

UNIVERSITY OF WISCONSIN-MADISON
The Center for Russia, East Europe, and Central Asia (CREECA)



**STRATEGIC LITIGATION: Bringing
the European Convention for
Human Rights to Russia**

Dr. Anton Burkov

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

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

Sutyajnik assists citizens and organizations:

- through litigation, education, and informational campaigns
- by helping to realize rights, both nationally and internationally

www.sutyajnik.ru



Bringing human rights home is a core idea of the Convention

- May 5, 1998: Russia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).
- Art. 1 of the Convention: The High Contracting Parties shall secure for everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.
- When Russia ratified the Convention in 1998, many Russian judges and lawyers thought this meant that only Russian citizens had the right to appeal at the European Court of Human Rights (the ECHR), not that Russian courts also had an obligation to implement the Convention at the national level.
- Russia did not expect such a high level of legal bindingness

Russia's Accession to the Council of Europe

Council of Europe

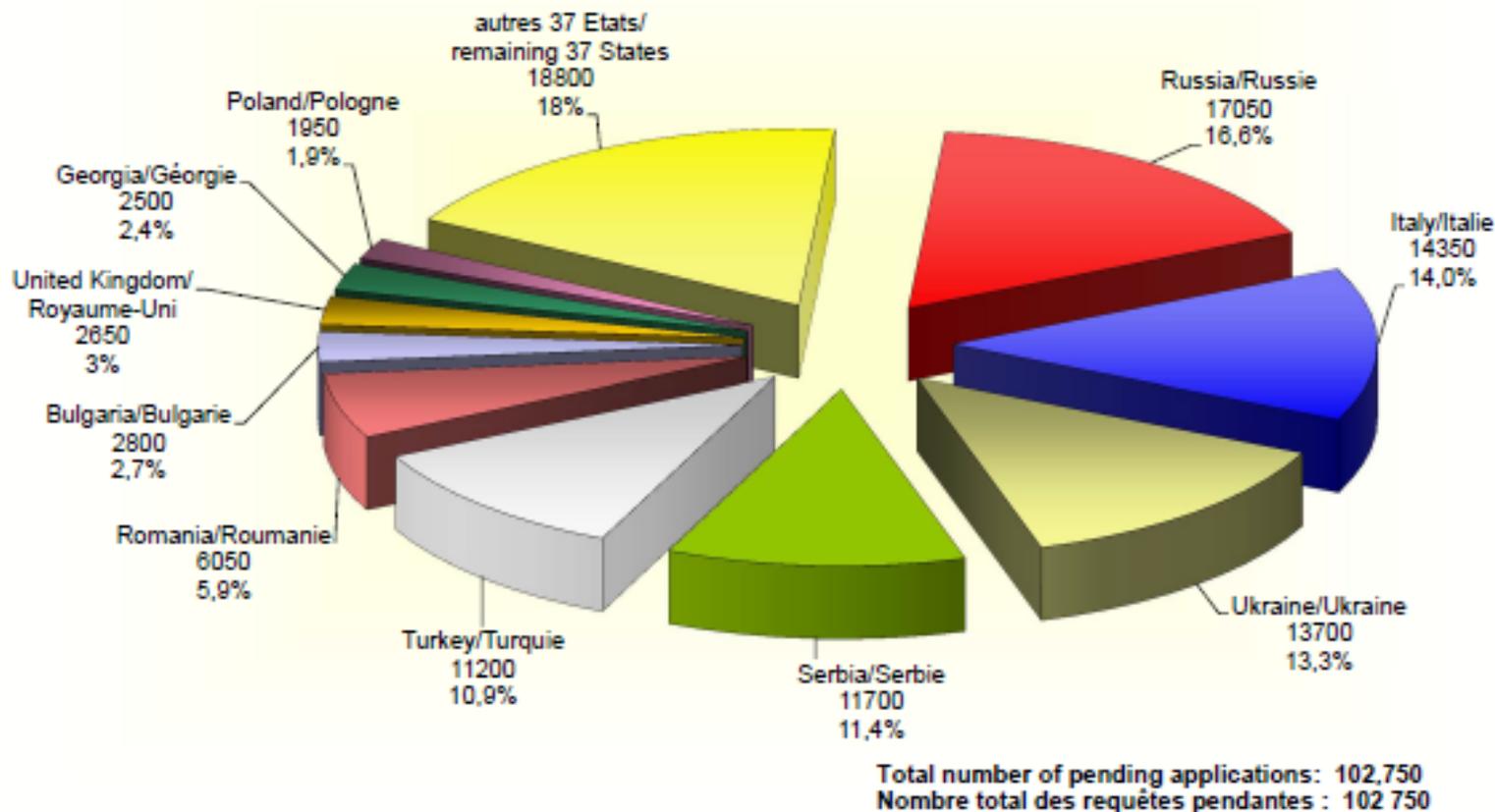
Russian Ministry of Foreign Affairs

Same conclusion

The legal order of the Russian Federation does not meet Council of Europe standards

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPEENNE DES DROITS DE L'HOMME

PENDING APPLICATIONS ALLOCATED TO A JUDICIAL FORMATION
REQUÊTES PENDANTES DEVANT UNE FORMATION JUDICIAIRE
31/11/2013



In 2013 almost half of the judgments delivered by the Court concerned 5 of the Council of Europe's 47 member States: Russia (129), Turkey (124), Romania (88), Ukraine (69) and Hungary (41).

Harmonization of the Convention with Russian Law

- The Russian Constitution provides that international treaties (i.e., the Convention) take supremacy over national law
- Constitutional Court:
 - ECHR judgments are part of the Russian legal system (2 February 2007)
- Supreme Court regulations of October 10, 2003 and June 27, 2013:
 - Judges should interpret the treaty by taking into account any subsequent practice of a treaty body [ECHR]” - ECHR cases against all member states must be taken into account (not only against Russia)
 - Non-application of the Convention is ground to quash a judgment
 - Gives a brief overview of six ECHR cases against Russia and some main principles

Convention in the Supreme Court's Practice (1998–2003 and 2004–2008)

- Before the 2003 Regulation:

- out of 3,911 judgments, ONLY 12 judgments mention the Convention
- cases contain no reference to ECHR case-law.

- After the 2003 Regulation (2003-2008):

- out of 3,723 judgments, ONLY 32 mention the Convention
- of these 32 judgments, ONLY 6 refer to ECHR case-law (i.e., progress, but not significant progress)

ATTITUDE TOWARDS THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Statement of Sverdlovsk region Chief Justice Ivan
Ovcharuk:

“No, we do not hold any special trainings on the Convention. What sort of training does one need in order to honor the provisions of Article 6 [of the Convention]? All you need is to follow the national legislation.”

—From “Judges Shall Know Everything,” Online Press Conference, August 2004

Relationship between attitude of judges and lawyers

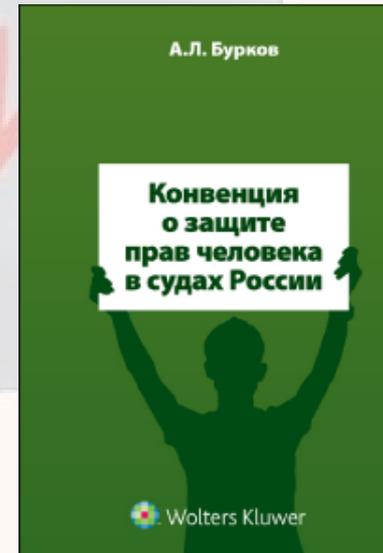
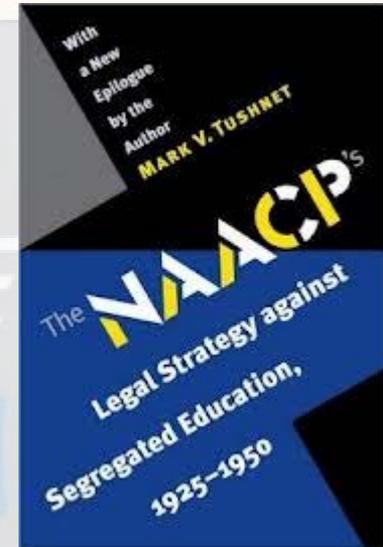
- Vicious circle:

Judges: We do not apply the Convention or ECHR case-law because attorneys do not ask us to do so;

Private attorneys: We do not argue the Convention or ECHR case-law because judges do not apply it.

Strategy to Bring Down Unlawful Practice

- (US) NAACP's Legal Strategy against Segregated Education, 1925-1950 by Mark Tushnet
- (Russia) We use legal strategy against judicial ignorance of the Convention for the Protection of Human Rights and Fundamental Freedoms



Strategy to Bring Down Resistance to the Convention in Russia

- By arguing cases before national courts on the basis of the Convention's guarantees
- By applying to the ECHR if national courts failed to take the Convention into account
 - Both should be done with the aim of not just protecting a particular right guaranteed by the Convention, but also;
 - Developing a legal tool which will be effective in motivating national judges to apply the Convention/ECHR
 - we believe this is ECHR judgment, which will rule that ignoring a party's arguments based on the Convention in itself is a violation of Art. 6 of the Convention (fair trial)

Strategic litigation (examples from Sutyajnik):

1. In 2003, when we started *Russian Labor Party v. Russia*, regarding the right of a political party to refuse to provide a list of its members, we did not anticipate its relevance today, when prosecutors run checks of NGOs and demand lists of their members. See <http://sutyajnik.ru/cases/161.html>

We also asked to regard the lack of attention to our Convention-based arguments as a violation of Article 6 (disclosing the list of members as a violation of freedom of association, and consideration of a case by a judge from a different court as a violation of a fair trial guarantee)



US in the 1960s – Russia of today



The head of the Little Rock office of the **National Association for the Advancement of Colored People (NAACP) Daisy Bates** refused to provide a list of members (advisor in 1957 to the Little Rock Nine, the students who braved hostile opponents of integration to Central High School).

- **Daisy Bates** was charged a fine by the judge for failing to provide information about NAACP members for the public record. She won a reversal in the United States Supreme Court.
- In a similar case, the high court held that the state of Alabama could not compel the NAACP to turn over its membership list to state officials.

(Peter Irons, *The Courage of Their Convictions*. 1990)

Examples, cont'd

2. *Michailova v. Russia* was spurred by the arrest of activists for participating in protests and by high fines and detentions for participating in protests and resisting arrest. The outcome of this case will make it expensive and troublesome for the state to make arrests and conduct trials on these grounds in the future, as these cases require the state to provide free legal representation for each person who has been arrested (ECHR judgment is expected in 2014). See <http://sutyajnik.ru/cases/487.html>

Applicant made requests before each court to be provided free legal aid – ignorance or rejection of the arguments by courts => the ECHR was asked to regard this as a violation of a fair trial principle (Art. 6).

3. Recently communicated case of *Novikova and 16 others v. Russia* – right to freedom of assembly and right to free legal aid if prosecuted for participating in protests <http://sutyajnik.ru/cases/482.html>

Examples, cont'd: In search for ideal case

3. *Burkov v. Russia*. Discrimination in taxation - 17% more taxes for Russians if one resides outside of Russia, asked the ECHR to rule on refusal of the Constitutional Court to consider Convention-based arguments as a violation of the right to a fair trial. See <http://sutyajnik.ru/cases/489.html>

4. A movement for better prison conditions led to the creation of public oversight commissions and to numerous cases being brought before the ECHR on prison conditions, most importantly the case of *Bugrova v. Russia*, which challenges rules of building prisons with limits of 2 sq. m. of floor space per prisoner. Both Supreme and Constitutional courts neglected Convention-based arguments. See <http://sutyajnik.ru/cases/510.html>

More recent (ideal) cases

- 5. *Enikeev v. Russia*. Right to freedom of movement - right to get a driver's licence at the place of residence, not at the place of registration; right of access to secret evidence advanced by a court; and the right to be heard by an appeal court. See <http://sutyajnik.ru/cases/522.html>
- 6. *Kudriakov v. Russia*. Right to private life – protection of personal data of those who reported to the police about minor crimes. Once again all the courts, including the Constitutional Court, ignored the Convention-based arguments <http://sutyajnik.ru/cases/525.html>

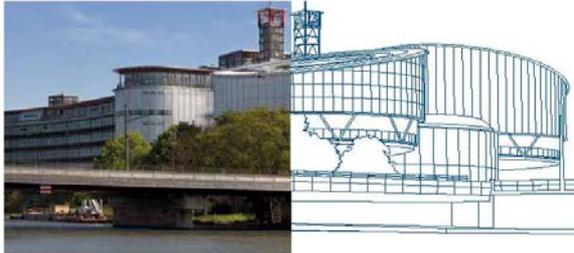
LACK OF LEGAL EDUCATION ON THE CONVENTION

- The root of the majority of violations is a lack of domestic application of the Convention
- As a force of change from below, lawyers should argue the Convention when bringing cases to Russian courts (lawyers arguing the Convention, especially in district courts, effect change from the bottom up)
- Improved human rights education for legal professionals and law students alike:
 - A required course on the Convention in Russian law schools
 - A master's degree program in international human rights protection
 - Legal training and seminars for district court judges

“The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe”

edited by
leonard hammer & frank emmert

the european convention
on human rights and
fundamental freedoms in
central and eastern europe

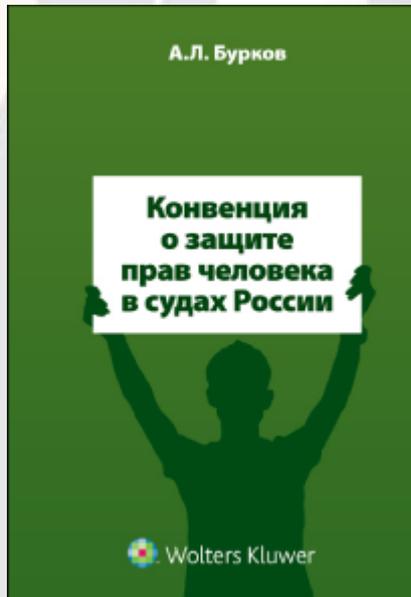


eleven
international publishing

Chapter on Russia in English
by the speaker

<http://www.elevenpub.com/law/catalogus/the-european-convention-on-human-rights-and-fundamental-freedoms-in-central-and-eastern-europe-1>

Burkov *“The Convention for the Protection of Human Rights in Russian Courts.”* Moscow: Wolters Kluwer. 2010.



- The full text of the book is available at (free for download)

www.sutyajnik.ru/documents/4679.pdf