to everyone; and "the capacity for enforcement of this supremacy of law over government", that requires an independent judiciary.
[39] DICEY ALBERT V., *Introduction to the Study of the Law of the Constitution*, 10th ed., London: Macmillan, 1959, p. 187.
[40] KAHN JEFFREY, *The Search for The Rule of Law, cit.,* footnote 37, p. 366.
[41] See NEWCITY MICHAEL, *Why is There No Russian Atticus Finch? Or Even a Russian Rumpole?* in *Texas Wesleyan Law Review*, Vol. 12, No. 1, 2005, p. 271. Some examples are "Stand up to God with truth and to the judge with money", "He went to court with his coat and came out stark naked".
[42] CALE WHITNEY, *op. cit.*, footnote 13, p. 100. See also NEWCITY MICHAEL, *op. cit.,* footnote 41, p. 273.
[43] HENDLEY KATHRYN, *Assessing the Rule of Law in Russia* in *Cardozo Journal of International and Comparative Law*, Vol. 14, No. 2, 2006, p. 351.
[44] CALE WHITNEY, *op. cit.*, footnote 13, p. 101.
[45] *Ibidem*. See also KRASNOV MIKHAIL, *The Rule of Law* in MCFAUL MICHAEL, PETROV NIKOLAI and RYABOV ANDREI (eds), *Between Dictatorship and Democracy*, Washington DC: Carnegie Endowment for International Peace, 2004, p. 212.

Therefore, as history suggests, any progress in the full implementation and, consequently, in the perception of the rule of law will be gradual and probably unique[46].

Russian legal traditions were deeply influenced by Byzantine culture, which placed special emphasis on values different from those promoted by the Roman Catholic Church, which had a key role in shaping Western European countries[47]. One of the most distinctive characteristics of Western legal traditions was the coexistence within the same community of different competing jurisdictions and legal systems; because of such plurality, the supremacy of the law was necessary and possible[48]. Instead of emphasizing the objective, formalistic and rationalistic, the Russian Orthodox Church accentuated the mystical and the subjective – "the personal religious experience versus the intellectual experience" – and encouraged the development of a theocracy[49]. The direction taken by the Russian legal traditions was, therefore, deeply different from that of the Western legal traditions and it resulted in widely differing attitudes towards the law and the legal institutions[50].

Over the course of history, Russians have never associated to the law values as morality and justice, rather it has always been viewed at as a "weapon of the state", a "tactical game" which requires persuasiveness and influence and leaves a large margin to political manoeuvre[51]. In the same way, legal institutions have always been deemed as

---

[46] CALE WHITNEY, *op. cit.*, footnote 13, p. 101. See also HENDLEY KATHRYN, *Assessing the Rule of Law in Russia, cit.,* footnote 43, p. 371.

[47] See FIGES ORLANDO, *Natasha's Dance: A Cultural History of Russia*, New York: Metropolitan Books, 2002, pp. 293-300.

[48] BERMAN HAROLD J., *Law and Revolutions: The Formation of the Western Legal Tradition*, Cambridge MA: Harvard University Press, 1983, p. 10.

[49] See NEWCITY MICHAEL, *op. cit.,* footnote 41, pp. 292-297, according to which "in Western Europe, the church's effort to establish itself as an entity with authority and jurisdiction separate from secular authority sparked revival interest in Roman law and stimulated the development of canon law and legalistic methods of analysis. During the law Middle Ages, the universities at Bologna and Paris were especially noted for their study of Roman and canon law. In Russia however, no comparable church-sponsored scholarly occurred".

[50] *Id.*, p. 295.

[51] KURKCHIYAN MARINA, *The Illegitimacy of the Law in Post-Soviet Societies* in DENIS J. GALLIGAN and MARINA KURKCHIYAN, *Law and Informal Practices: The Post-Communist Experience*, Oxford: Oxford University Press, 2003, p. 43. See also CALE WHITNEY, *op. cit.*, footnote 13, p. 103, who asserts that "simply, the law does not represent a moral truth for the Russian consciousness"; KRASNOV, MIKHAIL, *op. cit.,* footnote 45, p. 201, according to whom, because of the paternalistic relationship that the state has maintained with its citizens, "the spirit of a law-governed state has never existed in Russia".

lacking[52] and legal officers have never been respected as their peers in Western Europe[53]. On the contrary, the idea of justice reflects Russian collective morality and spirituality[54]. It is connected to natural law[55] and symbolizes "what man can achieve on his own", despite and beyond the flaws of positive law and the inadequacy of legal institutions[56].

The representation of law as a form of Western Imperialism contributed to increase Russians' scepticism towards the legal system[57]. Emblematic examples were the judicial reforms of 1864 that replaced the inquisitorial legal procedure with an adversarial system and introduced professional judges, jury in criminal cases and public judicial proceedings[58]. Such reforms were considered by Russian populace as an attempt to destroy Russian civilization[59].

What also profoundly influenced official and popular attitude towards the law in Russia was – undoubtedly – the Soviet experience[60]. After the October Revolution, Decree n. 1 "on the court" of Bolshevik government (1917) stated as follows: "all laws contrary to the decrees of the Central Executive Committee the workers' and peasants' government […] or to the minimum program of the Russian Social Democratic Workers' Party and the Socialist Revolutionary Party shall be considered abrogated"[61]. Bolsheviks prohibited the profession of law in all its manifestation, eliminated codes and encouraged Russian proletariat to use "revolutionary legal consciousness" (революционный

[52] KURKCHIYAN MARINA, *op. cit.*, footnote 51, pp. 28-34.
[53] NEWCITY MICHAEL, *op. cit.,* footnote 41, p. 280.
[54] WILSON JESSICA C., *Russia's Cultural Aversion to The Rule of Law* in *Columbia Journal of East European Law*, Vol. 2, No. 2, 2008, p. 198.
[55] See KRASNOV MIKHAIL, *op. cit.*, footnote 45, p. 202, according to whom "justice is the concentrated expression of the Russian people's awareness of natural law".
[56] CALE WHITNEY, *op. cit.*, footnote 13, p. 104. A Russian proverb says "judge according to the law or according to the conscience", see KRASNOV MIKHAIL, *op. cit.*, footnote 45, p. 202.
[57] CALE WHITNEY, *op. cit.*, footnote 13, p. 104.
[58] NEWCITY MICHAEL, *op. cit.,* footnote 41*,* p. 279.
[59] *Id*., p. 284. Dostoevsky described the new legal system as an attempt of liberal professionals "to destroy Russian civilization from within, to accomplish, in effect, what every foreign invasion had failed to do", ROSENSHIELD GARY, *Western Law, Russian Justice: Dostoevsky, The Jury Trial, and The Law*, Madison: University of Wisconsin Press, 2005, p. 181.
[60] CALE WHITNEY, *op. cit.*, footnote 13, p. 105.
[61] ZILE ZIGURDS L., *Idea and Forces in Soviet Legal History: A Reader of the Soviet State and Law*, Oxford: Oxford University Press, 1992, pp. 95-96, translating the Decree of the Council of People's Commissars of the Russian Soviet Federated Socialist Republic, November 22 (December 5) 1917, "On the Court", *SU* 1917-1918, no. 4 item 50.

правосознание) in place of them[62]. According to the *Marxist and Leninist Theory of the State and Law* "the idea that law […] rules over the state and over the political authority binding and limiting it, [was] by its nature a disguise for class dictatorship"[63].

Over the years, such position radically changed. For instance, Rudden argues that "during the last years of its life the Soviet Union turned to law like a dying monarch to his withered God"[64]. Qualitatively, however, such huge mass of laws could hardly have been considered as the foundation for the rule of law in the Soviet Empire[65]. Indeed, there is a fundamental difference between a state full of laws and a state based on the rule of law[66]. The institutional approach towards the law was extremely paternalistic, instrumentalist and oppressive[67]. Basic individual liberties were denied, legal studies

[62] The Bolsheviks abolished courts and replaced them with informal tribunals, which resolved conflicts and administrative disputes on the basis of the revolutionary consciousness of ordinary workers. The aim was to remove jurisdictional power from the "elite corps of professional jurists", SMITH GORDON B., *Reforming The Russian Legal System*, Cambridge: Cambridge University Press, 1996, p. 132. Art. 5 of Decree No. 1 "on the Courts" stated that "local judges shall decide cases in the name of the Russian [*Rossiiskoi*] Republic and be guided in their decisions and judgments by the laws of the overthrown governments only insofar as such laws have not been abrogated by the revolution and do not contradict the revolutionary conscience and revolutionary legal consciousness", see Decree of the Council of People's Commissars of the Russian Soviet Federated Socialist Republic, November 22 (December 5), 1917 as translated in ZILE ZIGURDS L., *op. cit.,* footnote 61, pp. 95-96. Pyotr Ivanovich Stuchka – one of the commissars who signed Decree No. 1 "on the Court" – stressed that Communism means the victory of socialism over law, since abolition of classes would result in extinction of law, see BERMAN HAROLD J., *Justice in the U.S.S.R.: An Interpretation of Soviet Law*, Cambridge MA: Harvard University Press, 1963, p. 63. However, the initial coalition government between the Bolsheviks and the Socialist Revolutionaries slightly retreated from such extreme position in February 1918 since Decree No. 2 "on the court" relied to some extent on the previously abolished Criminal Procedure Code (1864) and instituted a College of Advocates, see JOHNSON EDWARD L., *An Introduction to The Soviet Legal System*, London: Metheu1, 1969, p. 30.

[63] KRASNOV MIKHAIL, *op. cit.*, footnote 45, p. 195.

[64] RUDDEN BERNARD, *Civil Law, Civil Society and the Russian Constitution* in *Law Quarterly Review*, Vol. 110, No. 1, 1994, p. 56. Indeed, the initial legal nihilism was followed by a period of legal positivism and manipulation of law to serve state interests, see KAHN JEFFREY, *The Search for The Rule of Law, cit.,* footnote 37, pp. 380-387.

[65] KAHN JEFFREY, *Vladimir Putin and The Rule of Law, cit.*, footnote 17, p. 515.

[66] See *id.*, p. 516, who emphasises the distinction made by ancient Romans between *lex* and *jus*.

[67] *Id.*, p. 515. Vladimir Kudriavtsev, the Director of the Institute of State and Law and one of Gorbachev's advisors stressed in December 1986 that "of the two possible principles, 'You may do only what is permitted' and 'You may do everything which is not forbidden', priority should be given to the latter inasmuch as it unleashes the initiative and activism of people", KUDRIAVTSEV VLADIMIR, *Pravovaia Sistema: Puti Perestroiki* [Legal System: the Ways of Perestroyka] in Pravda, 5 December 1986, p. 3. Gorbachev fully agreed with Kudriavtsev's statement and publicly emphasises the importance of such principle himself. The idea of expanding human liberty was crucial to *perestroika*, see KAHN JEFFREY, *The Search for The Rule of Law, cit.*, footnote 37, p. 388. However, Gorbachev's genuine effort to change the role of law and construct a socialist rule-of-law based state failed, since the approach to law was heavily institutionalized, see KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.,* footnote 17, p. 515.

were banned and the law was exclusively employed as a tool to promote the Communist party[68]. Stalin's "dual state"[69] was based on the rule of force[70] that was "rule of man" – not rule of law – for most Russians[71]. Despite the significant mass (and morass) of legal provisions[72], telephone law "ensur[*ed*] that the justice system served the state and not its citizens"[73]. In addition, the official collections of legislation were not easily accessible to ordinary citizens[74]. Legal knowledge was, therefore, a prerogative of the state which administered it in a paternalistic way[75]. As a consequence, feelings as dissatisfaction and cynicism about the real meaning of legal guarantees increasingly grew in this era[76], despite Gorbachev's attempt to "change the role of law"[77].

Following the dissolution of the Soviet Union, "Russia was not starting from scratch which certainly has advantages, but it has the disadvantages of a lot of bad legal habits"[78]. Legal positivism was the starting point for establishing a rule-of-law based Russia[79]. However, the "Western" experts and specialists who assisted the pro-reform Institute for State and Law in writing the new laws had very little knowledge about the Russian legal system[80] and approached it as "*a tabula rasa*" without taking into consideration the real

---

[68] See *Ibidem*, for example, freedom of speech was guaranteed to the extent it complied with the interests of the Communist Party.
[69] SMITH GORDON B., *op. cit.,* footnote 62, p. 82.
[70] CALE WHITNEY, *op. cit.*, footnote 13, p. 106.
[71] FOSTER FRANCES H., *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative* in *Washington and Lee Law Review*, Vol. 54, No. 3, 1997, p. 974.
[72] See SMITH GORDON B., *op. cit.,* footnote 62, p. 82, according to whom legal provisions were "merely illusory".
[73] SHELLEY LOUISE I., *Why a Corrupt State Can't be a Strong State: Corruption in the Post-Yeltsin Era* in *East European Constitutional Review*, Vol. 9, Nos. 1 & 2, 2000, p. 72.
[74] HENDLEY KATHRYN, *Assessing the Rule of Law in Russia, cit.,* footnote 43, p. 363.
[75] *Ibidem.*
[76] WILSON JESSICA C., *op. cit.,* footnote 54, p. 198. See also MAGGS PETER B. et al., *Law and Legal System of the Russian Federation*, 3rd ed., Huntington NY: Juris Publishing, 2004, p. 5.
[77] HENDLEY KATHRYN, *Assessing the Rule of Law in Russia*, *cit.*, footnote 43, p. 352.
[78] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia*, *cit.*, footnote 17, p. 520.
[79] *Id.*, p. 519, who underlines that lawfulness was chosen as agreed starting point for reform even though laws were "not always enforced (or followed) by officials or believed by the populace".
[80] HENDLEY KATHRYN, *Assessing the Rule of Law in Russia, cit.,* footnote 43, p. 353, who points out that "the inexperience of Russian policy makers with market democracy caused them to turn to Western advisors for assistance in writing the new leas and creating the necessary institutions". See also CALE WHITNEY, *op. cit.*, footnote 13, p. 108; SMITH GORDON B., *op. cit.*, footnote 62, p. 87, who underlines that this group of scholars "had considerable knowledge and expertise about the legal systems in the United States, France, Germany, the Scandinavian countries, as well as the reformist Central European states such as Poland and Hungary […]".

needs of the country and its citizens[81]. As a result, such legal scholars pushed for reforms which were not able to deal with the complexity and diversity of such nation and with its transitional needs[82]. Such *modus operandi* put soon an end to the illusion that by adopting a western model of rule of law problems would be solved[83]. The reforms were rejected by Russians as the umpteenth Western imperialistic attempt to indoctrinate them and destroy their identity[84].

Nowadays, disillusionment and discontent still pervade the country, since Vladimir Putin, as his predecessors, seems to use the law as a weapon to repress dissent and maintain control over Russian resources and populace[85].

2.1 THE RESPECT FOR THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY IN PUTIN'S RUSSIA

According to Kahn, three legal matters have had a significant impact on the state of the law in present-day Russia: the second Chechen War; Russia's accession to the Council of Europe; and the reform of the criminal justice system[86]. These three topics are deeply connected and underline the ambiguity and complexity of "Putin's approach to the constitutionally professed establishment in Russia of a rule-of-law based state"[87].

Chechnya has represented "a challenge and an opportunity to Putin" since he came to power[88]. Putin was nominated by President Boris Yeltsin to the post of Russian Prime Minister two days after the incursion into Dagestan[89] and in the thirty days after the confirmation of his nomination (16 August 1999) several bombings occurred in Moscow,

---

[81] See HENDLEY KATHRYN, *Assessing the Rule of Law in Russia, cit.,* footnote 43, p. 353.
[82] CALE WHITNEY, *op. cit.*, footnote 13, p. 109.
[83] HENDLEY KATHRYN, *Assessing the Rule of Law in Russia, cit.,* footnote 43, p. 353.
[84] See IGNATIUS ADI, *A Tsar is Born* in *Time*, 4 December 2007, p. 46, at http://columbia.edu/cu/news/clips/foreign/2008/01/24/TimeTsar.pdf.
[85] KURKCHIYAN MARINA, *op. cit.,* footnote 51, p. 30.
[86] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.,* footnote 17, p. 512.
[87] *Ibidem*.
[88] *Id.*, p. 525.
[89] DE WAAL THOMAS, *Introduction* to ANNA POLITKOVSKAYA, *A Dirty War: A Russian Reporter in Chechnya*, trans. JOHN CROWFOOT, London: The Harvill Press, 2001, p. xviii.

Dagestan and Volgodonsk, killing hundreds of people[90]. Under the label of a limited counterterrorist operation, Putin launched an immediate counterattack in Chechnya, which was the beginning of a second bloody war[91]. The new Prime Minister took advantages from the escalation of violence and used the fight against Chechen separatists as an excuse to justify his centralization of power and his "dictatorship of law"[92]. The augmentation of already broad federal executive powers and "the creation of a legal black hole" dramatically affected the state of the law in Russia[93].

The military campaigns launched in Chechnya by Putin show that Post-Soviet Russia is "far from its constitutional claim to be a democratic, federal, rule-of-law state"[94]. By contrast, Russian membership in the Council of Europe suggests a willingness to establish a "modern legal culture"[95]. Allowing Russia to join the intergovernmental organization represented certainly a considerable risk, since Russia's non-compliance with its core values might destroy the Council of Europe from within[96]. However, Russia's acceptance of the jurisdiction of the European Court of Human Rights has had important positive effects on the development of the rule of law[97]. Indeed, the

[90] During his first month in office, Putin was confronted with a terrorist attack in the three-storey underground Manezh Square shopping complex in Moscow that injured forty people and killed one person (see GENTLEMAN AMELIA, *Who is Bombing Russia?* in *The Guardian*, 12 September 1999, at https://www.theguardian.com/world/1999/sep/12/terrorism.islam (consulted on 6 July 2016)); an explosion in Dagestan town of Buinaksk that killed sixty-eight people (see TYLER PATRICK, *6 Convicted in Russia Bombing That Killed 68* in *The New York Times*, 20 March 2001, at http://www.nytimes.com/2001 /03/20/world /6-convicted-in-russia-bombing-that-killed-68.html (consulted on 6 July 2016)); the Moscow apartment bombings that killed more than three-hundred people (see BAKER PETER and GLASSER SUSAN, *Kremlin Rising: Vladimir Putin's Russia and The End of Revolution*, Washington: Potomak Books, 2007, p. 54); the Volgodonsk apartment bombing that killed eighteen people (see GORDON MICHAEL R., *Another Bombing Kills 18 in Russia* in The *New York Times*, Sept. 17 1999, at http://www.nytimes .com/1999/09/17 /world/another-bombing-kills-18-in-russia.html (consulted on 6 July 2016)).

[91] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.,* footnote 17, p. 526. In this occasion Putin stated that "[t]he antiterrorist campaign was forced upon us", see VLADIMIR PUTIN, Opinion, *Why We Must Act* in *The New York Times*, 14 November 1999, at http://www.nytimes.com/1999/11/14/opinion /why-we-must-act.html (consulted on 6 July 2016).

[92] See KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.,* footnote 17, p. 525.

[93] *Id.*, pp. 527-531.

[94] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit*., footnote 17, p. 531. See Constitution of the Russian Federation, Article 1(1) according to which "The Russian Federation - Russia is a democratic, federal, rule-of-law state with a republican form of government".

[95] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit*., footnote 17, p. 531.

[96] *Id.*, pp. 531-532.

[97] *Id*., p. 537.

Court has the power to decide on the merits of admissible petitions by anyone whose rights guaranteed under the Convention are alleged violated[98].

Russia's initial commitment turned soon into malfeasance, as the country started to lose cases before the Court[99]. Despite their antipathy towards the Court[100], Russian Representatives at the Court seem to take their legal responsibilities very seriously; even in case of obstructionism – such as when they refuse documents or complain about judgments – they use legal filings and oral arguments[101]. The reason of such behavior is that Russian institutions and leaders "like, want and need a self-conception and outward impression of being a rule-of-law state"[102].

The codification and re-codification effort during the first Putin administration was impressive[103]. Much could be said about every single code, but the reform with the most direct and lasting effects on the state of the law in Russia was undoubtedly that of the criminal justice system[104]. The new Russian Criminal Code represents "a sea-change" in the legal system, guaranteeing greater rights to witnesses, suspects and defendants[105]. One of the most important changes is the adoption of adversarial principles[106]. The new code, turning away from Soviet practice, provides expressly that "a court is not an organ of criminal prosecution and shall not take the prosecution or defense side in a case. The court shall create the conditions necessary for the parties to perform their procedural duties and to exercise the rights granted to them" (art. 15(3))[107].

---

[98] See European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 32, 34 and 41, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.
[99] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit*., footnote 17, p. 537.
[100] With regard to the case *Ilascu et al. v. Moldova and Russia* [ECtHR (8 July 2004) Application No. 48787/99 (*Ilascu et al. v. Moldova and Russia*)], the Russian Representative to the Committee of Ministers of the Council of Europe described the judgment of the European Court as "inconsistent, controversial, subjective, politically and legally wrong and based on double standards", see WILDHABER, *The European Court of Human Rights: The Past, The Present, The Future* in *American University International Law Review,* Vol. 22, No. 4, 2007, p. 527.
[101] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit*., footnote 17, p. 540.
[102] *Ibidem*.
[103] *Id.*, p. 542.
[104] *Id.*, p. 543.
[105] *Ibidem*.
[106] *Ibidem*.
[107] See Criminal Procedural Code of the Russian Federation, No. 174-FZ, 18 December 2001, Article 15(3).

However, what transpires in Russian courtrooms is "much grimmer than these wonderful paper changes"[108]. In cases where state interests are at stake adversarial principles and legal guarantees are ignored by judges[109]. As Feldbrugge underlined, "one of the most intriguing features of the politico-legal scene in Russia over the last decade has been that political struggles were often fought out in the criminal courts"[110]. Such observations suggest that the Russian judiciary is still subject to interferences by the other branches of government. In Part III the independence of the judiciary in Russia is discussed, in particular, in the light of the reports of the International Commission of jurists on the state of the judiciary in Russia and the judicial appointments process and the report of the Special Rapporteur on the independence of judges and lawyers on her mission to the Russian Federation.

3. PUTIN'S REALPOLITIK. THE REPRESSION OF POLITICAL DISSENT IN RUSSIA'S COURTROOMS

Some commentators, such as Pitts and Ovsyannikova, argue that over the last decades, Russian opposition leaders, activists, sponsors and donors have been systematically targeted with unfair trials and unlawful convictions in order to silence their critics and discourage the public in large from involving in opposition activity[111]. According to the report of the International Commission of Jurists on the state of the judiciary in Russia, notwithstanding the significant advances in reforming the justice system, "Russian old traditions and *modus operandi* continue to hamper the establishment of an independent judicial branch with strong *de facto* status and powers"[112]. As Russian history has shown, "reform from above is never enough"[113].

---

[108] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit*., footnote 17, p. 547.
[109] *Id.*, p. 548.
[110] FELDBRUGGE FERDINAND, *The Rule of Law in Russia in a European Context* in FELDBRUGGE FERDINAND (ed.), *Russia, Europe, and The Rule of Law*, Leiden: Nijhoff, 2007, p. 208.
[111] PITTS CHIP and OVSUANNIKOVA ANASTASIA, *Russia's New Treason Statute, Anti-NGO and Other Repressive Laws: "Sovereign Democracy" or Renewed Autocracy?* in *Houston Journal of International Law*, Vol. 37, No. 1, 2015, p. 90.
[112] International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4, p. 5.
[113] KAHN JEFFREY, *The Search for The Rule of Law, cit.,* footnote 37, p. 401.

3.1 POLITICIZED JUDICIARY IN PUTIN'S RUSSIA. INSTITUTIONAL GUARANTEES *VERSUS* INFORMAL PRACTICES

Though western literature usually focuses on other forms of state repression, such as restrictions on the freedom of the press, "rotten courts" – undermining the principle of the separation of powers – threatens the very foundations of democracy[114]. According to Kahn, despite the judicial reforms introduced during the Putin administration, the Russian justice system continues to be abused through informal practices[115]. Judges with higher pay and defence counsels with greater legal powers make it harder, but not impossible, to conduct political trails[116]. Although it sounds contradictory, while Putin has pursued "his vendettas" – or has allowed others to do so – he has supported reforms that made it harder to use the courts as political weapons to repress opponents[117]. Such way of behaving – far from being schizophrenic – shows "a *realpolitik* side to Putin"[118].

In post-authoritarian regimes, judicial independence from political actors is of crucial importance for the establishment of the rule of law and the development of a healthy and stable democracy, where human rights and fundamental freedoms are fully respected[119]. Depending on whether the judiciary is independent or not, the courts can "act as watchdogs" that ensure the proper functioning of basic democratic institutions – such as free and fair elections, a free press and a competitive party system – or "become attack dogs that destroy any viable opposition"[120]. While independent courts constrain

---

[114] See TSCHUDI EDLE A., *op. cit.,* footnote 30.
[115] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.,* footnote 17, p. 549. See also KAHN JEFFREY, *The Search for The Rule of Law, cit.,* footnote 37, p. 399, noting that the efforts to reform the justice system "have their origins, in part, in Putin's foreign policy goals of closer ties to Europe […] and the international legal order".
[116] *Ibidem.*
[117] *Ibidem.*
[118] *Ibidem.*
[119] The judiciary is independent, when the courts make "decisions that do not systematically reflect the preferences of extrajudicial actors", see POPOVA MARIA, *op. cit.,* footnote 1, p. 6. Judicial independence is a "relational concept". For examples, courts may dependent on organized crime, on politicians or on the public. Before discussing the topic, it is, therefore, necessary to specify the source of dependence. This dissertation focuses on judicial independence from those who have political power.
[120] POPOVA MARIA, *op. cit.*, footnote 1, p. 6. See also KNAUL GABRIELA, *op. cit.*, footnote 9, para. 14 (noting that "an independent judiciary is essential if the courts are to fulfil their democratic role as guardians of the rule of law in the country, ensuring that everyone, including State agents, is treated equally before the law").

politicians from imposing their preferences in cases involving state interests, dependent courts act as mere executors of political orders[121].

The Constitution of the Russian Federation expresses a dedication to the principle of the separation of powers[122] and establishes a number of safeguards for the independence of the judiciary[123]. However, according to the Special Rapporteur on the independence of judges and lawyers, in Post-Soviet Russia the courts are not free from direct and indirect influence, interference and pressure from powerful political actors[124]. After the collapse of the Soviet Union, radical reforms were needed to implement the principle of the separation of powers enshrined in the new Constitution[125]. The Law on "Status of Judges in the Russian Federation", adopted in 1992, made important steps towards reinforcing the independence of the judiciary, by introducing a set of guarantees unknown in Russia before, such as life tenure and irremovability of judges[126]. However, some of the amendments that the Law has undergone over the years, have strengthened the "judicial vertical" (i.e. the hierarchical control within the justice system)[127].

---

[121] *Ibidem*.

[122] Article 10 of the Constitution of the Russian Federation (1993) provides that "State power […] shall be exercised on the basis of its separation into legislation, executive and judicial branches" and that "the bodies of legislative, executive and judicial power shall be independent from one another". According to the separation of powers doctrine, within the government powers should be divided in different branches. For further information, see WEISMAN AMY J., *Separation of Powers in Post-Communist Government: A Constitutional Case Study of the Russian Federation* in *American University Journal of International Law and Policy*, Vol. 10, No. 4, 1995, p. 1365. Even though in the United States Constitution the principle of the separation of powers is not expressly mentioned, the drafters divided the government into three branches (executive, legislative and judicial). The reason why they insisted on the separation was that they considered the concentration of powers in one single person or body as "the very definition of tyranny", see JAMES MADISON, *The Federalist No. 47* reprinted in DHAL ROBERT A. (ed.), *The Democracy Sourcebook*, Cambridge MA: MIT Press, 2003, p. 193.

[123] Chapter 7 of the Constitution of the Russian Federation, entitled 'Judicial power', provides for a set of safeguards for the independence of the judiciary: irremovability (art. 121), inviolability and immunity (art. 122) for judges; public nature of judicial proceedings (art. 123(1)); the principle of equality of arms (art. 123(3)) and financial autonomy of courts (art. 124).

[124] See KNAUL GABRIELA, *op. cit.*, footnote 9, para. 14 ("the Special Rapporteur is concerned about the many reported attempts by State authorities and private actors alike to exercise control over the judicial system").

[125] International Commission of Jurists (ICJ), *Appointing the Judges: Procedure for Selection of Judges in the Russian Federation*, *cit.*, footnote 9, p. 8.

[126] *Ibidem.*

[127] Such amendments increased the hierarchical control within the judicial system, by making judges more dependent on presidents of their respective courts and court presidents more dependent on the highest judicial officials. See International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4, p. 7.

Since 2002, the Russian authorities have implemented two consecutive federal justice reform plans in order to modernize the system of administration of justice and strengthen the independence of the judiciary by raising their salaries and improving their working conditions[128]. Although significant steps towards the full implementation of the principle of the separation of powers have been taken, there have also been counter-reforms with negative effects on the independence of the judiciary[129]. For example, in 2014, the Supreme Court of Arbitration was abolished and its jurisdictions and functions were transferred to the Supreme Court[130]. Since the Supreme Court of Arbitration was known for developing a more efficient and transparent administration of justice, the integration of the system of courts of arbitration into the system of general jurisdiction has been regarded as an attempt to further centralize a justice system that "is already widely viewed as beholden by the President"[131].

According to the report of the Special Rapporteur on the independence of judges and lawyers, in present-day Russia, "the poor state of judicial independence is facilitated by a legislative and administrative framework that fails to protect judges"[132]. The selection and appointment procedures lack transparent, objective and unified standards based on professional qualifications, which leads to arbitrariness and manipulations[133].

---

[128] KNAUL GABRIELA, *op. cit.*, footnote 9, para. 9.

[129] International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4, p. 5.

[130] The federal constitutional law No. 3-FKZ "On Supreme Court of the Russian Federation" (come into force on 5 February 2014) abolished the Supreme Court of Arbitration.

[131] BALMFORTH TOM, *Putin's Legal Vertical: Kremlin Seeks to Consolidate Court System* in *Radio Free Europe*, 9 October 2013, at http://www.rferl.org/content/russia-judicial-reform-arbitration-court/25131950.html (consulted on 6 July 2016). See also KNAUL GABRIELA, *op. cit.*, footnote 9, para. 11, where the Special Rapporteur expressed her concern about the abolition of the Supreme Court of Arbitration, since "the courts of arbitration have developed a more efficient, modern and transparent administration of justice than the courts of general jurisdiction". The Special Rapporteur stated that "the arbitration courts represent a model to be followed by the general jurisdiction courts in the Russian Federation".

[132] International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4, p. 7.

[133] See *Id.*, p. 13, noting that "a significant percentage of recommended judges do not get approved by the Presidential administration". In this regard, the Venice Commission stated that "What matters most is the extent to which the head of state is free from deciding on the appointment. […] as long as the President is bound by a proposal made by an independent judicial council the appointment by the president does not appear to be problematic", see Venice Commission, *Judicial Appointments*, CDL-AD(2007)028-e, Report adopted by the Venice Commission at its 70th Plenary Session, Venice, 16-17 March 2007, para. 14. However, in Russia the President's office is not bound by any independent judicial council, since it can ignore the recommendations of the Qualification Commission without giving reasons, see International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4, p. 13, noting that such procedure violates Principle No. 10 of UN Basic Principles on the Independence of the Judiciary, according to which "any method of judicial selection shall safeguard against judicial appointments for improper motives". For further information on the procedures of appointment and selection in Russia, see

Tenure is not secure, since "indeterminate and vague grounds for disciplinary responsibility" allow arbitrary dismissals[134]. The professional career of judges depends on their level of "loyalty and political sensitivity"[135], despite the fact that the promotion procedure shall be based on the assessment of factors such as "judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law"[136]. Finally, court presidents – far from being "*primus inter pares*" – enjoy excessive powers in the appointment and promotion procedures, in the allocation of cases, in material benefits and in disciplinary proceedings[137].

The weaknesses of the existing legislative and administrative framework facilitate informal practices – a legacy of the past, ignored by structural measures – that continue to hinder the establishment of an independent judiciary by rendering institutional safeguards useless[138]. According to Popova, though the justice system as a whole is subject to interferences by the executive branch of government, threats to the independence of the judiciary appear to be particularly severe in high-profile cases, where interests of powerful political actors are at stake[139]. The Russian legal system is, therefore, "best conceptualized as dualistic"[140].

International Commission of Jurists, *Appointing the Judges: Procedure for Selection of Judges in the Russian Federation*, *cit.*, footnote 9.

[134] Unlike Judges of the Peace who are appointed for a period of five years, federal judges have life tenure. However, the requirement to avoid "anything which can undermine the authority of the judiciary" is often used as a weapon to exert pressure on judges or to dismiss them, see International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4, p. 16. See also the RF Law *On the Status of Judges in the Russian Federation*, Article 3(2).

[135] According to International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4, p. 14, "the mission was constantly told that loyalty of a judge and political sensitivity are the most important factors for determining promotion, while independent and principled judges often have much lesser chances to be promoted or appointed as a court president". The prosecution often exerts pressure on judges and, in case of non-compliance with its orders, judges are targeted with disciplinary proceedings. See also KNAUL GABRIELA, *op. cit.*, footnote 9, para. 37, according to which in several high profile cases, judges were dismissed because of their non-compliance with orders issued by the president of their respective courts.

[136] See Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), Article 14.

[137] See KNAUL GABRIELA, *op. cit.*, footnote 9, para. 36, noting that court presidents "do use their position to improperly influence the judicial decisions of the judges of their courts". See also International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, *cit.*, footnote 4, p. 22, where a former judge argued that court presidents have become "vehicles to transcend the will of the executive".

[138] See POPOVA MARIA, *op. cit.*, footnote 1, p. 11, noting that structural measures are "notoriously unreliable", since they ignore informal practices.

[139] *Id.*, p. 7.

[140] HENDLEY KATHRYN, '*Telephone Law' and the 'Rule of Law'. The Russian Case* in *Hague Journal on the Rule of Law*, Vol. 1, 2009, p. 261.

It could be argued that, despite the fact that Russians are highly sceptical about the value of legal guarantees, caseload data show that the number of cases has increased over the past decade[141]. However, the apparent contradiction between the increasing willingness to relay on the justice system to resolve disputes and the pervasive cynicism about the capability of the judiciary to serve citizens' interests is explained by the fact that ordinary Russians are conscious of being "savvy consumers"[142]. Russians distinguish two categories of cases: those involving ordinary citizens and those involving opponents[143]. According to Hendley, even though the borderline between politicized and non-politicized cases might seem nebulous to outsiders, it is very palpable in Russia[144].

3.2 'TELEPHONE JUSTICE'

It is widely accepted that the recent attempts by the Kremlin to silence its opponents and prevent future critics "mark a return to a pre-perestroika use of the judicial system", the so-called 'telephone justice' (*telefonnye pravo*)[145]. The expression 'telephone justice' (also referred to as 'telephone law') was coined to describe a pervasive Soviet practice by which Communist Party officials communicated over the phone their preferences about the outcome of individual cases[146]. According to Vaksberg, since the dissolution of the Soviet Union, the practice by which decisions are written accordingly to orders issued by politicians – rather than in accordance with the law[147] – has turned into something even more sinister: "the transformation of law enforcement agencies […] into zealous

[141] *Id.*, p. 243.
[142] *Id.*, p. 261.
[143] *Ibidem*.
[144] *Ibidem*.
[145] See, for example, TSCHUDI EDLE A., *op. cit*, footnote 30 and LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia*, *cit.*, footnote 10, p. 26, who points out that in present-day Russia, 'telephone justice' is a metaphor used to describe a legal system scarred by corruption and lack of transparency and based on a "culture of informality".
[146] POPOVA MARIA, *op. cit.,* footnote 1, p. 131.
[147] HENDLEY KATHRYN, '*Telephone Law' and the 'Rule of Law'. The Russian Case, cit.*, footnote 140, p. 241.

executors of political orders who break the law and don't even bother to camouflage it" (*basmannoe pravosudie*)[148].

According to some judges, the phenomenon of 'telephone justice' disappeared after the collapse of the Soviet Union; even though they acknowledge the problem, they refer to it as a myth, an exaggeration[149]. However, such view is not shared by those judges who lost their positions for disobeying the orders issued over the phone[150]. What is evident from the information given by experts and former judges is that formally the judicial branch of government is independent and judges are "guided solely by law", in practice the outcomes of cases where political interests are at stake are dictated by the executive and communicated to judges by court presidents or other influential judicial actors[151]. Those conscientious judges who find themselves in such situation are inevitably "open to pressure from within the system and have no chance of defending [their] rights"[152].

More generally, 'telephone justice' is expression of the culture of informality, upon which the Russian legal system is based[153]. The arbitrariness and lack of transparency, to which the prevalence of informal (oral) commands over formal (written) instructions leads, create at any level in the judicial hierarchy a climate of insecurity and fear of disciplinary measures and punishments[154]. Such situation allows the executive to

---

[148] Arkadii Vaksberg, a leading Russian historian, writer and journalist, quoted in LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia*, *cit.,* footnote 10, pp. 24-25. In 2003 the Centre for Aid to International Defence, after monitoring the hearings of the Basmanny district court, published a book entitled "*Basmannoe pravosudie*" (Basmanny Justice). The reports, included in the book, confirmed the existence of a relationship of mutual trust between judges and prosecutors. Since 2003, the expression "*basmannoe pravosudie*" has been used to refer to those decisions taken by courts in accordance with the orders issued by the executive. See also POPOVA MARIA, *op. cit.*, footnote 1, p. 131.

[149] The former Chairman of the Moscow District Federal Arbitration Court, Liudmila Maikova, stated that "it is hard to work not because of the 'telephone law' but because of the myth about 'telephone justice'", see LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia*, *cit.,* footnote 10, pp. 29-32.

[150] *Id.*, p. 32.

[151] President's Advisory Council on Civil Society and Human Rights, quoted in LEDENEVA ALENA, *Telephone Justice in Russia* in *The Eu-Russia Centre Review*, No. 18, 2011, p. 14, at http://www.eu-russiacentre.org/wp-content/uploads/2008/10/EURC_review_XVIII_ENG.pdf. President's Advisory Council on Civil Society and Human Rights stressed that judges "do not possess genuine, as opposed to declaratory, independence. […] The powers of a judge who does not agree to carry out the requests may be prematurely terminated".

[152] President's Advisory Council on Civil Society and Human Rights, quoted in LEDENEVA ALENA, *Telephone Justice in Russia*, *cit.*, footnote 151, p. 14.

[153] LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia, cit.,* footnote 10, p. 26.

[154] *Id.*, p. 33.

maintain control on the judicial branch of the government and use politicized courts as a form of state repression to silence opponents[155].

The *Yukos* case is regarded as the most notorious example of 'telephone justice' during Putin's term[156]. In October 2003, in May 2005 and again in December 2010, Mikhail Khodorkovsky, the former *Yukos* chairman and a strong advocate of multi-party democracy, was convicted of crimes ranging from tax evasion to fraud[157]. It is not particularly surprising that an oligarch, who accumulated his wealth in the legal landscape of privatization, was convicted[158]. What is alarming is "the selection of Khodorkosvky, and Khodorkosvky alone, for prosecution", the manipulation of the law by the Russian courts to his detriment and the gross and systematic flaws in the proceedings brought against him[159]. According to Kahn, Khodorkosvky's conviction was to some extent predicted in 2000, when Putin conveyed to Russian oligarchs a clear message: you will not loose your assets as long as you do not engage in politics[160].

[155] *Id.*, p. 34.
[156] MENDRAS MARIE, *Foreword* in LEDENEVA ALENA, *Telephone Justice in Russia, cit.,* footnote 151*,* p. 3.
[157] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.*, footnote 17, p. 549.
[158] *Ibidem*.
[159] *Ibidem*.
[160] KAHN JEFFREY, *The Search for The Rule of Law, cit.*, footnote 37, p. 5. See also ANONYMOUS, *Taming the Robber Barons* in *The Economist*, 22 May 2004, at http://www.economist.com/node/2668288 (consulted on 7 July 2016); KONONCZUK WOJCIECH, *The "Yukos Affair", its Motives and Implications*, Centre for Eastern Studies (OSW), Warsaw, 2006, p. 38, at http://pdc.ceu.hu/archive/00003363/yukos_affair.pdf.

CHAPTER II

ASSESSING THE (MAL)FUNCTIONING OF THE RUSSIAN JUDICIARY IN "POLITICAL" CASES THROUGH THE LENS OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. INTRODUCTION

Establishing whether or not a country's judicial branch of government functions independently is an extremely delicate and complex matter, since interferences on the judiciary by political actors are usually "kept away from the public eye"[161]. Even the states that are alleged to be the most corrupt are indeed keen to preserve an appearance of judicial independence[162]. However, it is possible "to draw conclusions [with this regard] *indirectly*, from the way legal procedures are being dealt with by the courts of a particular country"[163].

Given the severity of allegations of non-independence of a country's judiciary, it is necessary to bring hard "proof of (severely) flawed judicial proceedings" in support of such accusations[164]. This is the reason why this chapter focuses on the case law of the European Court of Human Rights[165]. In my research the analysis of the judgments of the Court in the cases *Nemtsov v. Russia*, *Navalny and Yashin v. Russia* and *Navalnyy and Ofitserov v. Russia* serve as the basis to to establish whether the Russian courts in the

[161] GROEN LAURENCE A., *op. cit.,* footnote 11, p. 79.
[162] *Ibidem*.
[163] *Ibidem*.
[164] *Ibidem*.
[165] *Id.*, p. 80, who defined the judgements of the European Court of Human Rights "the most trustworthy of sources".

above mentioned cases were entirely free from influence and pressure by the other branches of government[166].

The case of *Nemtsov v. Russia* and the case of *Navalny and Yashin v. Russia* are particularly interesting for two reasons. Firstly, because they both involve a confrontation between the opposition and the political power holders in the context of the peaceful mass protests which took place in Moscow on 31 December 2010 and on 5 December 2011, respectively. Secondly, because in both cases the European Court of Human Rights held unanimously that there had been a violation of art. 11 (freedom of assembly and association), art. 6(1) (right to a fair trial), art. 5(1) (right to liberty and security), art. 3 (prohibition of inhuman and degrading treatment) and art. 13 (right to an effective remedy) of the European Convention on Human Rights[167].

In both cases, the Court stated that the arrest of the applicants (all prominent Russian opposition leaders) at the demonstration and their administrative conviction for having disobeyed a police order to stop a spontaneous peaceful march and chanting anti-government slogans (acts protected by Articles 10 and 11 of the Convention) could not but have the effect of deterring the applicants and the public in general from attending other demonstrations and from engaging in opposition politics[168]. As the Court emphasized, "the chilling effect of those sanctions was further amplified by the fact that they targeted well-know public figures whose deprivation of liberty was bound to attract broad media coverage"[169].

In the years following the demonstrations, Alexei Navalny, the first applicant of the case *Navalny and Yashin v. Russia,* has continued to be targeted through fabricated charges and administrative harassments[170], while Boris Nemtsov, the applicant of the case *Nemtsov v. Russia,* a veteran opposition figure, was assassinated in Moscow (27 February

[166] See ECtHR (31 July 2014) *op. cit.*, footnote 5; ECtHR (4 December 2014) *op. cit.*, footnote 5; ECtHR (23 February 2016) *op. cit.*, footnote 5.
[167] See ECtHR (31 July 2014) *op. cit.*, footnote 5; ECtHR (4 December 2014) *op. cit.*, footnote 5.
[168] ECtHR (31 July 2014) *op. cit.*, footnote 5, §77; ECtHR (4 December 2014) *op. cit.*, footnote 5, §73.
[169] ECtHR (31 July 2014) *op. cit.*, footnote 5, §78.
[170] See ECtHR (23 February 2016) *op. cit.*, footnote 5. See also TSCHUDI EDLE A., *op. cit.,* footnote 30, pp. 1-2; KAHN JEFFREY, *Building Brics: Human Rights in Today's Emerging Economic Powers. Freedom of Expression in Post-Soviet Russia* in *UCLA Journal of International Law and Foreign Affairs*, Vol. 18, No. 1, 2013, p. 17, according to which Russian courts function quite well, however "if a political case should arise, a different world emerges. This is the world of the former oligarch Mikhail Khodorkovsky or the opposition blogger Alexei Navalny".

2015)[171]. In the recent case of *Navalny and Ofitserov v. Russia* the Court found a breach of Article 6(1) of the Convention[172]. It noted that "the criminal law was arbitrarily and unforeseeably construed to the detriment of the applicants" (Alexei Navalny and Petr Ofitserov)[173] and that the omission by the court to address the applicants' allegations of political pressure gave ground for heightened concern that "the real reason for [their] prosecution and conviction was a political one"[174].

It is unusual for the Court to state that a domestic court is driven by political motives in its actions[175], since – as the Court pointed out in the case of *Khodorkovsky v. Russia* – "the whole structure of the Convention rests on the general assumption that public authorities in the Member States act in good faith" [176]. Denouncing a country's judiciary as not independent would place in doubt the desirability of the accession of that state to the Convention, jeopardize the credibility of the ECHR "as a means of protection of citizen's human rights" and in the long term gradually erode the foundations of the Council of Europe from within[177].

However, the fact the Court establishes a violation of the Convention that involves directly or indirectly a court of a Member State does not necessarily imply that its judicial branch of government is not independent[178]. Findings by the Court are related to individual cases and thus "insufficient to indicate a general court practice"[179]. This is the reason why it is necessary to examine separate judgments of the Court in order to attempt to assess a country's judicial independence through its lens[180].

---

[171] YAFFA JOSHUA, *op. cit.,* footnote 29, p. 131, according to which "in the new climate, people like Nemtsov are not political opponents to be mocked but enemies to be destroyed, whether by the Kremlin itself or by hard-line elements within its orbit". For further information, see also REID CHARLES, *op. cit.,* footnote 6, p. 282; HARDING LUKE, *Who Killed Boris Nemtsov? We Will Never Know* in *The Guardian*, 3 March 2015, at https://www.theguardian.com/world/2015/mar/02/boris-nemtsov-never-know-who-killed-moscow-vladimir-putin-russian-opposition (consulted on 7 July 2016); KRAMER ANDREW, *Boris Nemtsov, Putin Foe, is Shot Dead in Shadow of Kremlin* in *The New York Times*, 27 February 2015, at http://www.nytimes.com/2015/02/28/world/europe/boris-nemtsov-russian-opposition-leader-is-shot-dead.html?_r=0 (consulted on 7 July 2016).
[172] ECtHR (23 February 2016) *op. cit.*, footnote 5, §120.
[173] *Id.*, §115.
[174] *Id.*, §119.
[175] GROEN LAURENCE A., *op. cit.,* footnote 11, p. 82.
[176] ECtHR (31 May 2011) Application No. 5829/04 (*Khodorkovsky v. Russia*), §259.
[177] GROEN LAURENCE A., *op. cit.,* footnote 11, p. 82.
[178] *Ibidem*.
[179] *Ibidem*.
[180] *Ibidem*.

Before analysing the proceedings before the European Court of Human Rights in the cases *Nemtsov v. Russia* and *Navalny and Yashin v. Russia*, the next paragraphs will provide the readers with some background information about the demonstrations which took place in Moscow on 31 December 2010 and on 5 December 2011 and the applicants' arrest, detention and conviction.

2. NEMTSOV V. RUSSIA: PRINCIPAL FACTS

In 2009 and 2010, on the 31st day of each month, political activists gathered in Triumfalnaya Square in Moscow to stress the importance of Article 31 of the Russian Constitution, according to which "citizens of the Russian Federation shall have the right to assembly peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets"[181]. Moscow authorities did not approve such demonstrations until 31 October 2010[182]. At the authorised rally conducted on 31 December 2010 dozens of demonstrators were arrested, including the applicant, Boris Nemtsov, a Russian politician and a prominent opposition leader[183]. Several street peaceful protests were held in Moscow in his support, many of which ended with the arrest and detention of the participants[184].

During the demonstration, the applicant held a speech in which he criticized Mikhail Khodorkovsky and Platon Lebedev's convictions (respectively, the former chairman of the Yukos oil company and his close associate), accused the state administration of

[181] See Article 31 of the Constitution of the Russian Federation. See also Amnesty International, *Russia: Amnesty International Calls for Immediate Release of Russian Activists Jailed over Freedom of Assembly Protest*, Amnesty International Press, at http://www.amnestyusa.org/news/press-releases/russia-amnesty-international-calls-for-the-immediate-release-of-russian (consulted on 7 July 2016).

[182] See Amnesty International, *The Strangling of the Freedom of Assembly in the Russian Federation Must Stop*, Amnesty International Public Statement, 7 January 2011, p. 1, at http:/amnesty.org/download/Documents/28000/eur460022011 en.pdf.

[183] *Ibidem*. See also Amnesty International, *Freedom under Threat. The Clampdown against Freedoms of Expression, Assembly and Association in Russia*, Report, 24 April 2013, p. 8, at http://www.amnestyusa.org/sites/default/files/eur460112013en.pdf, according to which "the wave of protest sparked by the recent parliamentary and presidential elections has […] met with a consistently repressive response".

[184] Amnesty International, *The Strangling of the Freedom of Assembly in the Russian Federation Must Stop*, *cit.*, footnote 182, p. 2.

corruption and chanted anti-government slogans such as "Putin to resign!" and "Happy New Year without Putin!"[185]. According to the applicant, at the end of the demonstration, before he could leave the area where the meeting took place and without any warning, he was arrested[186]. The Government contested his statements and maintained that following the authorized demonstration the applicant called passers-by to hold a second unauthorised march and ignored the repeated demands of the police to stop agitating the crowd[187]. Confronted with such behaviour, the police officers arrested the applicant[188].

After his arrest, the applicant was placed in police detention until 2 January 2011[189]. The applicant claimed that at the Tverskoy District police station he was kept in a narrow solitary cell (1.5 by 3 metres), with no window and ventilation, poorly illuminated and unfurnished, with the exception of a small wooden bench[190]. He also submitted that during his detention he was provided only with the food and potable water that his family passed to him[191]. Such allegations were contested by the Government, according to which the applicant was placed in a cell adequate for a two-day confinement, with artificial illumination and ventilation[192]. The Government also maintained that the applicant received food and water and was provided with bedding, but he refused them[193]. On 1 January 2011, two members of a Public Monitoring Commission visited the Tverskoy District police station[194]. According to their reports, the conditions of the applicant's detention were extremely poor[195].

The administrative hearing against the applicant took place on 2 January 2011[196]. According to the applicant, he was not given the opportunity to sit during the whole hearing (which lasted for over five hours), which was "humiliating and physically

[185] ECtHR (31 July 2014) *op. cit.*, footnote 5, §11.
[186] *Id.*, §14.
[187] *Id.*, §16.
[188] *Ibidem*.
[189] *Id.*, §23.
[190] *Id.*, §24. See also Amnesty International, *The Strangling of the Freedom of Assembly in the Russian Federation Must Stop*, *cit.*, footnote 182, p. 2.
[191] ECtHR (31 July 2014) *op. cit.*, footnote 5, §24.
[192] *Id.*, §25.
[193] *Ibidem*.
[194] *Id.*, §26. See also Amnesty International, *The Strangling of the Freedom of Assembly in the Russian Federation Must Stop*, *cit.*, footnote 182, p. 2.
[195] *Ibidem*.
[196] ECtHR (31 July 2014) *op. cit.*, footnote 5, §29.

difficult" and "prevented him from participating effectively in the proceedings"[197]. According to the Government, the applicant was offered the opportunity to sit, but he preferred to remain standing[198]. At the hearing, the applicant pleaded not guilty, contested the reports drawn up by the police and alleged that he had been detained for no reason other than political oppression"[199]. The applicant requested the court to admit as evidence video recordings of the demonstration, however such requests were dismissed[200]. The Justice of the Peace dismissed also the testimonies of the applicant and all (thirteen) defense eyewitnesses on the grounds they were irrelevant or incompatible with the police officers' testimonies and biased towards the applicant[201].

On the same day, "the applicant was found guilty of having disobeyed a lawful order of the police in breach of Article 19(3) of the Code of Administrative Offences [and] sentenced to fifteen days' administrative detention"[202]. The findings of the Justice of the Peace were based only on the testimonies of the police officers that drew up the arrest report and their reports.[203] After his conviction, the applicant was placed in a different detention facility; he maintained that "the poor conditions of detention" compromised his health[204]. The applicant's appeals were dismissed[205].

2.1 NAVALNY AND YASHIN V. RUSSIA: PRINCIPAL FACTS

On 5 December 2011 the applicants, Aleksey Navalny and Ilya Yashin, both prominent opposition leaders, participated in a public authorized meeting against the

[197] *Id.*, §§31-32.
[198] *Id.*, §31.
[199] *Id.*, §§33-34.
[200] *Id.*, §37. See also Amnesty International, *The Strangling of the Freedom of Assembly in the Russian Federation Must Stop*, *cit.*, footnote 182, p. 2.
[201] ECtHR (31 July 2014) *op. cit.*, footnote 5, §40. See also Amnesty International, *The Strangling of the Freedom of Assembly in the Russian Federation Must Stop*, *cit.*, footnote 182, p. 2, stating that "Amnesty International is further concerned at reports indicating that the court hearing which resulted in Boris Nemtsov's extending administrative detention failed to meet international standards of fairness".
[202] ECtHR (31 July 2014) *op. cit.*, footnote 5, §41.
[203] *Id.*, §40. See also Amnesty International, *The Strangling of the Freedom of Assembly in the Russian Federation Must Stop*, *cit.*, footnote 182, p. 2.
[204] ECtHR (31 July 2014) *op. cit.*, footnote 5, §§27-28.
[205] *Id.,* §§49-55.

allegedly flawed elections of the State Duma conducted on 4 December 2011[206]. During the demonstration, the first applicant held a speech in which he accused United Russia (Putin's party) of being "a party of crooks and thieves"[207]. According to the applicants, at the end of the demonstration, on their way to Navalnyy's car, they were blocked by the police and arrested without any warning[208]. According to the Government, following the meeting the applicants begun a second unauthorized march, while chanting anti-government slogans[209]. The police ordered the protestants to stop agitating the crowd and obstructing the traffic; given their disobedience, the applicants were arrested[210].

Following their arrest, the applicants were placed in detention at the Severnoye Izmaylovo District police station[211]. The applicants' request to meet their lawyers was refused[212]. They were, subsequently, transferred to the Vostochnyy District police station (at 12.45 a.m.) and, then, to the Kitay-Gorod District Police Station (at 2.30 a.m.) where the police officers drew up the arrest reports[213]. According to the applicants, their conditions of detention were "inhuman and degrading"[214]. They were not provided with food and water by the police and their cell at the Kitay-Gorod District Police Station was unfurnished, except for two wooden benches, without windows and sanitary equipment[215]. The Government contested such allegations and claimed that the cell where the applicants were detained was clean and furnished and had sufficient space to accommodate two people[216]. According to the Government, the police provided the applicants with bedding, food and water, but they were refused[217].

The hearings against the applicants took place, consecutively, on 6 December 2011[218]. At the first hearing (the hearing of the administrative case against the second applicant), the second applicant requested that the court call and examine five

[206] ECtHR (4 December 2014) *op. cit.*, footnote 5, §7.
[207] *Ibidem*.
[208] *Id.*, §9.
[209] *Id.*, §10.
[210] *Ibidem*.
[211] *Id.*, §12.
[212] *Ibidem*.
[213] *Id.*, §§15-16.
[214] *Id.*, §19.
[215] *Ibidem*.
[216] *Id.*, §20
[217] *Ibidem.*
[218] *Id.*, §21.

witnesses[219]. The request was granted in respect of the police officers who drew up the arrest reports and a fellow activist[220]. The second applicant also "complained of unlawful detention during the first six hours after his arrest, poor conditions of detention at the Kitay-Gorod police station and the acts and omissions of the officials at the Severnoye Izmaylovo police station", however the Justice of the Peace did not examine such complaints[221]. The police officers testified that following the demonstration (agreed with Moscow authorities) the second applicant took part in an unauthorized march and ignored the police orders to stop and to follow them to the police van to draw up a report[222]. The second applicant pleaded not guilty and stressed the fact that he had been arrested without any prior warning while he was returning from the public demonstration[223]. The fellow activist testified that he was present at the moment of the second applicant's arrest and that it was not preceded by any police order[224].

On the same day, the second applicant was found guilty of an administrative offence for having ignored a lawful police order in breach of Article 19(3) of the Code of Administrative Offences and sentenced to fifteen days of detention[225]. The Justice of the peace based her findings solely on the police officers' statements and their written reports[226]. The testimonies of the second applicant and the fellow activist were dismissed on the grounds that they were incompatible with the testimonies given by the policemen[227].

Before the second hearing (the hearing of the administrative case against the first applicant), the first applicant met for the first time his counsel[228]. According to the first applicant, at the beginning the proceedings were not open to the public[229]; subsequently,

---

[219] *Id.*, §23.
[220] *Ibidem*.
[221] *Id.*, §24.
[222] *Id.*, §25.
[223] *Id.*, §26.
[224] *Id.*, §27.
[225] *Id.*, §28. According to Article 19(3) of the Code of Administrative Offences, "failure to obey a lawful order or demand of a police officer…in connection with the performance of their official duties related to maintaining public order and security, or impeding the performance by them of their official duties, shall be punishable by a fine of between 500 and 1000 Russian rubles (RUB) or by administrative detention of up to fifteen days".
[226] ECtHR (4 December 2014) *op. cit.*, footnote 5, §28.
[227] *Ibidem*.
[228] *Id.*, §29.
[229] *Id.*, §30.

the police allowed eight journalists to attend the hearing[230]. The first applicant lodged numerous motions. He requested the court to transfer the case to a court at his place of residence; to adjourn the hearing in order to enable him (adequately) to prepare his defence; to keep open the verbatim records of the hearing; to call and examine five eyewitnesses; and to admit as evidence two video recordings of his arrest and a video footage[231]. The Justice of the Peace called and examined two eyewitnesses, all the other requests were dismissed[232]. The first applicant complained of unlawful detention and inhuman and degrading conditions of detention, however the Justice of Peace did not examine his complaints[233].

At the hearing, the police officers "gave testimonies identical to those they had given in the second applicant's case"[234]. The first applicant pleaded not guilty and insisted that he was arrested while walking to his car, that his arrest was not preceded by any warning, and that he did not put up any resistance[235]. The two eyewitnesses called and examined by the court on the first applicant's request testified that they were present during the arrest and they did not see the police facing any resistance by the first applicant[236].

On the same day, the first applicant was found guilty of an administrative offence for having refused to comply with a lawful police order and sentenced to fifteen days of detention[237]. As in the case of the second applicant, the Justice of the Peace based her findings exclusively "on the witness statements of [the police officers], their written reports and the report on the administrative arrest"[238]. The testimonies of the first applicant and the eyewitnesses called and examined at his request were dismissed "on the grounds they had contradicted the police officers' testimonies and reports"[239]. Both applicants lodged appeals but they were dismissed[240].

---

[230] *Ibidem.*
[231] *Id.*, §§31,36.
[232] *Id.*, §32.
[233] *Id.*, §37.
[234] *Id.*, §33.
[235] *Id.*, §34.
[236] *Id.*, §35.
[237] *Id.*, §38.
[238] *Ibidem.*
[239] *Ibidem*.
[240] *Id.*, §40.

2.2 COMPARISON OF THE PROCEEDINGS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS. VIOLATIONS OF ARTICLE 11 ECHR

In the cases *Nemtsov v. Russia* and *Navalny* and *Yashin v. Russia* the applicants complained before the Court that their arrest, detention and conviction following the public meeting had violated their right to freedom of expression and to freedom of assembly protected by Articles 10 and 11 ECHR[241]. In both cases, the Court considered it appropriate to examine the applicants' complaint under Article 11 ECHR (regarded by the Court as *lex specialis*) in the light of Article 10 ECHR (*lex generalis*)[242].

The Court repeatedly stressed in its jurisprudence that "the right to freedom of peaceful assembly is a fundamental right in a democratic society and is one of the foundations of such society"[243]. The right to freedom of assembly, which includes among its objectives the protection of personal opinions guaranteed by Article 10 ECHR, is subject to many exceptions to be interpreted restrictively[244]. According to the Convention, any restriction to the right of freedom of assembly constitutes a breach of Article 11

[241] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §12 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §45. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*cit.*, footnote 98) reads as follows: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by the public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". Article 11 of the Convention reads as follows "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 his interests. 2. 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

[242] ECtHR (31 July 2014) *op. cit.*, footnote 5, §§61-62; ECtHR (4 December 2014) *op. cit.*, footnote 5, §§49-50.

[243] ECtHR (31 July 2014) *op. cit.*, footnote 5, §72; ECtHR (4 December 2014) *op. cit.*, footnote 5, §53. See also, for example, ECtHR (15 November 2007) Application No. 269886/03 (*Galstyan v. Armenia*), §114.

[244] ECtHR (31 July 2014) *op. cit.*, footnote 5, §72.

ECHR, unless such restriction is "prescribed by law", "necessary in a democratic society" and pursues a legitimate aim[245]. The ultimate objective of Article 11 ECHR is, indeed, "to protect the individual against arbitrary interferences by public authority with the exercise of the rights protected"[246]. As the Court pointed out, the term "restriction" (Article 11(2) ECHR) has to be understood as any interference with the exercise of the right to assembly occurred before, during or following the public meeting, including punitive measures[247].

In the case *Nemtsov v. Russia* the Court noted that it was not disputed by the parties the fact that the applicant's arrest had taken place one or two minutes after he had arrived at the cordon of the police[248]. The parties disagree on the issue of whether or not the applicant had chanted anti-government slogans before his arrest, had called passers-by to hold a second unauthorized march and had refused to comply with police orders[249]. The Court considered the applicant's statements "sufficiently convincing and corroborated by evidence", while it found "cogent elements […] to doubt the credibility of the official reason for the applicant's arrest, detention and administrative charges"[250]. In particular, the Government did not explain how this series of events could have occurred in such a limited time-frame[251]. In addition, only the police officers heard the applicant agitating the crowd and calling passers-by to hold a march[252]. However, unlike the domestic courts (which based their findings exclusively on the testimonies and reports of the police officers), the Court did not consider the policemen "neutral observers" and did not see any reason for "affording their testimonies stronger evidentiary value"[253]. The Court came to the conclusion that the interference with the applicant's right to freedom of

[245] See Article 11(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*cit.*, footnote 98).
[246] ECtHR (31 July 2014) *op. cit.*, footnote 5, §72. See also ECtHR (27 February 2007) Application No. 11002/05 (*Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*).
[247] See ECtHR (26 April 1991), Series A No. 202 (*Ezelin v. France*), §39 and ECtHR (15 November 2007) *op. cit.*, footnote 243, §101.
[248] ECtHR (31 July 2014) *op. cit.*, footnote 5, §66.
[249] *Id.*, §67.
[250] *Id.*, §71.
[251] *Id.*, §68.
[252] *Id.*, §69.
[253] *Id.*, §70.

assembly could not but have been arbitrary and unlawful and, therefore, constitutes a breach of Article 11 ECHR[254].

In the case *Navalny* and *Yashin v. Russia,* the Court observed that it was common ground between the parties that following the public authorized demonstration the applicants had walked some distance (around 1.5 km) together with about sixty to one hundred people[255]. The disputes concerned whether or not the applicant had ignored the police orders to stop the unauthorized march and had resisted the arrest[256]. The policemen testified that they repeatedly ordered the applicants to stop but the applicants ignored their warnings and subsequently resisted the arrest[257]. The applicants and the defense witnesses contested the allegations of the police officers[258]. However, the Russian courts dismissed their testimonies because they were incompatible with the police officers' statements and based their findings solely on the testimonies and written reports of the policemen[259]. On the basis of the evidence at its disposal, the Court was not able to establish whether or not the police officers had given any order to the applicant and, therefore, whether or not the authorities had acted in accordance with the Russian law[260]. In any case, the Court found that "the applicants' arrest and their conviction for an administrative offence [had] pursued the legitimate aim of maintaining public order"[261], since "it was not unreasonable" for the Russian authorities to perceive the crowd as a march[262].

However, it was undisputed between the parties that the (perceived) march had taken place within a very short time (only fifteen minutes), had been peaceful and of limited size (not more than one hundred people)[263]. Since, the march could have been easily contained by the police[264], the Court came to the conclusion that the applicants had been blocked by the police only because the march had not been authorized[265]. However, as

[254] *Id.*, §§79-80.
[255] ECtHR (4 December 2014) *op. cit.*, footnote 5, §55.
[256] *Id.*, §57.
[257] *Id.*, §58.
[258] *Ibidem.*
[259] *Ibidem.*
[260] *Id.*, §59.
[261] *Id.*, §60.
[262] *Id.*, §56.
[263] *Id.*, §64.
[264] *Ibidem.*
[265] *Id.*, §65.

the Court has on many occasions pointed out, holding an unauthorised rally does not justify a violation of the right to peaceful assembly, since the "enforcement [of the rules governing public meetings] cannot become an end in itself"[266]. In addition, the Court noted that the Russian courts had not verified whether the interception had been necessary[267]. Therefore, it came to the conclusion that "the police's forceful intervention [had been] disproportionate and […] not necessary for the prevention of disorder"[268].

Article 27 of the Code of Administrative Offences provides that an individual can be escorted to a police station, only if it is not possible to draw up the administrative offence report "at the place where the offence was discovered"[269]. However, the Government did not claim that it had been impossible to draw up the report at the same place where the applicants had been arrested[270]. On the contrary, it maintained that the police officers had ordered the applicants to follow them to the police van and then they had been escorted to a police station, where the reports had been drawn up[271]. The applicants complained that there had been no need to escort them to the police station, but the Russian courts had not examined their complaints[272]. Therefore, the Court came to the conclusion that there had been "no pressing social need to arrest the applicants and escort them to the police station"[273]. Finally, the Court observed that the penalty imposed by the Russian authorities was disproportionate[274].

In both cases, *Nemtsov v. Russia* and *Navalnyy* and *Yashin v. Russia,* the Court found that the Russian courts knew that "ultimately, the applicants had been punished for holding a spontaneous peaceful demonstration and for chanting anti-government slogans", which are "acts protected by Articles 10 and 11 of the Convention"[275]. It further

---

[266] See ECtHR (4 December 2014) *op. cit.*, footnote 5, §63. See also ECtHR (ECHR 2002-III) Application No. 51346/99 (*Cisse v. France*), §50 and ECtHR (ECHR 2006-XIII) Application No. 74552/01 (*Oya Ataman v. Turkey*), §§37 and 39.
[267] ECtHR (4 December 2014) *op. cit.*, footnote 5, §65.
[268] *Id.*, §66.
[269] Article 27(1)(2) of the Code of Administrative Offences reads as follows "1. The escorting or the transfer by force of an individual for the purpose of drawing up an administrative offence report, if this cannot be done at the place where the offence was discovered and if the drawing up of a report is mandatory, shall be carried out: (1) by the police […] 2. The escort operation shall be carried out as quickly as possible".
[270] ECtHR (4 December 2014) *op. cit.*, footnote 5, §68.
[271] *Ibidem.*
[272] *Ibidem.*
[273] *Id.*, §69.
[274] *Id.*, §72.
[275] *Id.*, §73. See also ECtHR (31 July 2014) *op. cit.*, footnote 5, §77.

observed that the dispersal of the (perceived) peaceful march, the arrest of the applicants (well-known public figures), their detention and conviction "could not but have had the effect of discouraging them […] from engaging actively in opposition politics" and had "a serious potential also to deter other opposition supporters and the public in large […] from participating in open political debate"[276]. In both cases, the Court unanimously came to the conclusion that there had been a breach of Article 11 of the Convention[277].

2.3 VIOLATIONS OF ARTICLE 6 ECHR

In the cases of *Nemtsov v. Russia* and *Navalnyy* and *Yashin v. Russia* the applicants complained that they had not been given a fair trial in breach of Article 6 of the Convention[278]. In both cases the Court established that the offence should be qualified as "criminal" for the purposes of Article 6 of the Convention, given the severity of the penalty (fifteen days' administrative detention) and its punitive nature[279]. The notion of 'fair trial' embraces a number of procedural safeguards, "by which the domestic courts should abide in the conduct of the legal proceedings brought before them"[280]. One fundamental aspect of the concept of "fair trial" is the principle of equality of arms, which

[276] See ECtHR (4 December 2014) *op. cit.*, footnote 5, §§73-74; ECtHR (31 July 2014) *op. cit.*, footnote 5, §§77-78.
[277] ECtHR (4 December 2014) *op. cit.*, footnote 5, §75; ECtHR (31 July 2014) *op. cit.*, footnote 5, §80.
[278] Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*cit.*, footnote 98) reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. […] 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of the defense; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court".
[279] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §81 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §76.
[280] GROEN LAURENCE A., *op. cit.,* footnote 11, p. 91.

is inextricably linked to the adversarial principle[281]. According to the principle of equality of arms each party involved in a trial should have "a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis his* opponent" [282]. In other words, in a criminal trial the defense and the prosecution should have the same opportunities to state their case, including the possibility to present evidence and observations to the court, to obtain the attendance and examination of witnesses, to contest the evidence and observations adduced by the opponent and to cross-examine the witnesses called at the opponent's request[283].

In both cases, *Nemtsov v. Russia* and *Navalnyy* and *Yashin v. Russia,* the applicants complained that the administrative proceedings had not been in line with the principles of fairness and equality of arms[284] and that their conviction "had not been based on an adequate assessment of the relevant facts"[285]. In particular, they complained that the domestic courts had largely taken into consideration the evidence adduced by the policemen, while they had dismissed the evidence they had presented or given it no weight[286]. Even though the applicants had been given the opportunity to obtain the attendance of witnesses on their behalf, their testimonies were dismissed on the grounds that they were biased, irrelevant or incompatible with the police officers' statements, which – on the contrary – had been considered neutral and reliable[287]. In addition, although the applicants had been able to cross-examine the police officers, numerous questions had been disallowed[288]. Finally, the applicants claimed that the administrative hearings against them had not been open to the public and that they had not been given

[281] TEMMINCK TUINSTRA*, Defense Counsel in International Criminal Law*, The Hague: T.M.C. Asser Press, 2011, p. 147. For further details, see WASEK-WIADEREK MALGORZATA, *The Principle of Equality of Arms in Criminal Procedure under Article 6 of the European Convention on Human rights and its Functions in Criminal Justice of Selected European Countries: A Comparative View*, Leuven: Leuven Univerisity Press, 2000.
[282] ECtHR (27 October 1993) Application No. 14448/88 (*Dombo Beheer BV v. The Netherlands*), §33.
[283] GROEN LAURENCE A., *op. cit.,* footnote 11, p. 92.
[284] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §81 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §81. In the case *Nemtsov v. Russia* the applicant relied on Article 6(1) and (3)(d) of the Convention, while in the case *Navalnyy* and *Yashin v. Russia* the applicants relied on Article 6(1) and (3) (b), (c) and (d) of the Convention.
[285] ECtHR (31 July 2014) *op. cit.*, footnote 5, §86.
[286] See *Id.*, §86; ECtHR (4 December 2014) *op. cit.*, footnote 5, §81.
[287] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §86 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §81.
[288] *Ibidem*.

the opportunity to participate effectively in the proceedings[289]. In both cases, the Government contested the applicants' allegations, arguing that they had received a fair hearing[290].

In the case *Nemtsov v. Russia* the Court found that the applicant's conviction had been arbitrary (and, therefore, breached Article 11 of the Convention)[291]. In coming to this conclusion, the Court considered the fact that the Russian courts had dismissed the testimonies of the defense eyewitnesses on the grounds that the witnesses who had taken part in the rally were biased towards the applicant[292]. The Court observed that "by applying this criterion the domestic courts [had] disqualified *ab initio* any potential eyewitness in this case"[293] with the exception of the police officers, "so that the applicant's defense could not, in any event, have had the slightest prospect of success"[294]. In the case *Navalnyy* and *Yashin v. Russia* the Court was not able to establish on the basis of the evidence at its disposal whether or not the Russian authorities had acted in accordance with the law[295]. However, it noted that the courts had based their findings exclusively on the testimonies and written reports of the police officers who were the only prosecution witnesses, despite the fact they had played an active role in the applicants' arrest and detention[296]. According to the Court, the domestic courts had, therefore, failed "to exhaust every reasonable possibility of verifying their incriminating statements"[297].

In both cases, *Nemtsov v. Russia* and *Navalnyy* and *Yashin v. Russia,* the Court found that the procedural requirement according to which the prosecution has to prove the accused's guilt and the principle *in dubio pro reo* had been breached[298]. It further noted that the domestic courts had omitted to verify whether the orders of the policemen were lawful[299]. They had, therefore, imposed a penalty on the applicants for holding a

[289] ECtHR (31 July 2014) *op. cit.*, footnote 5, §81; ECtHR (4 December 2014) *op. cit.*, footnote 5, §81.
[290] ECtHR (31 July 2014) *op. cit.*, footnote 5, §85; ECtHR (4 December 2014) *op. cit.*, footnote 5, §80.
[291] ECtHR (31 July 2014) *op. cit.*, footnote 5, §76.
[292] *Id.*, §91.
[293] *Ibidem.*
[294] *Id.*, §92.
[295] ECtHR (4 December 2014) *op. cit.*, footnote 5, §59.
[296] *Id.*, §83.
[297] *Ibidem.*
[298] ECtHR (31 July 2014) *op. cit.*, footnote 5, §92; ECtHR (4 December 2014) *op. cit.*, footnote 5, §83.
[299] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §93 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §84.

spontaneous march and chanting antigovernment slogans– actions protected by Articles 11 and 10 of the Convention – while absolving the police officers from justifying the interference with the applicants' rights, in breach of the principle of equality of arms[300]. Therefore, in both cases, the Court unanimously reached the conclusion that the proceedings "taken as a whole" had violated the applicants' right to a fair hearing within the meaning of Article 6(1) of the Convention[301]. It considered unnecessary to examine the remaining complaints under Article 6(1) and (3) of the Convention[302].

2.4 VIOLATIONS OF ARTICLE 5 ECHR

In the cases *Nemtsov v. Russia* and *Navalnyy* and *Yashin v. Russia,* the applicants filed complaints under Article 5 of the Convention, alleging that their arrest and detention had been arbitrary and unlawful[303]. In the case *Nemtsov v. Russia* the applicant further complained that "he had been unable effectively to challenge the decision to detain him for forty-eight hours pending trial"[304]. The applicant relied on Article 5(1) and (4) of the Convention, which provides a fundamental guarantee against arbitrariness[305]. According

[300] ECtHR (31 July 2014) *op. cit.*, footnote 5, §93; ECtHR (4 December 2014) *op. cit.*, footnote 5, §84.
[301] ECtHR (31 July 2014) *op. cit.*, footnote 5, §94; ECtHR (4 December 2014) *op. cit.*, footnote 5, §85.
[302] ECtHR (31 July 2014) *op. cit.*, footnote 5, §95; ECtHR (4 December 2014) *op. cit.*, footnote 5, §86.
[303] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §96 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §87. Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*cit.*, footnote 98) reads as follow: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law: (a) the lawful detention of a person after the conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicious of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. […] 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".
[304] ECtHR (31 July 2014) *op. cit.*, footnote 5, §99.
[305] *Id.*, §96.

to Article 5(4), everyone who is deprived of his liberty has the right to effectively challenge the 'lawfulness' of his detention; it implies the right to have his case speedily examined by a court (*habeas corpus*)[306]. Article 5(4) (as well as Article 5(3)) of the Convention shares some similarities with the notion of 'fair trial' of Article 6 of the Convention, for example the 'speediness' element[307].

In the case *Nemtsov v. Russia* the Court found that the applicant's arrest, detention and conviction had been arbitrary and unlawful[308]. It further noted that the domestic courts "[had] acted arbitrarily in reviewing both the factual and the legal basis for the applicant's detention"[309]. The Court unanimously came to the conclusion that the applicant's deprivation of liberty taken "as a whole" had been in breach of Article 5(1) of the Convention[310]. It did not find necessary to address separately the applicant's complaints under Article 5(4) of the Convention[311]. In the case *Navalnyy* and *Yashin v. Russia* (as in the case *Nemtsov v. Russia*) the Court unanimously reached the conclusion that the applicants' arrest and pre-trial detention had been arbitrary and unlawful and, therefore, breached Article 5(1) of the Convention[312].

2.5 VIOLATIONS OF ARTICLES 3 AND 13 ECHR

In the cases *Nemtsov v. Russia* and *Navalnyy* and *Yashin v. Russia* the applicants complained that their conditions of detention had been inhuman and degrading and that there had not been an effective remedy for their complaints under Article 3 of the Convention, as provided for in Article 13 of the Convention[313]. In both cases, the

[306] See BANTEKAS ILIAS and OETTE LUTZ, *International Human Rights. Law and Practice*, Cambridge: Cambridge University Press, 2013, p. 342.
[307] See GROEN LAURENCE A., *op. cit.,* footnote 11*,* p. 91.
[308] ECtHR (31 July 2014) *op. cit.*, footnote 5, §103.
[309] *Ibidem.*
[310] *Id.*, §§103-104.
[311] *Id.*, §105.
[312] ECtHR (4 December 2014) *op. cit.*, footnote 5, §§97-98.
[313] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §106 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §99. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*cit.*, footnote 98) reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 13 of the Convention reads as follows: "Everyone whose rights and

Government held that the applicants had failed to use all the domestic remedies available to deal with their complaints[314]. In particular, according to the Government, "a complaint to the prosecutor's office would have allowed the competent authority to resolve their situation"[315]. The applicants contested the Government's allegations and maintained that they had exhausted the effective remedies at their disposal[316]. However, the domestic courts had always refused to examine their complaints[317].

The rule of exhaustion of domestic remedies provided for in Article 35 of the Convention is a fundamental aspect of the principle of subsidiarity and "is based on the assumption, reflected by Article 13 of the Convention, that there is an effective remedy available to deal with the substance of an 'arguable' complaint under the Convention"[318]. The Court has on several occasions verified whether the remedy suggested by the Government could be regarded as effective[319]. It noted that the prosecutor has a standpoint which is not sufficiently independent to rule on a complaint concerning the conditions of detention of the accused[320]. Therefore, a complaint to the prosecutor's office about poor conditions of detention could not have been considered an effective remedy[321]. In both cases, the Court further observed that the domestic courts had not examined the applicants' complaints, nor had they suggested that the prosecutor's office was the most suitable authority for a complaint concerning their conditions of detention[322]. Therefore, in both cases, the Court dismissed the objection raised by the Government and

---

freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

[314] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §107; ECtHR (4 December 2014) *op. cit.*, footnote 5, §100.

[315] ECtHR (31 July 2014) *op. cit.*, footnote 5, §107; ECtHR (4 December 2014) *op. cit.*, footnote 5, §100.

[316] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §109 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §102.

[317] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §109; ECtHR (4 December 2014) *op. cit.*, footnote 5, §102.

[318] ECtHR (31 July 2014) *op. cit.*, footnote 5, §113 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §105. See also ECtHR (26 October 2000) Application No. 30210/96 (*Kudła v. Poland*), §152; ECtHR (7 December 1976) Series A No. 24 (*Handyside v. the United Kingdom*).

[319] ECtHR (4 December 2014) *op. cit.*, footnote 5, §106.

[320] ECtHR (31 July 2014) *op. cit.*, footnote 5, §113 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §106. See also ECtHR (27 November 2012) Appliation No. 41461/10 (*Dirdizov v. Russia*), §75 and ECtHR (10 January 2012) Application Nos. 42525/07 and 60800/08 (*Ananyev and Others*), §101.

[321] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §113.

[322] ECtHR (31 July 2014) *op. cit.*, footnote 5, §114 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §107.

unanimously reached the conclusion that the applicants' right to an effective remedy under Article 13 of the Convention had been violated[323]. The Court further observed that the applicants' conditions of detention had been inhuman and degrading in violation of Article 3 of the Convention[324].

2.6 ALLEGED VIOLATIONS OF ARTICLE 18 ECHR

According to Article 18 of the Convention "the restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed"[325]. In the cases *Nemtsov v. Russia* and *Navalny* and *Yashin v. Russia,* the applicants invoked Article 18 of the Convention to complain that their arrest, conviction and detention for administrative charges had been politically motivated[326]. In the case *Navalny* and *Yashin v. Russia* the applicants claimed that they had been punished for "expressing the political views of the opposition"[327] and that they had been arrested, convicted and sentenced to fifteen days' administrative detention for "political revenge"[328]. In the case *Nemtsov v. Russia* the applicant alleged that "he had been been detained for no reason other than political oppression"[329].

In both cases, the Court found that the applicants' arrest, detention and conviction had been arbitrary and this could not but have the effect of deterring them and the public from "engaging actively in opposition politics" and "participating in open political debate"[330]. In the light of its findings, the Court held that the applicants' complaint under

[323] ECtHR (31 July 2014) *op. cit.*, footnote 5, §§115-116 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §§108-109.
[324] ECtHR (31 July 2014) *op. cit.*, footnote 5, §§120-121 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §112.
[325] See Article 18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*cit.*, footnote 98).
[326] ECtHR (31 July 2014) *op. cit.*, footnote 5, §§126-127 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §§113-114.
[327] ECtHR (4 December 2014) *op. cit.*, footnote 5, §47.
[328] ECtHR (4 December 2014) *op. cit.*, footnote 5, §113.
[329] ECtHR (31 July 2014) *op. cit.*, footnote 5, §33.
[330] See *Id.*, §§77 and 78; ECtHR (4 December 2014) *op. cit.*, footnote 5, §§73 and 74.

Article 18 of the Convention did not raise a separate issue; therefore it was not necessary to establish whether such provision had been breached[331].

3. NAVALNY AND OFITSEROV V. RUSSIA: PRINCIPAL FACTS

In January 2009 Alexei Navalny was asked by the Governor of the Kirov region to volunteer as his ("pro bono") adviser[332]. His main task was to propose solutions to improve "the transparency of the Region's property management"[333]. His main objective was to lead the Kirov regional State enterprise, Kirovles, (whose main business was woodcutting and timber processing) out of its crisis[334]. On Navalny's advice, the director of Kirovles agreed that the timber processing company "join forces with a timber trading company to bring in customers and, in particular, curtail the Kirovles timber mills' practice of direct sales for cash bypassing Kirovles' accounts"[335]. The second applicant, the businessmen Petr Ofitserov, (on Navalny's invitation) established a timber trading company (VLK). In April 2009 Kirovles and VLK entered into a framework contract, providing for "non exclusive sales by Kirovles to VLK, who would then sale the goods on to the customers at 7% commission"[336]. At the end of 2009 the property management department dismissed the director of the regional State enterprise for mismanagement[337] and terminated the contract with the timber trading company[338].

In 2010 the "unintimidated" Navalny, despite being targeted with administrative harassment and charges, run an anticorruption campaign, during which he denounced the implication of senior officials in massive scale fraud[339]. In particular, in November 2010

---

[331] ECtHR (31 July 2014) *op. cit.*, footnote 5, §130; ECtHR (4 December 2014) *op. cit.*, footnote 5, §117.
[332] ECtHR (23 February 2016) *op. cit.*, footnote 5, §8.
[333] *Ibidem.*
[334] *Ibidem.*
[335] *Id.*, §9.
[336] *Id.*, §10.
[337] *Id.*, §13.
[338] *Id.*, §14.
[339] LIPMAN MARIA, *How Putin Silences Dissent. Inside the Kremlin's Crackdown* in *Foreign Affairs*, Vol. 95, No. 3, 2016, p. 42. See also ECtHR (23 February 2016) *op. cit.*, footnote 5, §15. For further information, see ELDER MIRIAM, *Alexei Navalny: "The Kremlin Want to Jail me but They're Scared too"* in *The*

Navalny denounced in an article the implication of high ranking officials, including Vladimir Putin, in the misappropriation of four billion US dollars of State funds during the construction of a state-owned oil pipeline[340]. Three weeks after the publication of the article about the financial scandal, the Kirov Regional department of the Prosecutor's Office initiated an investigation against the applicants[341]. Navalny and Ofitserov were suspected of having defrauded the regional State enterprise "by inducing its director to enter into a loss-making transaction"[342]. In January and March 2012 the Investigative Committee for three consecutive times came to the conclusion that there was no case against Navalny and Ofitserov; a criminal investigation was therefore not opened "for lack of *corpus delicti*"[343]. It is important to recall that in February 2012 the inquiry against Navalny resumed just a few days after he defined United Russia (Putin's party) as "a party of crooks and thieves" in a radio interview (Finam FM Radio Station)[344].

In May 2012 the Chief of the Investigative Committee initiated a criminal investigation against Navalny and Ofitserov on suspicion of "deception and abuse of trust" of the director of the State enterprise[345]. After eleven month, the criminal investigation against Navalny and Ofiteserov was terminated for lack of *corpus delicti*, but soon after the decision was reversed[346]. In July 2012 the Chief of the Investigative Committee strongly criticized the decision of his subordinates to close Navalny's case[347]. He said the following words: "You have got a man there called Mr Navalny. The criminal case, why have you terminated it without asking the Investigative Committee superiors?

Guardian, 12 July 2013, at https://www.theguardian.com/world/2013/jul/12/alexei-navalny-kremlin-jail-russia-embezzlement (consulted on 8 July 2016).

[340] ECtHR (23 February 2016) *op. cit.*, footnote 5, §15. See AMOS HOWARD and BRATERSKY ALEXANDER, *Transneft Accused of $4Bln Theft* in *The Moscow Times*, 18 November 2010, at http://www.themoscowtimes.com/business/article/transneft-accused-of-4bln-theft/423619.html (consulted on 8 July 2016).

[341] ECtHR (23 February 2016) *op. cit.*, footnote 5, §16.

[342] *Ibidem*.

[343] *Id.*, §§18, 21 and 25.

[344] *Id.*, §§22-23. See IOFFE JULIA, *New Impact. One Man's Cyber Crusade against Russian Corruption* in *The New Yorker*, 4 April 2011, at http://www.newyorker.com/magazine/2011/04/04/net-impact (consulted on 9 July 2016).

[345] ECtHR (23 February 2016) *op. cit.*, footnote 5, §26.

[346] *Id.*, §§27-29.

[347] *Id.*, §30. See BARRY ELLEN, *Russia Charges Anticorruption Activist in Plan to Steal Timber* in *The New York Times*, 31 July 2012, at http://www.nytimes.com/2012/08/01/world/europe/aleksei-navalny-charged-with-embezzlement.html (consulted on 9 July 2016).

[…] You had a criminal file against this man, and you have quietly closed it. I am warning you, there will be no mercy, no forgiveness if such things happen again"[348].

At the end of July 2012 a criminal investigation was opened against the director of Kirovles[349]. He was suspected of having conspired "with unknown individuals" to steal the property of the regional State enterprise through VLK[350]. On 30 July 2012 the Investigative Committee decided to join the criminal cases against Navalny, Ofitserov and the director of Kirovles[351], who were all accused of conspiring to steal the assets of the timber processing company[352]. However, "in September 2012 the Deputy Prosecutor General granted [the Kirovles ex-director's] request to conclude a plea-bargaining agreement and to have his criminal case examined in [separated] accelerated proceedings"[353]. A condition of the agreement was to "actively provide the investigation with information" on "Navalny and Ofitserov's involvement […] in the commission of the crime"[354]. Navalny complained that his procedural rights had been violated by the plea-bargaining agreement and requested the Investigative Committee to re-join the cases[355]. However, his request was dismissed[356]. In December 2012 (without examination of evidence) the ex-director of the State enterprise was found guilty of stealing the patrimony of the timber processing company[357]. According to the judgment, the ex-director of Kirovles, "acting in premeditated conspiracy with N. and O. […], unlawfully dissipated the assets he was in charge of […] for the benefit of third parties"[358]. Navalny's appeal claiming that the decision against the ex-director of the regional State enterprise could not but be prejudicial to his criminal case was dismissed[359].

---

[348] ECtHR (23 February 2016) *op. cit.*, footnote 5, §30.
[349] *Id.*, §32.
[350] *Ibidem.*
[351] *Id.*, §33.
[352] *Id.*, §34.
[353] *Id.*, §35.
[354] *Id.*, §36.
[355] *Id.*, §37. See also KRAMER ANDREW E., *Navalny is Spared Prison Term in Russia* in *The New York Times*, 16 October 2013, at http://www.nytimes.com/2013/10/17/world/europe/russian-opposition-leader-is-spared-jail.html?_r=0 (consulted on 9 July 2016).
[356] ECtHR (23 February 2016) *op. cit.*, footnote 5, §§38 and 40.
[357] *Id.*, §42.
[358] *Ibidem*. See ANONYMOUS (Associated Press in Kirov), *Alexei Navalny Trial: Key Prosecution Witness Contradicts Himself in Court* in *The Guardian*, 25 April 2013, at https://www.theguardian.com/world/2013/apr/25/alexei-navalny-trail-witness-contradicts (consulted on 9 July 2016).
[359] ECtHR (23 February 2016) *op. cit.*, footnote 5, §43 and 45.

In June 2013 Navalny and Ofitserov requested the court not to admit as evidence in their trial the judgment against the ex-director of the State enterprise[360]. Their request was dismissed on the grounds that it could not predetermine them guilt, since "their names [were not] mentioned in it"[361]. During the hearing against Navalny and Ofitserov the domestic court, after rejecting the applicants' objections, allowed the public prosecutors to read out the statements given by the ex-director of the regional State enterprise during the investigation, since the latter, examined as a witness, was not able to remember every detail[362]. It occurred before the defense could cross-examine him[363]. Navalny's request to obtain the attendance and examination of a number of witnesses was dismissed[364]. In June 2013, Navalny "was registered as a candidate for the Moscow mayoral elections"[365]. The day after the court convicted "[him] of organizing, and [Ofitserov] of facilitating, large-scale embezzlement" and gave them a prison sentence of five and four years, respectively[366]. The court refused to examine Navalny's complaints of political prosecution[367].

3.1 VIOLATION OF ARTICLE 6 ECHR

[360] *Id.*, §51.
[361] *Id.*, §52.
[362] *Id.*, §53. See also ANONYMOUS (Associated Press in Kirov), *op. cit.*, footnote 358.
[363] ECtHR (23 February 2016) *op. cit.*, footnote 5, §53.
[364] *Id.*, §57.
[365] *Id.*, §60.
[366] *Id.*, §§61 and 66. Navalny was convicted under Article 33(3) in conjunction with Article 160(4) of the Criminal Code of the Russian Federation. Article 160 of the Russian Criminal Code reads as follows: "1. Misappropriation or embezzlement, that is, the theft of another's property entrusted of the convicted person: shall be punishable […] 2. The same acts committed in conspiracy or which cause significant damage to an individual […] 3. The same acts committed by a person by abuse of his official position or on a large scale […] 4. The acts set out in paragraphs 1,2 or 3 of this Article committed by an organized group or on an especially large scale: shall be punishable by up to ten years' deprivation of liberty with or without a fine of up to one million roubles or up to three years' wages/salary or other income with or without up to two years' restriction of liberty". Article 33(3) of the Russian Criminal Code reads as follows: "A person who has organized the commission of a crime or ordered its commission, and a person who has created an organized group or criminal community (criminal organisation) or has guided them, shall be deemed an organiser". See also ELDER MIRIAM, *Russia: Alexei Navalny Found Guilty of Embezzlement* in *The Guardian*, 18 July 2013, at https://www.theguardian.com/world/2013/jul/18/alexei-navalny-found-guilty-embezzlement (consulted on 9 July 2016); LIPMAN MARIA, *op. cit.,* footnote 339, p. 38; FAVRET REBECCA, *Back to the Bad Old Days: President Putin's Hold on Free Speech in the Russian Federation* in *Richmond Journal of Global Law and Business*, Vol. 12, No. 2, 2013, p. 303.
[367] ECtHR (23 February 2016) *op. cit.*, footnote 5, §63.

In the case *Navalnyy and Ofitserov v. Russia* the applicants filed complaints under Article 6(1),(2) and (3)(d) of the Convention, alleging that the criminal proceedings against them were conducted in breach of their right to a fair trial[368]. In particular, the applicants claimed that the decision to examine the criminal case of the ex-director of Kirovles in separated accelerated proceedings and the admission of evidence originating from it in their trial "had had a prejudicial effect on the outcome of their cases"[369]. Notwithstanding their impossibility to challenge the court decisions in the case of the ex-director of Kirovles, "the judgement against him had formed the basis of their conviction"[370]. In addition, they alleged that the testimony of the ex-director of the regional state enterprise had not been reliable because of the plea-bargaining agreement[371]. The applicants further maintained that the judgement against the ex-director of Kirovles could not but have been prejudicial, since "they were referred to as [his] partners in crime and were clearly identifiable by their initials and jobs titles" and "by operation of Article 90 of the Code of Criminal Procedure, [the judgement] was *res judicata*"[372]. The applicants further alleged that the prosecutor had been allowed to read out the statements given by the ex-director of Kirovles and other witnesses, before the defense had been given the possibility to cross-examine them[373]. Finally, the applicants maintained that the domestic law had been unforeseeably and arbitrarily interpreted by the court and that "the only purpose of their prosecution and conviction was to curb the first applicant's public and political

[368] *Id.*, §84.
[369] *Id.*, §91.
[370] *Ibidem.*
[371] *Ibidem.*
[372] *Id.*, §92. Article 90 of the Code of Criminal Procedure of the Russian Federation reads as follows: "Circumstances established in a judgment which has acquired legal force, given by a court in criminal proceedings, or in civil, commercial-court or administrative proceedings, shall be accepted by a court, prosecutor, investigator or inquirer without additional verification. However, such a judgment or decision cannot predetermine the guilt of persons who have not previously participated in the criminal case".
[373] ECtHR (23 February 2016) *op. cit.*, footnote 5, §94.

activity"[374]. The Government contested the applicants' allegations and maintained that they had been given a fair hearing[375].

The Court considered it appropriate to examine the applicants' complaints "as elements of general fairness"[376]. The Court observed that since the charges against the ex-director of the regional State enterprise and those against the applicants "were based on the same facts", it was of the utmost importance to guarantee that the manner in which the proceedings against the ex-director of Kirovles were conducted would not prejudice the "fairness" of the applicants' trial[377]. In particular, there were two basic procedural safeguards to be secured[378]. The first one was "the courts' obligation to refrain from any statements that may have a prejudicial effect on the pending proceedings"[379]. The second one was that "the quality of *res judicata* would not be attached to facts admitted in a case to which the individuals were not party"[380]. According to the Court neither requirement had been met by the domestic courts[381]. With respect to the first procedural safeguard the Court found that the judgement against the ex-director of Kirovles was prejudicial since it had been worded in such a way that there was no doubt about the applicants' involvement in the commission of the crime[382]. With respect to the second procedural safeguard the Court established that by operation of Article 90 of the Code of Criminal Procedure the judgement against the ex-director of Kirovles and "the circumstances established by [it]" had acquired the effect of *res iudicata*[383]. Although the domestic court had to base its judgement solely on the evidence presented and the testimonies given at the hearing against the applicants,

[374] *Id.*, §95.
[375] *Id.*, §§88-90.
[376] *Id.*, §102.
[377] *Id.*, §103.
[378] *Ibidem.*
[379] *Id.*, §104.
[380] *Id.*, §105.
[381] *Id.*, §106.
[382] *Ibidem.*
[383] *Id.*, §107.

de facto it "had an obvious incentive to remain concordant, because any conflicting findings made in related cases could undermine the validity of both judgments"[384].

The Court further observed that the decision to separate the cases and to examine the case of the ex-director of Kirovles in plea-bargaining proceedings "compromised his competence as a witness in the applicants' case"[385]. If in the proceedings against the applicants it had emerged that his previous statements were false, his four years suspended sentence with three years' parole could have been revoked, "depriving him of the negotiated reduction of his sentence"[386]. Therefore, he had no other choice than repeating the statements he made as an accused (therefore not under oath). Furthermore, by allowing the prosecutor to read out Kirovles ex-director's statements, the domestic court could not but "give an independent observer the impression to encourage the witness to maintain a particular version of events"[387].

With regard to the applicants' allegations of unforeseeable and arbitrary application of the law, the Court noted that "the acts described as criminal by the domestic court fell entirely outside the scope of the provision under which the applicants were convicted"[388]. The Court further observed that the domestic courts did not examine Navalny and Ofitserov's allegations of political prosecution, even if they "were at least arguable"[389]. In particular, the Court noted that "virtually any date on which [Navalny's] prosecution would begin would inevitably coincide with some of his articles appearing in the media"[390]. According to the Court, given the obvious connection between Navalny's opposition activities and the initiation of criminal investigations against him, it was the duty of the domestic courts to

[384] *Id.*, §108.
[385] *Id.*, §109.
[386] *Ibidem.*
[387] *Ibidem.*
[388] *Id.*, §115.
[389] *Id.*, §116.
[390] *Id.*, §118.

verify whether Navalny was a victim of political repression[391]. The courts, having dismissed without examination such allegations, could not but give themselves grounds for "concerns that the real reason for the applicants' prosecution and conviction was a political one"[392]. In the light of the above observations, the Court unanimously came to the conclusion that the proceedings brought against Navalny and Ofitserov "taken as whole" breached their right to a fair hearing (Article 6 of the Convention)[393].

4. CONCLUSION

The judgments of the European Court of Human Rights in the cases *Nemtsov v. Russia, Navalnyy and Yashin v. Russia* and *Navalnyy and Ofitserov v. Russia* show the deficiencies of the Russian courts when state interests are at stake. The systematic nature of the violations established by the Court in the proceedings against the applicants, all prominent politicians and opposition leaders, raises serious concern about the independence of the Russian judiciary in political cases. The outcome of the cases will be discussed in the following chapter.

[391] *Id.*, §119.
[392] *Ibidem*.
[393] *Id.*, §120.

CHAPTER III

RUSSIA'S DICHOTOMY BETWEEN "POLITICIZED" AND "NON-POLITICIZED" CASES. THE RUSSIAN JUDICIARY AND THE EUROPEAN COURT OF HUMAN RIGHTS

1. INTRODUCTION

As already mentioned in Chapter 1, the new Russian Code of Criminal Procedure has introduced important guarantees in the criminal justice system[394]. One of the most important innovation was the introduction of an adversarial procedure[395]. Article 15(3) of the new Code lays down expressly that "a court is not an organ of criminal prosecution and shall not take the prosecution […] side in a case. The court shall create the conditions necessary for the parties to perform their procedural duties and to exercise the rights granted to them"[396]. However, what is prescribed by the new Russian legislation does not reflect what transpires from the judgments of the European Court of Human Rights in cases involving Russian opponents[397]. This institutional failure to deliver justice to

[394] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.,* footnote 17, p. 545, who observed that thanks to the new Code of Criminal Procedure "witnesses, suspects and defendants now have greater rights than ever before".
[395] *Ibidem*. The author makes a comparison between the new Code and the old Code of Criminal procedure. He defined the old Code "a calcified version of continental European practices that provided for an exclusive state investigation into criminal wrongdoing".
[396] See Criminal-Procedural Code of the Russian Federation, No. 174-FZ of December 18, 2001, Article 15(3).
[397] See KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.,* footnote 17, p. 547, whose research confirms that the reality that transpires on the ground is much more miserable than the picture portrayed by the new Code of Criminal procedure of the Russian Federation.

Russian citizens cannot but have "a palpable effect on the consolidation of democracy" in Russia[398].

This final chapter investigates the functioning of the Russian justice system when state interests are at stake by analysing the judgments of the European Court of Human Rights in the cases *Nemtsov v. Russia, Navalny and Yashin v. Russia* and *Navalny and Ofitserov v. Russia,* described in Chapter 2, in the light of the literature and reports reviewed in Chapter 1[399]. The analysis will focus, in particular, on the breaches by the Russian state of Article 6 of the European Convention on Human Rights[400].

The cases *Nemtsov v. Russia, Navalnyy and Yashin v. Russia* and *Navalnyy and Ofitserov v. Russia* serve as the basis to assess the degree of Russia's judicial independence in cases involving political dissenters for three main reasons. First of all, they involved the most prominent Russian opposition leaders who are vocal and visible Kremlin critics[401]. Secondly, in all cases the Court established unanimously that the proceedings brought against the applicants "taken as whole" had been conducted in breach of the applicants' right to a fair hearing[402]. Thirdly, the Court found a link between the applicants' conviction and their opposition activities[403].

---

[398] KAHN JEFFREY, *The Search for The Rule of Law, cit.,* footnote 37, p. 403.

[399] See ECtHR (31 July 2014) *op. cit.*, footnote 5; ECtHR (4 December 2014) *op. cit.*, footnote 5; ECtHR (23 February 2016) *op. cit.*, footnote 5.

[400] See Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (*cit.*, footnote 98).

[401] Boris Nemtsov was a high profile opposition politician and political activist who was assassinated in Moscow on 27 February 2015. For further information on the murder of Boris Nemtsov, see REID CHARLES, *op. cit.,* footnote 6, pp. 280-282. Alexei Navalny is a prominent opposition leader and a popular blogger. Ilya Yashin is a well known opposition politician and political activist.

[402] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §94; ECtHR (4 December 2014) *op. cit.*, footnote 5, §85; ECtHR (23 February 2016) *op. cit.*, footnote 5, §120.

[403] In the cases *Nemtsov v. Russia* and *Navalnyy and Yashin v. Russia* the Court found that the applicants' conviction for ignoring the repeated demands of the police to stop chanting anti-government slogans and holding a peaceful, spontaneous demonstration was arbitrary and therefore breached the applicants' right to assembly, see ECtHR (4 December 2014) *op. cit.*, footnote 5, §75; ECtHR (31 July 2014) *op. cit.*, footnote 5, §80. In both cases, the Court further observed that the opponents' conviction could not but dissuade the applicants and the public in large from participating in opposition activity, see ECtHR (4 December 2014) *op. cit.*, footnote 5, §§73-74; ECtHR (31 July 2014) *op. cit.*, footnote 5, §§77-78. In the case *Navalny and Ofitserov v. Russia,* the Court noted that it should be obvious to the domestic courts that "there had been a link between the first applicant's activities and the Investigative Committee's decision to press charges against him. It was therefore the duty of the domestic courts to scrutinize his allegations of political pressure. […] Having omitted to address these allegations the courts have themselves heightened the concerns that the real reason for the applicants' prosecution and conviction was a political one", see ECtHR (23 February 2016), *op. cit*., footnote 5, §119.

The systematic nature of the procedural flaws detected by the Court in the cases *Nemtsov v. Russia* and *Navalnyy and Yashin v. Russia* suggests that the malfunctioning of the Russian justice system in cases involving opponents has to be looked at as part of a continuous narrative[404]. Such considerations are corroborated by the recent judgment of the Court in the case *Navalnyy and Ofitserov v. Russia*, where the Court with strong language stated that the courts' rejection (without examination) of the applicants' allegations of political repression gave ground for concern that "the real reason for the applicants' prosecution and conviction was a political one"[405].

2. ANALYSIS OF THE CASES

As the cases *Nemtsov v. Russia, Navalnyy and Yashin v. Russia* and *Navalnyy and Ofitserov v. Russia* clearly show, in the proceedings brought against political dissenters adversarial principles and legal guarantees are systematically ignored, in violation of their right to a fair hearing[406]. For ordinary cases where state interests are not at stake, such as run-of-the-mill property disputes, the courts in Russia operate quite professionally[407]. However, "if a political case should arise a different world emerges"[408]. The Kremlin critic and former oligarch, Mikhail Khodorkovsky, before being sentenced to fourteen years' imprisonment for embezzlement and money laundering, stated that "no person who conflicts with the 'system' has any right whatsoever. Even when enshrined in law, rights

[404] With regard to the judgments of the Court in the "*Yukos* affairs", Groen reached a similar conclusion, see GROEN LAURENCE A., *op. cit.,* footnote 11, p. 107.
[405] See ECtHR (23 February 2016), *op. cit*., footnote 5, §119.
[406] KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia, cit.*, footnote 17, p. 548. In the cases *Nemtsov v. Russia* and *Navalny and Yashin v. Russia* the Court found that the administrative proceedings against the applicants had been carried out in violation of the adversarial principles, see ECtHR (31 July 2014) *op. cit.*, footnote 5, §92; ECtHR (4 December 2014) *op. cit.*, footnote 5, §83. According to Article 14 of the European Convention on Human Rights (*cit.*, footnote 98) "the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any grounds" including "political opinions".
[407] KAHN JEFFREY, *Building Brics: Human Rights in Today's Emerging Economic Powers. Freedom of Expression in Post-Soviet Russia*, *cit.*, footnote 170, p. 18.
[408] *Ibidem.*

are not protected by the courts. Because the courts are either […] afraid, or are part of the 'system'"[409].

2.1 NEMTSOV V. RUSSIA AND NAVALNY AND YASHIN V. RUSSIA

Although formally the courts gave Boris Nemtsov, Alexei Navalny and Ilya Yashin the opportunity to present evidence, to obtain the attendance and examination of witnesses on their behalf and to cross-examine the witnesses for the prosecution, *de facto* they put the dissenters in a position in which they could not present their cases[410]. First of all, the Russian courts, by systematically dismissing the testimonies of all defense witnesses as biased, contrary to the police officer's statements or irrelevant[411], placed the opposition leaders at a substantial disadvantage *vis-à-vis* the prosecution[412], so that their "defense could not, in any event, have had the slightest prospect of success"[413]. Secondly, even though the opponents were given the opportunity to cross-examine the police officers, most of the questions were rejected by the courts[414]. Finally, without justification, the courts gave the police officers' statements stronger evidentiary value, despite the fact that they, having played an active role in the events, were not "neutral observers"[415].

[409] GROEN LAURENCE A., *op. cit.,* footnote 11, p. 78.
[410] See ECtHR (31 July 2014) *op. cit.*, footnote 5, §93 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §84.
[411] In the proceedings against Nemtsov the Justice of the Peace dismissed the testimonies of the defense eyewitnesses "on the grounds that they had contradicted the policemen's testimonies and because those witnesses had been acquainted with the applicant, had taken part in the same demonstration and therefore must have been biased towards the applicant", see ECtHR (31 July 2014) *op. cit.*, footnote 5, §40. In the proceedings against Navany and Yashin the Justice of the Peace dismissed the testimonies given by the defense witnesses simply "on the grounds that they had contradicted the police officers' testimonies and reports", see ECtHR (4 December 2014) *op. cit.*, footnote 5, §§28 and 38.
[412] ECtHR (31 July 2014) *op. cit.*, footnote 5, §§91-92.
[413] ECtHR (31 July 2014) *op. cit.*, footnote 5, §92.
[414] See ECtHR (4 December 2014) *op. cit.*, footnote 5, §§33, 37, 81 and 84.
[415] ECtHR (31 July 2014) *op. cit.*, footnote 5, §70. In the proceedings against Boris Nemtsov, Alexei Navalny and Ilya Yashin the Justice of the Peace dismissed the testimonies of the defense witnesses on the grounds that they were incompatible with the testimonies and reports of the policemen, see ECtHR (31 July 2014) *op. cit.*, footnote 5, §40 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §§28 and 38.

What clearly emerges from the judgments of the Court in the cases *Nemtsov v. Russia* and *Navalnyy and Yashin v. Russia* is that the proceedings against the opposition leaders met the standards of a strictly "formal" concept of the rule of law, since formally Boris Nemtsov, Alexei Navalny and Ilya Yashin were given the opportunity to state their case, by presenting evidence and obtaining the attendance of witnesses[416]. However, they did not meet the standards of a more substantial or "thicker" notion of the rule of law, that goes beyond the mere application of norms and procedures[417], since the evidence presented by the applicants and the testimonies of the defense witnesses were systematically dismissed or given no weight. In both cases the Russian courts based their findings solely on the statements and reports of the policemen, who were the only witnesses for the prosecution (notwithstanding their active involvement in the opponents' arrest) even if there were reasonable grounds for doubting the credibility of the official version[418].

A fundamental feature of the rule of law is that "a purely institutional approach does not say anything about actual outcomes of processes and procedures, even if the letter are formally correct"[419]. Indeed, clear legal standards and procedures, without a substantive component, do not prevent states from abusing their powers and committing gross human rights violations[420]. Rather, as Henderson underlined, if the rule of law does not incorporate substantive values, it may be "invoked to require unquestioning obedience to law", regardless its content[421].

Thanks to the developments in international law, a thicker notion of the rule of law is gaining ground[422]. This definition extends beyond the procedures through which legal

---

[416] With regard to the distinction between the "thin" and "thick" definitions of the rule of law, see TAMANAHA BRIAN Z., *A Concise Guide to the Rule of Law* in GIANLUIGI PALOMBELLA and NEIL WALKER (eds.)*, Relocating the Rule of Law*, Oxford: Hart, 2009, p. 7.

[417] With regard to the substantive notion of the rule of law and, in particular, the *nexus* between democracy and the rule of law, see TOMMASOLI MASSIMO, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices* in *UN Chronicle. The Magazine of the United Nations*, Vol. XLIX, No. 4, 2012, at http://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices/ (consulted on 11 July 2016).

[418] ECtHR (31 July 2014) *op. cit.*, footnote 5, §90 and ECtHR (4 December 2014) *op. cit.*, footnote 5, §83.

[419] TOMMASOLI MASSIMO, *op. cit.*, footnote 417.

[420] ELLIS MARK, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice* in *University of Pittsburgh Law Review*, Vol. 72, No. 2, p. 195.

[421] HENDERSON LYNNE, *Authoritarianism and the Rule of Law* in *Indiana Law Journal*, Vol. 66, No. 2, 1991, p. 398.

[422] ELLIS MARK, *op. cit.*, footnote 420, p. 195.

standards are formulated and applied to embody "qualitative principles of justice"[423]. The substantive or "thick" notion of the rule of law embraces elements such as democracy and human rights, in particular civil and political rights, and requires "measures to ensure the adherence to the principle of […] fairness in the application of the law"[424].

Since the judiciary "acts as a guardian of the rule of law", independent courts are indispensable to the promotion and protection of the rule of law. [425]. In particular, the right to a fair trial, which is strictly connected to the protection of individuals against human rights abuses by the state, constitutes a cardinal prerequisite of the rule of law[426]. Whether the courts in Russia act as neutral arbiters or as mere executors of political orders is controversial.

In the administrative proceedings brought against Boris Nemtsov, Alexei Navalnyy and Ilya Yashin, the courts were aware of the fact that they, ultimately, had been blocked by the police and punished for expressing their dissent and holding a peaceful protest march[427]. However, they did not devote any effort to verify whether the police order was necessary to prevent disorder[428]. Furthermore, since Boris Nemtsov, Alexei Navalnyy and Ilya Yashin were all very well-known public figures, their conviction and detention could not but have the effect of creating an intimidating environment and deter them, other activists and the general public from participating in opposition politics[429].

Such findings strongly suggest that their conviction and detention *de facto* served as a warning to those Russians willing to become involved in political opposition activities. The above observations cannot but give rise to serious concerns about the independence of the judiciary in Russia[430].

---

[423] *Ibidem.*
[424] The then United Nations Secretary-General, Kofi Annan, in his 2004 report on the rule of law, quoted in TOMMASOLI MASSIMO, *op. cit.,* footnote 417.
[425] TOMMASOLI MASSIMO, *op. cit.,* footnote 417.
[426] ELLIS MARK, *op. cit.*, footnote 420, p. 203.
[427] ECtHR (4 December 2014) *op. cit.*, footnote 5, §73.
[428] ECtHR (31 July 2014) *op. cit.,* footnote 5*,* §77; ECtHR (4 December 2014) *op. cit.*, footnote 5, §65.
[429] ECtHR (31 July 2014) *op. cit.,* footnote 5, §§77-78; ECtHR (4 December 2014) *op. cit.*, footnote 5, §§73-74.
[430] With regard to the judgments of the Court in the "*Yukos* affairs", Groen reached a similar conclusion, see GROEN LAURENCE A., *op. cit.,* footnote 11*,* p. 108.

2.2 NAVALNY AND OFITSEROV V. RUSSIA

The concerns risen by the administrative proceedings brought against Boris Nemtsov, Alexei Navalny and Ilya Yashin in 2011 are reinforced by the judgment of the Court in the case *Navalnyy and Ofitserov v. Russia*[431]. According to the Court, the criminal proceedings brought before Alexei Navalny and Petr Ofitserov in 2012 demonstrated that the Russian courts "failed, by a long margin, to ensure a fair hearing in the applicant's criminal case, and may be taken as suggesting that they did not even care about appearances"[432].

Despite the fact that the criminal charges against Navalny, Ofitserov and the ex-director of Kirovles were based on the same facts[433], the case of the ex-director of the State enterprise was disjoined from the cases of Navalny and Ofitserov[434]. In those circumstances it was essential to fulfil at least the basic requirements necessary to avoid that the proceedings against the ex-director of the regional state enterprise would prejudice the fairness of the criminal proceedings against Navalny and Ofitserov[435]. However, such safeguards were not observed by the courts[436]. Furthermore, in the criminal proceedings against Navalny and Ofitserov "the criminal law was arbitrarily and unforeseeably construed to the detriment of the applicants, leading to a manifestly unreasonable outcome of the trial"[437].

The manner in which the courts carried out the proceedings against Alexei Navalny and Petr Ofitserov cannot but confirm Vaksberg' observations about the exacerbation of the informal practice called "telephone justice" in Putin's Russia[438]. According to the leading Russian historian and journalist, in contemporary Russia the practice by which political power holders seek to influence the outcomes of cases[439] has evolved into

[431] See ECtHR (23 February 2016) *op. cit.*, footnote 5, §119.
[432] *Id.*, §116.
[433] *Id.*, §103.
[434] *Id.*, §36.
[435] *Id.*, §103.
[436] *Id.*, §106.
[437] *Id.*, §115.
[438] Arkadii Vaksberg, quoted in LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia*, *cit.,* footnote 10, p. 24.
[439] HENDLEY KATHRYN, '*Telephone Law' and the 'Rule of Law'. The Russian Case, cit.*, footnote 140, p. 241.

something even more alarming: "the transformation of law enforcement agencies […] into zealous executors of political orders who break the law and don't even bother to camouflage it"[440].

Even though, in the case *Navalnyy and Ofitserov v. Russia*, the Court came to the conclusion that the refusal by the domestic courts to examine the applicants' allegations of political prosecution gave grounds for concern that the real reason for the applicants' conviction was a political one, it does not automatically imply that the entire Russian judiciary is subject to interferences by the other braches of government in cases involving opponents[441]. First of all, because such findings are related only to the specific case of Alexei Navalny and Petr Ofitserov[442]. Secondly, because public authorities of the Member States are presumed to act with good faith[443].

However, the systematic nature of the procedural flaws detected by the Court in the cases *Nemtsov v. Russia*, *Navalnyy and Yashin v. Russia* and *Navalnyy and Ofitserov v. Russia* shows that the malfunctioning of the Russian courts "cannot be considered to have occurred incidentally"[444]. Rather it is clear that the violations detected by the Court "transcend the circumstances of [the] individual case" and therefore have to be looked at as part of a continuous narrative[445]. In Russia, miscarriages of justice are so frequent and widespread when state interests are at stake that they cannot be viewed at as "atypical"[446].

Furthermore, given "the general reluctance of the Court to establish the existence of political influence on court decisions rendered in a signatory state"[447], the fact that in the case *Navalnyy and Ofitserov v. Russia* the Court observed that the Russian courts heightened themselves concerns that the applicants' conviction was politically motivated

[440] Arkadii Vaksberg, quoted in LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia*, *cit.,* footnote 10, pp. 24-25. See also POPOVA MARIA, *op. cit.*, footnote 1, p. 131.
[441] With regard to the *Yukos* case, see GROEN LAURENCE A., *op. cit.,* footnote 11*,* p. 107.
[442] *Ibidem.*
[443] *Ibidem.*
[444] *Ibidem*.
[445] *Ibidem.*
[446] See SMITH GORDON, *op. cit.*, footnote 62, p. 109, quoting Arkadii Vaksberg.
[447] GROEN LAURENCE A., *op. cit.,* footnote 11*,* p. 82.

cannot be underestimated[448]. In the light of the above considerations, the presumption that in Russia legal mistakes occur accidentally seems to be at least "dubious"[449].

In 2015, in the light of the renewed attempts to punish Navalny as opponent of the Russian Government, the European Parliament notably exhorted "the Russian judicial and law enforcement authorities to carry out their duties in an impartial and independent manner, free of political interference and to ensure that […] the judicial trials against opposition activists, meet the internationally accepted standards"[450].

3. FINAL REMARKS

Fundamental legal principles are usually illustrated by Putin "with a darker double meaning"[451]. An example is his motto "the dictatorship of the law"[452]. In his state-of-the-nation address (2005), Putin stated that "every law-abiding citizen [has] the right to demand for himself reliable legal guarantees"[453]. What transpires from this speech is that, according to Putin, citizens are entitled to legal safeguards at the condition that they are 'law-abiding' citizens[454]. However, a core requirement of the rule of law is that legal guarantees are "universally and equally applied"[455].

To conclude, notwithstanding its constitutional claim to be a rule of law governed state, Russia has a long way to go before the rule of law is fully implemented. Its membership to the Council of Europe represents a great opportunity for Russia but it also

---

[448] With regard to the *Yukos* case, see Groen made similar comments, see GROEN LAURENCE A., *op. cit.,* footnote 11, p. 107.
[449] *Ibidem.*
[450] *European Parliament Resolution on Russia, in particular the case of Alexei Navalny (2015/2503(RSP)),* para. 3. It is interesting to note that the European Parliament openly denounced the lack of independence of the judiciary in Russia in cases involving opponents. Such strong stance is probably due to the fact that Russia is not a Member State of the European Union.
[451] KAHN JEFFREY, *The Search for The Rule of Law, cit.,* footnote 37, p. 396.
[452] See GEL'MAN VLADIMIR, *The Dictatorship of Law: Neither Dictatorship, Nor Rule of Law*, *PONARS Policy Memo,* No. 146, 2000, p. 1.
[453] Putin' s State-of-the-nation Address, 25 April 2005 at http://fas.org/irp/news/2005/04/putin042505.html (consulted on 12 July 2016).
[454] KAHN JEFFREY, *The Search for The Rule of Law, cit.,* footnote 37, p. 396.
[455] *Ibidem.*

constitutes a risk, since "Russian noncompliance with Council norms and obligations [can] destroy the Council of Europe from within"[456].

[456] KAHN JEFFREY, *Vladimir Putin and The Rule of Law, cit.,* footnote 17, p. 533.

CONCLUSION

The violations established by the Court in the cases *Nemtsov v. Russia*, *Navalny and Yashin v. Russia* and *Navalny and Ofitserov v. Russia* leads to the conclusion that the flaws in the proceedings brought against Boris Nemtsov, Alexei Navalny and Ilya Yashin did not occur incidentally and that they were targeted with arbitrary convictions because of their opposition activities[457]. Given the systematic nature of the breaches of Article 6 of the Convention it is likely that the Russian judiciary as a whole is subject to pressure from political power holders when state interests are at stake[458]. Formally the judges are guided by the law, in practice the outcomes of political cases are dictated by extrajudicial actors through informal practices, a legacy of the Soviet era ignored by structural measures, that continues to pervade the Russian justice system[459]. It follows that in Russia the principle of the separation of powers, enshrined in the Russian Constitution[460], is not fully respected[461].

[457] With regard to the *Yukos* case, Groen reached a similar conclusion, see GROEN LAURENCE A., *op. cit.,* footnote 11*,* p. 107.
[458] *Ibidem*.
[459] President's Advisory Council on Civil Society and Human Rights, quoted in LEDENEVA ALENA, *Telephone Justice in Russia*, *cit.*, footnote 151, p. 14. See also POPOVA MARIA, *op. cit.*, footnote 1, p. 11.
[460] See Article 10 of the Constitution of the Russian Federation, according to which "State power […] shall be exercised on the basis of its separation into legislation, executive and judicial branches" and "the bodies of legislative, executive and judicial power shall be independent from one another".
[461] For further information, see GREENFELD MOLLY, *The Asymmetry of the Separation of Powers Doctrine in Australia* in *The Western Australian Jurist*, Vol. 3, 2012, p. 233.

BIBLIOGRAPHY

Amnesty International, *Freedom under Threat. The Clampdown against Freedoms of Expression, Assembly and Association in Russia*, Report, 24 April 2013.

Amnesty International, *The Strangling of the Freedom of Assembly in the Russian Federation Must Stop*, Amnesty International Public Statement, 7 January 2011.

Amnesty International, *Russia: Amnesty International Calls for Immediate Release of Russian Activists Jailed over Freedom of Assembly Protest*, Amnesty International Press, 4 January 2010, at http://www.amnestyusa.org/news/press-releases/russia-amnesty-international-calls-for-the-immediate-release-of-russian (consulted on 7 July 2016).

AMOS HOWARD and BRATERSKY ALEXANDER, *Transneft Accused of $4Bln Theft* in *The Moscow Times*, 18 November 2010, at http://www.themoscowtimes.com/business/article/transneft-accused-of-4bln-theft/423619.html (consulted on 8 July 2016).

ANONYMOUS (Associated Press in Kirov), *Alexei Navalny Trial: Key Prosecution Witness Contradicts Himself in Court* in *The Guardian*, 25 April 2013, at https://www.theguardian.com/world/2013/apr/25/alexei-navalny-trial-witness-contradicts (consulted on 9 July 2016).

ANONYMOUS, *Taming the Robber Baroons* in *The Economist*, 22 May 2004, at http://www.economist.com/node/2668288 (consulted on 7 July 2016).

BAKER PETER and GLASSER SUSAN, *Kremlin Rising: Vladimir Putin's Russia and The End of Revolution*, Washington: Potomak Books, 2007.

BAKER PETER and GLASSER SUSAN, *Kremlin Rising: Vladimir Putin's Russia and the End of Revolution*, New York: Scribner, 2005.

BALMFORTH TOM, *Putin's Legal Vertical: Kremlin Seeks to Consolidate Court System* in *Radio Free Europe*, 9 October 2013, at http://www.rferl.org/content/russia-judicial-reform-arbitration-court/25131950.html (consulted on 6 July 2016).

BANTEKAS ILIAS and OETTE LUTZ, *International Human Rights. Law and Practice*, Cambridge: Cambridge University Press, 2013.

BARRY ELLEN, *Russia Charges Anticorruption Activist in Plan to Steal Timber* in *The New York Times*, 31 July 2012, at http://www.nytimes.com/2012/08/01/world/europe/aleksei-navalny-charged-with-embezzlement.html (consulted on 9 July 2016).

BERMAN HAROLD J., *Law and Revolutions: The Formation of the Western Legal Tradition*, Cambridge MA: Harvard University Press, 1983.

BERMAN HAROLD J., *Justice in the U.S.S.R.: An Interpretation of Soviet Law*, Cambridge MA: Harvard University Press, 1963.

BLOMFIELD ADRIAN, *Vladimir Putin Could Reclaim Russian Presidency Within Months*, Thelegraph.co.uk, 6 November 2008, http/:telegraph.co.uk/news/worldnews/europe/russia/3392827/Vladimir-Putin-could-reclaim-Russian-presidency-within-months.html.

BOLT ROBERT, *A Man for All Seasons*, Act II 152-153, New York: Random House, 1962.

BOWRING BILL, *Russia and Human Rights: Incompatible Opposites?* in *Gottingen Journal of International Law*, Vol. 1, No. 2, pp. 257-278.

CALE WHITNEY, *Through the Russian Looking Glass: The Development of a Russian Rule of Law and Democracy* in *Loyola University Chicago International Law Review*, Vol. 7, No. 2, 2009-2010, pp. 93-129.

CHANCE MATTHEW and TKACHENKO MAX, *Russian Parliament Approves Extension of Presidential Term*, CNN.com, 12 November 2008, http://www.cnn.com/2008/WORLD/europe/11/12/russia.president/index.html.

DE WAAL THOMAS, *Introduction* to ANNA POLITKOVSKAYA, *A Dirty War: A Russian Reporter in Chechnya*, 2001, pp. xiii-xxxii.

DICEY ALBERT V., *Introduction to the Study of the Law of the Constitution*, 10th ed., London: Macmillan, 1959.

ELDER MIRIAM, *Russia: Alexei Navalny Found Guilty of Embezzlement* in *The Guardian*, 18 July 2013, at https://www.theguardian.com/world/2013/jul/18/alexei-navalny-found-guilty-embezzlement (consulted on 9 July 2016).

ELDER MIRIAM, *Alexei Navalny: "The Kremlin Want to Jail me but They're Scared too"* in *The Guardian*, 12 July 2013, at https://www.theguardian.com/world/2013/jul/12/alexei-navalny-kremlin-jail-russia-embezzlement (consulted on 8 July 2016).

ELLIS MARK, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice* in *University of Pittsburgh Law Review*, Vol. 72, No. 2, pp. 191-216.

FAVRET REBECCA, *Back to the Bad Old Days: President Putin's Hold on Free Speech in the Russian Federation* in *Richmond Journal of Global Law and Business*, Vol. 12, No. 2, 2013, pp. 299-316.

FELDBRUGGE FERDINAND, *The Rule of Law in Russia in a European Context* in FELDBRUGGE FERDINAND (ed.), *Russia, Europe, and The Rule of Law*, Leiden: Nijhoff, 2007, pp. 203-216.

FIGES ORLANDO, *Natasha's Dance: A Cultural History of Russia*, New York: Metropolitan Books, 2002.

FOSTER FRANCES H., *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative* in *Washington and Lee Law Review*, Vol. 54, No. 3, 1997, pp. 923-994.

GEL'MAN VLADIMIR, *The Dictatorship of Law: Neither Dictatorship, Nor Rule of Law*, *PONARS Policy Memo,* No. 146, 2000, pp. 1-4.

GENTLEMAN AMELIA, *Who is Bombing Russia?* in *The Guardian*, 12 September 1999, at https://www.theguardian.com/world/1999/sep/12/terrorism.islam (consulted on 6 July 2016).

GORDON MICHAEL R., *Another Bombing Kills 18 in Russia* in *New York Times*, Sept. 17 1999, at http://www.nytimes.com/1999/09/17 /world/another-bombing-kills-18-in-russia.html (consulted on 6 July 2016).

GREENFELD MOLLY, *The Asymmetry of the Separation of Powers Doctrine in Australia* in *The Western Australian Jurist*, Vol. 3, 2012, pp. 233-243.

GROEN LAURENCE A., *The "Jukos Affair". The Russian Judiciary and the European Court of Human Rights* in *Review of Central and East European Law*, Vol. 38, No. 1, 2013, pp. 77-112.

HANDELMAN STEPHAN, *Shadows on the Wall: Putin's Law-and-Order Dilemma* in *East European Constitutional Review*, Vol. 9, Nos. 1 & 2, 2000, pp. 88-91.

HARDING LUKE, *Who Killed Boris Nemtsov? We Will Never Know* in *The Guardian*, 3 March 2015, at https://www.theguardian.com/world/2015/mar/02/boris-nemtsov-never-know-who-killed-moscow-vladimir-putin-russian-opposition (consulted on 7 July 2016).

HENDERSON LYNNE, *Authoritarianism and the Rule of Law* in *Indiana Law Journal*, Vol. 66, No. 2, 1991, pp. 379-456.

HENDLEY KATHRYN, '*Telephone Law' and the 'Rule of Law'. The Russian Case* in *Hague Journal on the Rule of Law*, Vol. 1, 2009, pp. 241-262.

HENDLEY KATHRYN, *Assessing the Rule of Law in Russia* in *Cardozo Journal of International and Comparative Law*, Vol. 14, No. 2, 2006, pp. 347-392.

IGNATIUS ADI, *A Tsar is Born* in *Time*, 4 December 2007.

IOFFE JULIA, *New Impact. One Man's Cyber Crusade against Russian Corruption* in *The New Yorker*, 4 April 2011, at http://www.newyorker.com/magazine/2011/04/04/net-impact (consulted on 9 July 2016).

International Commission of Jurists (ICJ), *Appointing the Judges: Procedure for Selection of Judges in the Russian Federation*, ICJ Mission Report 2014.

International Commission of Jurists (ICJ), *The State of the Judiciary in Russia*, Report of the ICJ Research Mission on Judicial Reform to the Russian Federation, 2010.

JAMES MADISON, *The Federalist No. 47* reprinted in DHAL ROBERT A. (ed.), *The Democracy Sourcebook*, Cambridge MA: MIT Press, 2003, pp. 193-194.

JOHNSON EDWARD L., *An Introduction to The Soviet Legal System*, London: Methuen, 1969.

KAHN JEFFREY, *Building Brics: Human Rights in Today's Emerging Economic Powers; Freedom of Expression in Post-Soviet Russia* in *UCLA Journal of International Law and Foreign Affairs*, Vol. 18, No. 1, 2013, pp. 1-30.

KAHN JEFFREY, *Vladimir Putin and The Rule of Law in Russia* in *Georgia Journal of International and Comparative Law*, Vol. 36, No. 3, 2008, pp. 511-558.

KAHN JEFFREY, *The Search for The Rule of Law* in *Georgetown Journal of International Law*, Vol. 37, No. 2, 2006, pp. 353-410.

KNAUL GABRIELA, Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/26/32/Add. 1 (2014).

KRAMER ANDREW, *Boris Nemtsov, Putin Foe, is Shot Dead in Shadow of Kremlin* in *The New York Times*, 27 February 2015, at http://www.nytimes.com/2015/02/28/world/europe/boris-nemtsov-russian-opposition-leader-is-shot-dead.html?_r=0 (consulted on 7 July 2016).

KRAMER ANDREW E., *Navalny is Spared Prison Term in Russia* in *The New York Times*, 16 October 2013, at http://www.nytimes.com/2013/10/17/world/europe/russian-opposition-leader-is-spared-jail.html?_r=0 (consulted on 9 July 2016).

KRASNOV MIKHAIL, *The Rule of Law* in MCFAUL MICHAEL, PETROV NIKOLAI and RYABOV ANDREI (eds), *Between Dictatorship and Democracy*, Washington DC: Carnegie Endowment for International Peace, 2004, pp. 195-212.

KUDRIAVTSEV VLADIMIR, *Pravovaia Sistema: Puti Perestroiki* [Legal System: The Ways of Perestroyka] in Pravda, 5 December 1986.

KURKCHIYAN MARINA, *The Illegitimacy of the Law in Post-Soviet Societies* in DENIS J. GALLIGAN and MARINA KURKCHIYAN, *Law and Informal Practices: The Post-Communist Experience*, Oxford: Oxford University Press, 2003, pp. 25-46.

LEDENEVA ALENA, *Telephone Justice in Russia* in *The EU-Russia Centre Review*, No. 18, 2011, pp. 1-22.

LEDENEVA ALENA, *Behind the Façade: 'Telephone Justice' in Putin's Russia* in MARY MCAULEY, ALENA LEDENEVA and HUGH BARNES, *Dictatorship or Reform? The Rule of Law in Russia*, London: The Foreign Policy Centre, 2006, pp. 24-36.

LIPMAN MARIA, *How Putin Silences Dissent. Inside the Kremlin's Crackdown* in *Foreign Affairs*, Vol. 95, No. 3, 2016, pp. 38-46.

MAGGS PETER B., SCHWARTZ OLGA, BURHAM WILLIAM, *Law and Legal System of the Russian Federation*, 3rd ed., Huntington NY: Juris Publishing, 2004.

MENDRAS MARIE, *Foreword* in LEDENEVA ALENA, *Telephone Justice in Russia* in *The EU-Russia Centre Review*, No. 18, 2011, p. 3.

NEWCITY MICHAEL, *Why is There No Russian Atticus Finch? Or Even a Russian Rumpole?* in *Texas Wesleyan Law Review*, Vol. 12, No. 1, 2005, pp. 271-302.

OVERSLOOT HANS, *Crisis and Understanding in Russian Democracy and Politics* in *Review of Central and East European Law*, Vol. 37, No. 4, 2012, pp. 473-480.

PETROV NIKOLAI, *Regional Elections under Putin and Prospects for Russian Electoral Democracy*, *PONARS Policy Memo,* No. 287, 2003.

PITTS CHIP and OVSUANNIKOVA ANASTASIA, *Russia's New Treason Statute, Anti-NGO and Other Repressive Laws: "Sovereign Democracy" or Renewed Autocracy?* in *Houston Journal of International Law*, Vol. 37, No. 1, 2015, pp. 83-138.

POLITKOVSKAYA ANNA, *A Dirty War: A Russian Reporter in Chechnya*, trans. JOHN CROWFOOT with an introduction by THOMAS DE WAAL, London: The Harvill Press, 2001.

POPOVA MARIA, *Politicized Judiciary. A Study of Courts in Russia and Ukraine*, New York NY: Cambridge University Press, 2012.

REID CHARLES, *Vladimir Putin's Culture of Terror: What is to be Done?* in *University of Saint Thomas Journal of Law and Public Policies*, Vol. 9, No. 2, 2015, pp. 275-376.

REMINGTON THOMAS F., *Russia and the "Strong State" Ideal* in *East European Constitutional Review*, Vol. 9, Nos. 1 & 2, 2000, pp. 65-69.

ROSENSHIELD GARY, *Western Law, Russian Justice: Dostoevsky, The Jury Trial, and The Law*, Madison: University of Wisconsin Press, 2005.

ROSS CAMERON, *Federalism and Electoral Authoritarianism under Putin* in *Demokratizatsiya: The Journal of Post-Soviet Democratization*, Vol. 13, No. 3, 2005, pp. 347-371.

RUDDEN BERNARD, *Civil Law, Civil Society and the Russian Constitution* in *Law Quarterly Review*, Vol. 110, No. 1, 1994, pp. 56-83.

SEIBERT-FOHR ANJA, *Introduction: the Challenge of Transi*tion in ANJA SEIBERT-FOHR (ed.), *Judicial Independence in Transition – Strenghtening the Rule of Law in the OSCE Region*, Heidelberg: Springer, 2012, pp. 1-15.

SHELLEY LOUISE I., *Why a Corrupt State Can't be a Strong State. Corruption in the Post-Yeltsin Era* in *East European Constitutional Review*, Vol. 9, Nos. 1 & 2, 2000, pp. 70-74.

SMITH GORDON B., *Reforming The Russian Legal System*, Cambridge: Cambridge University Press, 1996.

TAMANAHA BRIAN Z., *A Concise Guide to the Rule of Law* in GIANLUIGI PALOMBELLA and NEIL WALKER (eds.)*, Relocating the Rule of Law*, Oxford: Hart, 2009, pp. 3-15.

TEMMINCK TUINSTRA*, Defense Counsel in International Criminal Law*, The Hague: T.M.C. Asser Press, 2011.

TOMMASOLI MASSIMO, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices* in *UN Chronicle. The Magazine of the United Nations*, Vol. XLIX, No. 4, 2012, at http://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices/ (consulted on 11 July 2016).

TYLER PATRICK, *6 Convicted in Russia Bombing That Killed 68* in *The New York Times*, 20 March 2001, at http://www.nytimes.com/2001/03/20/world/6-convicted-in-russia-bombing-that-killed-68.html (consulted on 6 July 2016).

TSCHUDI EDLE A., *Telephone Justice: Khodorkovsky, Magnitsky and Navalny* in *Brown Political Review*, 30 September 2013, http://www.brownpoliticalreview.org/2013/09/telephone-justice-khodorkovsky-magnitsky-and-navalny/ (consulted on 6 July 2016).

Venice Commission, *Judicial Appointments*, CDL-AD(2007)028-e, Report adopted by the Venice Commission at its 70th Plenary Session, Venice, 16-17 March 2007.

VLADIMIR PUTIN (Opinion), *Why We Must Act* in *The New York Times*, 14 November 1999, at http://www.nytimes.com/1999/11/14/opinion/why-we-must-act.html (consulted on 6 July 2016).

WASEK-WIADEREK MALGORZATA, *The Principle of Equality of Arms in Criminal Procedure under Article 6 of the European Convention on Human rights and its Functions in Criminal Justice of Selected European Countries: A Comparative View*, Leuven: Leuven Univerisity Press, 2000.

WEISMAN AMY J., *Separation of Powers in Post-Communist Government: A Constitutional Case Study of the Russian Federation* in *American University International Law and Policy*, Vol. 10, No 4. 1995, pp. 1365-1398.

WILDHABER LUZIUS, *The European Court of Human Rights: The Past, The Present, The Future* in *American University International Law Review,* Vol. 22, No. 4, 2007, pp. 521-538.

WILSON JESSICA C., *Russia's Cultural Aversion to The Rule of Law* in *Columbia Journal of Eastern European Law*, Vol. 2, No. 2, 2008, pp. 195-232.

YAFFA JOSHUA, *Putin's Hard Turn* in *Foreign Affairs*, Vol. 94, No. 3, 2015, pp. 128-135.

ZILE ZIGURDS L., *Idea and Forces in Soviet Legal History: A Reader of the Soviet State and Law*, New York: Oxford University Press, 1992.

TABLE OF CASES

ECtHR (23 February 2016) Application Nos. 46632/13 and 28671/14 (*Navalny and Ofitserov v. Russia*).

ECtHR (4 December 2014) Application No. 76204/11 (*Navalny and Yashin v. Russia*).

ECtHR (31 July 2014) Application No. 1774/11 (*Nemtsov v. Russia*).

ECtHR (27 November 2012) Appliation No. 41461/10 (*Dirdizov v. Russia*).

ECtHR (10 January 2012) Application Nos. 42525/07 and 60800/08 (*Ananyev and Others*).

ECtHR (31 May 2011) Application No. 5829/04 (*Khodorkovsky v. Russia*).

ECtHR (15 November 2007) Application No. 269886/03 (*Galstyan v. Armenia*).

ECtHR (27 February 2007) Application No. 11002/05 (*Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*).

ECtHR (ECHR 2006-XIII) Application No. 74552/01 (*Oya Ataman v. Turkey*).

ECtHR (ECHR 2002-III) Application No. 51346/99 (*Cisse v. France*).

ECtHR (26 October 2000) Application No. 30210/96 (*Kudła v. Poland*).

ECtHR (27 October 1993) Application No. 14448/88 (*Dombo Beheer BV v. The Netherlands*).

ECtHR (26 April 1991), Series A No. 202 (*Ezelin v. France*).

ECtHR (7 December 1976) Series A No. 24 (*Handyside v. the United Kingdom*).