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Toward a Jurisprudence of Free Expression in Russia: The European Court of Human Rights, Sub-National Courts, and Intersystemic Adjudication

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*Robert B. Ahdieh & H. Forrest Flemming**

ABSTRACT

Protection of free expression in Russia is headed the wrong direction, but one institution may still be able to slow its backward slide: the Russian judiciary. In particular, sub-national courts—those operating at the ground level—have the potential to shape a renewed jurisprudence of free expression in Russia. To encourage as much, the European Court of Human Rights (ECHR) should engage the Russian courts in a pattern of "intersystemic adjudication," pressing them to embrace ideas about the role of courts, the law, human rights, and free expression more in line with international norms. Hopefully, this can reverse Russia's current path toward the suppression of free expression.

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INTRODUCTION

Even as its status as a fundamental right spread across the globe in the nineteenth and twentieth centuries, free expression failed to establish any meaningful foothold in Tsarist Russia or the Soviet Union. Following Russia's independence, its advance was episodic at best. And of late, even that limited progress has been threatened.

To all but the most forgiving observers of Russia today, the protection of free expression is heading in the wrong direction. Crackdowns on public protests,[1] limitations on religious freedom,[2] the assassination of journalists,[3] legislative initiatives to limit the critique of government officials,[4]

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[1] Russian police arrested hundreds of protestors the night before Vladimir Putin's inauguration in late 2012. Afterwards, new legislation increased penalties for unauthorized protests. *See* Michael Birnbaum, *A Year into Russia Crackdown, Protestors Try Again*, WASH. POST (May 5, 2013), http://js.washingtonpost.com/world/europe/a-year-into-russia-crackdown-protesters-try-again/2013/05/05/b7c35870-b5a4-11e2-b94c-b684dda07add_story.html.

[2] *See, e.g.*, Matthew Brunwasser, *Extremism Law Curbs Religious Freedom in Russia*, MATTHEWBRUNWASSER.COM (July 10, 2012), http://matthewbrunwasser.com/index.php/2012/07/extremism-law-curbs-religious-freedom-in-russia/ (reporting on the negative impact of an anti-extremism law on the religious freedom of worshipers in St. Petersburg).

[3] *See, e.g.*, Michael Schwirtz, *Journalist Is Shot Dead in Russia's North Caucasus Region*, N.Y. TIMES (Dec. 16, 2011), http://www.nytimes.com/2011/12/17/world/europe/journalist-is-shot-dead-in-russias-north-caucasus-region.html.

[4] Putin signed a law in 2012 broadly defining treason, leading critics to warn that it could be used to stifle dissent. *Russia Treason: Putin Approves Sweeping New Law*, BBC (Nov. 14, 2012, 5:08 ET), http://www.bbc.co.uk/news/world-europe-20323547.

significant constraints on independent media outlets,[5] and other curtailments of free expression have received widespread attention—both in Russia and around the world. For all that discussion, however, the country's journey away from the freedom of expression has not only continued but even accelerated.

Some might see this trend as irreversible. The influence of the Putin regime at every level of government in Russia, and across the social and economic order,[6] suggests little by way of a political backstop to the growing limitation of free expression. Meanwhile, Russia's non-governmental sector is in wholesale decline, to the extent it even continues to function.

Surveying this bleak landscape, one institution that might still be able to slow Russia's backward slide is the Russian judiciary. In particular, systematically engaged and empowered sub-national courts have the capacity to shape a renewed jurisprudence of free expression in Russia—precisely where the rubber hits the road.

Realization of this capacity begins at the opposite end of the judicial spectrum. By all accounts, the European Court of Human Rights (ECHR) stands at the apex among courts in the protection of free expression.[7] In what follows, we offer a strategy to use the power and influence of the ECHR to reverse Russia's path towards the suppression of free expression. By recognizing both the reality of and potential for "intersystemic adjudication"—a robust form of engagement of courts across jurisdictional lines—the ECHR may effectively press Russia's sub-national courts to embrace ideas about the role of courts, the law, human rights, and free expression that are more closely aligned with international norms.

Of course, any solution to the dilemma of free expression in Russia will ultimately involve the courts at the top of its judicial pyramid as well: the Constitutional Court, the Supreme Court, and perhaps even the Supreme

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[5] *See* Corey Flintoff, *Signs of A Media Crackdown Emerge in Russia*, NPR (Feb. 20, 2012, 12:01 AM), http://www.npr.org/2012/02/20/147052681/signs-of-a-media-crackdown-emerge-in-russia.

[6] *See generally Putin's Russia: Repression Ahead*, ECONOMIST (June 1, 2013), http://www.economist.com/news/europe/21578716-vladimir-putins-crackdown-opponents-protesters-and-activist-groups-may-be-sign-fragility.

[7] *See, e.g.*, Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 125 (2008) ("The European Court of Human Rights (ECHR) is the crown jewel of the world's most advanced international system for protecting civil and political liberties.").

Arbitrazh Court. We do well, however, to concentrate particular attention on the lower courts—especially with reference to the freedom of expression. Russia's lower courts are critical to changing the norms of free expression in the country, both because they hear questions of free expression at the ground level, and because they have consistently been less engaged with the international community of courts than Russia's senior judges.[8] Intersystemic adjudication offers the opportunity to systemically and substantively change that.

To establish as much, this Article proceeds as follows: Part I briefly reviews recent indicators of the decline of free expression in Russia, linking this pattern to conceptions of law rooted in Soviet legal culture. Part II describes the role that courts can play in addressing Russia's free expression challenges, with particular focus on the ECHR and Russia's lower courts. Part III introduces the concept of intersystemic adjudication, tracing its origins in and connections to other scholarly approaches to judicial interaction. Finally, Part IV argues that intersystemic adjudication offers the most appropriate window into the relationship of the ECHR and Russia's sub-national courts. Further, it identifies ways that we might enhance the dynamic of intersystemic adjudication in that relationship, so as to best encourage a new jurisprudence of free expression in Russia.

I. FREE EXPRESSION IN RUSSIAN LEGAL HISTORY AND CULTURE

By all accounts, the freedom of expression is under siege in the Russian Federation, from freedom of the press to free assembly and protest, and from the work of non-governmental organizations to the freedom of religion. Reporters Without Borders ranks Russia 148 out of 179 nations surveyed when it comes to journalistic freedom of expression.[9] Human Rights Watch writes that the Russian government engages in "restriction and censure of protected expression and the media, and harassment of activists and human rights defenders."[10] According to the Committee to Protect Journalists, 17 journalists were killed in Russia between 2000 and 2009 in retaliation for published stories, making Russia one of the most dangerous places in the

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[8] *See infra* Part II.B.

[9] REPORTERS WITHOUT BORDERS, 2013 WORLD PRESS FREEDOM INDEX: DASHED HOPES AFTER SPRING 20-24 (2013), *available at* http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf.

[10] HUMAN RIGHTS WATCH, WORLD REPORT 396 (2009), *available at* http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf.

world for journalists.[11]

Political speech is similarly unprotected. Freedom of speech in Russia captured international headlines in 2012, with the prosecution and conviction of three members of the feminist rock band Pussy Riot.[12] In advance of the presidential election that returned Vladimir Putin to the presidency that year, the band staged an anti-Putin protest in a Moscow cathedral, prompting a charge of hooliganism.[13] All three of the captured members were convicted, with two sent to labor camps to serve their sentences.[14] On a wider scale, mass protests like those against Putin in Bolotnaya Square in 2012 have resulted in mass arrests and prosecutions.[15] And, as with Pussy Riot, Russian courts have largely gone along, convicting protesters as a matter of course.

Russian legislators have likewise done their part to limit the freedom of expression. In June 2012, just a month after his inauguration, President Putin endorsed new legislation imposing hefty fines on participants in unsanctioned demonstrations.[16] That same month, the Russian parliament enacted three other laws impinging on free expression. The first imposed limits on internet use, another limited the activity of non-governmental organizations, and the third criminalized defamation.[17] These moves, alongside the government's significant control of the press, create substantial barriers to free expression in Russia.

Such impositions on free expression, however, are not new to Russia. The freedoms of speech, of press, and of assembly have consistently been limited under the tsars, Communist rule, and Russia's post-Soviet leadership.

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[11] *See* COMM. TO PROTECT JOURNALISTS, ANATOMY OF INJUSTICE: THE UNSOLVED KILLINGS OF JOURNALISTS IN RUSSIA 6 (2009), *available at* http://cpj.org/reports/CPJ.Anatomy%20of%20Injustice.pdf.

[12] Reuters, *Band Members in Putin Protest Said to Face Harsh Conditions,* N.Y. TIMES (Oct. 29, 2012), http://www.nytimes.com/2012/10/30/world/europe/imprisoned-pussy-riot-members-in-harsh-conditions.html.

[13] *Id.*

[14] *Id.*

[15] Andrew E. Kramer, *Thousands in Moscow Rally Against New Trials*, N.Y. TIMES (May 6, 2013), http://www.nytimes.com/2013/05/07/world/europe/russian-protest-goes-ahead-despite-volunteers-death.html.

[16] Potential fines exceeded $9,000 for individuals, $18,000 for organizers, and $30,000 for groups. David M. Herszenhorn, *New Russian Law Assesses Heavy Fines on Protesters*, N.Y. TIMES (June 8, 2012), http://www.nytimes.com/2012/06/09/world/europe/putin-signs-law-with-harsh-fines-for-protesters-in-russia.html.

[17] Poel Karp, *Why Russia Needs a Defamation Law. . . a Proper One*, OPENDEMOCRACY (Aug. 3, 2012), www.opendemocracy.net/print/67389.

That history, meanwhile, has helped to enshrine a legal culture—and a particular conception of law's role in society—that represent the greatest obstacle to change.

Early in the Bolshevik Revolution, the law was seen in a harsh light. Consistent with Marxist theory, the rule of law was seen as the rule of the ruling class.[18] Law was thus little more than another tool by which the ruling class could exert power over the masses and maintain its position at the top of the political and economic order. Given as much, the revolutionaries looked forward to a withering away of the law, along with the state, as communism was perfected in the new Soviet Union.[19]

Perhaps predictably, the idealism of this thinking did not persist for long. One of the very first decrees issued after the Revolution concerned the operation of the judicial system.[20] Just one year later, the new government issued an important decree on strict observance of the rule of law.[21] Still, there existed a certain equilibrium of respect for and distrust of the rule of law in the earliest days of communist rule.[22] Law continued to be seen as a means of bourgeoisie influence, yet it was also understood as an essential tool of effective governance.

By the 1930s, however, this balance was abandoned, as Josef Stalin established his authority over the Soviet state. In place of a withering away of the law, there emerged a virulent legal instrumentalism, in which law was, first and foremost, a tool of state power.[23] In many respects, this dynamic arose out of the work of Andrei Vyshinsky, a firm believer in the power of law and Stalin's chief prosecutor. Led by Vyshinsky, the Great Purge of Stalin's competitors for authority and influence within the Communist Party took the particular form of the infamous "show trials."[24] Widely publicized, these proceedings sought to give the appearance of due process to what were

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[18] *See* Evgeny Pashukanis, *The Marxist Theory of State and Law, in* SELECTED WRITINGS ON MARXISM AND LAW 273 (Piers Beirne & Robert Sharlet eds., Peter B. Maggs trans., 1980).

[19] *Id.*

[20] This was the Decree No. 1 on Courts. SAMUEL KUCHEROV, THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION 21-25 (1970).

[21] This was the Decree No. 2 on Courts. *Id.* at 35-38.

[22] ROBERT B. AHDIEH, RUSSIA'S CONSTITUTIONAL REVOLUTION: LEGAL CONSCIOUSNESS AND THE TRANSITION TO DEMOCRACY 1985-1996, at 15 (1997).

[23] Molly Warner Lien, *Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion*, 30 STAN. J. INT'L L. 41, 72-73 (1994).

[24] *See* Jonathan D. Greenberg, *The Kremlin's Eye: The 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 STAN. J. INT'L L. 1, 6-7 (2009).

essentially decisions to eliminate political enemies.[25] They did so, however, at the expense of public (and governmental) conceptions of law.

Adoption of Stalin's 1936 constitution offered further confirmation of this legal instrumentalism. No longer would law be avoided or ignored, let alone abandoned. Henceforth, law would emerge as one of the critical—and perhaps the most important—instruments of Soviet power, both in rhetoric and in practice.[26] Law would thus come to function as a social, political, and economic constraint on individuals and institutions, rather than a tool to protect the citizenry from one another, let alone the state.[27]

In the ensuing decades, this conception of law would come to be ingrained in the mindset of both the subjects and practitioners of law in the Soviet Union.[28] In particular, given the bureaucratic structure of judicial promotion in the country,[29] it was instilled in each new generation of judges, as a matter of culture and belief. Even with the collapse of the Soviet Union, in fact, this statist conception of law persisted in critical ways. Beyond Moscow and Russia's highest courts, there is limited notion—at best—of law as a source of individual rights. More troubling, perhaps especially with regard to free expression, the conception of it as a tool of constraint has not yet been purged, perhaps particularly in the lower courts.[30] Changing the conception of law in Russia's lower courts will thus be central to any effective response to the crisis of free expression in Russia.

II. THE ROLE OF THE COURTS

In light of the broad range of challenges to free expression in Russia today, any meaningful response must integrate a diversity of strategies. It is equally clear, however, that any such response must rely heavily on the courts. Courts are uniquely situated to protect the freedom of expression. As the ultimate arbiters of the law's structure, it falls to them to define the scope of free expression. Courts are also naturally positioned to redress violations of freedom of expression, given the ordinary commission of such

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[25] *See id.*

[26] AHDIEH, *supra* note 22, at 15-16, 97-98.

[27] *See* Lien, *supra* note 23, at 74-75.

[28] *See id.* at 80-81.

[29] *See* Greenberg, *supra* note 24, at 34-35 (arguing that the bureaucracy of the Kremlin has imposed its will on the judicial system).

[30] *See* Yulia Dernovsky, Note, *Overcoming Soviet Legacy: Non-Enforcement of the Judgments of the European Court of Human Rights by the Russian Judiciary*, 17 CARDOZO J. INT'L & COMP. L. 471 (2009).

violations by the political branches of government, rather than by the courts.[31]

In this Part, we review the judicial institutions relevant to protecting the freedom of expression in Russia and consider the role they have played—and might potentially play—in that process. First, we describe the European Court of Human Rights and its connection to the human rights jurisprudence of Russia and other members of the Council of Europe. We then turn to the Russian judiciary and consider its role in protecting the freedom of expression, with particular emphasis on Russia's sub-national courts.

a. The European Court of Human Rights

Since World War II, the European Convention on Human Rights and Fundamental Freedoms has been the fulcrum of human rights protection in Europe. Among members of the Council of Europe, the Convention guarantees certain core rights, including the freedom of expression, freedom of assembly, and freedom of association.[32] Signatories to the European Convention are required to "secure to everyone within their jurisdiction" these rights and freedoms.[33] In 1998, Russia ratified the Convention and accepted this obligation.[34]

The European Court of Human Rights serves as the judicial branch of the European Convention and exercises jurisdiction over all members of the Council of Europe.[35] Headquartered in Strasbourg, France, it is comprised of judges appointed by each member state, making it the largest supranational tribunal in the world.[36] Sitting in chambers of seven judges, ECHR judges hear cases brought by member states, as well as by individual citizens challenging actions of their home country.[37] Individual petitioners

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[31] To be sure, courts are often themselves the source of rights' violations. *See* Helfer, *supra* note 7, at 158. Even as to those circumstances, I would argue the engagement proposed herein is likely to have a salutary influence.

[32] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms arts. 10-11, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

[33] *Id.* art. 1.

[34] Wrede Smith, Note, *Europe to the Rescue: The Killing of Journalists in Russia and the European Court of Human Rights*, 43 GEO. WASH. INT'L L. REV. 493, 510 (2011).

[35] Convention, *supra* note 32, art. 19.

[36] The organization of the Court is complex. *See id.* art. 26(b); *see generally* Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1 (2005) (describing how the Court is split into four "sections," each with its own president, and elaborating on the role of these sections).

[37] Convention, *supra* note 32, arts. 33-34.

must have exhausted available remedies in their home jurisdiction, however, before bringing their claims to the ECHR.[38]

The primary remedy ECHR provides is declaratory relief. In these circumstances, the Court simply declares that the member state has violated one or more rights guaranteed by the European Convention. The Court can also provide damages, however, in appropriate cases.[39] This relief takes the form of "just satisfaction"—granted where the Court finds that the applicant has sustained injury as a result of the member state's violation.[40] In recent years, the Court has also shown willingness to demand more specific remedies from member states, including the reopening of proceedings, alterations of domestic law, and the return of seized property.[41]

The enforcement of ECHR judgments falls largely to individual member states.[42] Because the ECHR has limited enforcement mechanisms of its own, the cooperation of member states is essential to its integrity.[43] Yet the Court is not completely without power to encourage execution of its judgments. In various ways, the Court may publicly encourage a member state to provide applicants with an effective remedy.[44] The Court may thus seek to "shame" member states into providing relief.[45] Such shaming may extend beyond the Court, moreover, as other member states join a chorus of pressure on non-compliant states.[46] At the other extreme, disregard of the Court could ultimately lead to expulsion from the Council of Europe.

Since Russia ratified the European Convention in 1998, it has submitted to the jurisdiction of the ECHR, strained as that relationship has sometimes been.[47] As a formal matter, Russia's obligation to apply the Convention and

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[38] *Id.* art. 35(1). The judge appointed by the member state being challenged always serves on the panel deciding the relevant case. *Id.* art. 26.

[39] *Id.* art. 41.

[40] *Id.*

[41] Helfer, *supra* note 7, at 147.

[42] MICHAEL D. GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 4-6 (2007).

[43] *Cf.* Helfer, *supra* note 7, at 158.

[44] *Id.*

[45] *Id.* at 153, 158.

[46] For example, both the ECHR and other member states were highly critical of Russia's delay in signing Protocol 14 of the Convention, as such measures must be ratified unanimously by member states to take effect. *See* Jennifer W. Reiss, Recent Development, *Protocol No. 14 ECHR and Russian Non-ratification: The Current State of Affairs*, 22 HARV. HUM. RTS. J. 293, 293-95 (2009).

[47] *See generally* Julia Lapitskaya, Note, *ECHR, Russia, and Chechnya: Two is Not*

accept the ECHR's interpretations of it is clear. Under Article 15 of the Constitution of the Russian Federation, thus, international treaties are integrated into Russian domestic law.[48] Indeed, they sit in a position of superiority to domestic statutory law, when the two conflict.

On the other hand, as one commentator has suggested:

> Russia violates the spirit and letter of the [European Convention] by ignoring the substance of the ECHR judgments, failing to implement measures that are necessary to punish wrongdoers and prevent human rights violations in the future, and engaging in techniques, including intimidation of human rights applicants, attorneys, and activists, that are designed to dissuade Russian nationals, including Chechen residents, from accessing the ECHR.[49]

This disregard is no small matter. In 2011, over 14,000 ECHR complaints were filed against Russia—nearly 6,000 more than the next most challenged member state, Turkey.[50]

If the ECHR is to play a meaningful role in the protection of free expression in Russia, this relationship must obviously change.[51] Unlikely as that may seem, two recent decisions offer reason for hope.

In 2010, after several years of delay, Russia became the last member of the Council of Europe to ratify Protocol 14 to the European Convention.[52] With that decision, the path was paved for a significant strengthening of the ECHR's procedures, to allow it to work through its backlog of cases and

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Company and Three is Definitely a Crowd, 43 N.Y.U. J. INT'L L. & POL. 479 (2011).

[48] KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15 (Russ.); *see generally*, Anton Burkov, *Impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on the Russian Legal System*, *in* EU-RUSSIA LEGAL COOPERATION 30 (2010), *available at* http://www.eu-russiacentre.org/wp-content/uploads/2008/10/EURC_Review_XIV_english.pdf (elaborating on these constitutional provisions and their interpretation as they related to the ECHR in particular).

[49] Lapitskaya, *supra* note 47, at 480.

[50] EUR. COURT OF HUMAN RIGHTS, THE EUROPEAN COURT OF HUMAN RIGHTS IN FACTS & FIGURES 10 (2011), *available at* http://www.echr.coe.int/Documents/Facts_Figures_2011_ENG.pdf.

[51] *See* William E. Pomeranz, *Russia and the European Court of Human Rights: Implications for U.S. Policy*, WILSON CENTER, http://www.wilsoncenter.org/publication/russia-and-the-european-court-human-rights-implications-for-us-policy (last visited Sept. 28, 2013) (arguing that cooperation with the ECHR is strictly limited to financial compensations and that Russia refuses to adopt policies recommended by the Court).

[52] Robert Bridge, *Russia Ratifies Protocol 14 on Human Rights Court Reform*, RT (Jan. 15, 2010, 12:10), http://rt.com/politics/russia-ratifies-protocol-14/.

thereby increase its effectiveness as a tribunal.[53]

Even more critically for present purposes, in February 2010, the Russian Constitutional Court issued a judgment mandating enactment of legislation to create a mechanism for the effective execution of ECHR decisions. Such a mechanism of redress, the Constitutional Court held, was a binding obligation on the Russian parliament under the European Convention.[54] Further, the Constitutional Court mandated amendment of the Russian Code of Civil Procedure, to incorporate a mechanism for reconsidering cases when mandated by the ECHR.[55]

b. The Russian Courts

For all its potential as a supranational human rights tribunal, the ECHR represents only half of the picture in any effort to use the courts to protect free expression in Russia. Russia's own courts have at least as important a role to play.

The judiciary of Russia comprises three main court systems: commercial courts, courts of general jurisdiction, and the Constitutional Court.[56] Presiding over the commercial courts—whose jurisdiction extends to fiscal and business disputes between and among both public and private institutions—is the Supreme Arbitrazh Court.[57] Atop the generalist courts sits the Supreme Court of the Russian Federation, which "has the ultimate judicial responsibility for civil, criminal, administrative, and other cases from general jurisdiction courts."[58] The Supreme Court is thus the ultimate arbiter of non-constitutional questions, exercising appellate authority over district and regional courts of general jurisdiction.[59]

Most important among the three high courts when it comes to free expression is the Constitutional Court. Standing on its own, without lower courts below it, the Constitutional Court is charged (among other things) with hearing cases from citizens that implicate constitutional rights and liberties.[60] The Constitutional Court is the ultimate interpreter of the

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[53] *See* Reiss, *supra* note 46.

[54] Burkov, *supra* note 48, at 33.

[55] *Id.*

[56] *See* RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY 419-32 (7th ed. 2009).

[57] *See id.* at 431.

[58] *Id.* at 424.

[59] *Id.*

[60] KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 125 (Russ.).

Russian constitution, and its decisions constitute binding precedents akin to the decisions of the U.S. Supreme Court.[61] One commentator has thus described the Constitutional Court as "so large, powerful, and productive that it could be treated as a separate judiciary."[62]

Much has been written on the role of Russia's high courts, especially the Constitutional Court and the Supreme Court, in the protection of human rights.[63] Those courts are well connected with what Anne-Marie Slaughter has termed the "global community" of courts.[64] Their judges sit on panels with judges from other nations and are aware of, and even engage, opinions of the high courts of those nations. Russia's high court judges thus count other high court judges as their peers and are influenced by their views, values, and practices. This dynamic extends beyond other national courts, moreover, to the ECHR as well. Both the Constitutional Court and the Supreme Court thus regularly invoke the case law of the ECHR in their decisions.[65]

There are, to be sure, significant limits to the relationship of Russia's high courts with the ECHR. If the former fully embraced the judgments of the latter, the protection of free expression would be far less of a concern in Russia than it is today.[66] Compared to Russia's lower courts, however, the high courts are far more aware of and engaged with supranational and foreign courts, and with their foundational values.

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[61] *See generally* Ekaterina Mouliarova, *The Role of Constitutional Justice in Russia in the Process of Interpretation of European Values and the Promotion of European Constitutionalism* (Eur. Univ. Inst., Working Paper MWP 2010/04, 2010), *available at* http://cadmus.eui.eu/bitstream/handle/1814/13344/MWP_2010_04.pdf?sequence=1.

[62] Todd Foglesong, *The Dynamics of Judicial (In)dependence in Russia, in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 62, 64 (Peter H. Russell & David M. O'Brien eds., 2001)

[63] *See, e.g.*, Stephen Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000); Jeffrey Kahn, Note, *Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 U. MICH. J.L. REFORM 641 (2002).

[64] *See* Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 711 (1998) (describing a "global community" of judges engaged in dialogue about shared social, economic, and legal challenges).

[65] Kahn, *supra* note 63, at 662. *But see* Burkov, supra note 48, at 34 (arguing that the Supreme Court only rarely invokes the ECHR).

[66] *See* Helfer, *supra* note 7, at 133. Although Russia frequently pays ECHR monetary judgments, it is unwilling to remedy more systemic issues addressed by ECHR judgments. *See* Dernovsky, *supra* note 30, at 489.

Lower courts in Russia thus interact with the international community of courts with dramatically less frequency than the high courts. In an apt example, lower court judges have largely disregarded judgments of the ECHR in their own adjudication of disputes.[67] Their operative "community," by contrast with the high courts, consists almost exclusively of the Russian bench and bar. Given as much, their mindset has tended to remain more grounded in the instrumental conception of law described in Part I.[68]

The lived experience of the law for Russia's lower court judges, meanwhile, is as an instrument of governance, rather than as a tool to protect citizens' rights.[69] As a result, they are more likely to accept the suppression of free expression in the service of governmental imperatives.[70] Because of their lack of engagement with international legal values, this mindset has defined their jurisprudence.[71]

Yet Russia's lower courts have a crucial role to play in the protection of free expression. Battles over the freedom of expression are first fought in the lower courts.[72] It is at that stage that the complexities of free speech and free association can be most readily negotiated. Courts engaged with the facts of the case and the principals of the underlying dispute are thus best positioned to reach results that effectively balance the demands of law enforcement, national security, and the prevailing politics with the dictates of free expression.

Engaging the demands of free expression in the lower courts is also essential, given the failure of the overwhelming majority of cases to reach the high courts—whether for reasons of cost, delay, or otherwise.[73] Appeal to the ECHR, meanwhile, is available only after all domestic options for recovery have been exhausted.[74] Any robust protection of free expression in Russia must therefore involve a change at the level of the lower courts, rather than necessarily long-delayed judgments of the high courts or the

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[67] Lapitskaya, *supra* note 47, at 495; *see also* Helfer, *supra* note 7, at 137.

[68] *See supra* Part I.

[69] *See id.*

[70] *See* Dernovsky, *supra* note 30, at 474-76.

[71] Exacerbating this situation is the fact that lower court judges most often have lesser education than their high court counterparts. As a result, they have likely had lesser indirect exposure to international legal norms as well.

[72] *Cf.* Helfer, *supra* note 7, at 156.

[73] *Id.* at 133.

[74] Convention, *supra* note 32, art. 35.

ECHR.[75]

Finally, emphasis on the lower courts may also be important for Russian legal culture more generally. For the overwhelming majority of Russia's citizens, any interaction with the judiciary will come via the lower courts. Whatever they may read of the decisions of the Supreme Court or the Constitutional Court, it is the legal culture of the lower courts that they are most likely to observe—and embrace.

III. FROM JUDICIAL DIALOGUE TO INTERSYSTEMIC ADJUDICATION

Having described the role of the ECHR in advancing human rights in Europe and suggested the relevance of the lower courts to any sustainable effort to do so in Russia, one might consider the role that engagement between these institutions could play in furthering that cause. In a growing body of academic work, scholars have explored the engagement of courts across jurisdictional lines.

For the most part, this analysis has approached such cross-jurisdictional interaction as a kind of voluntary "dialogue."[76] For some, this dialogue is simply a source of judicial community.[77] For others, it constitutes a critical means to disseminate international norms to judges in those jurisdictions that operate outside those norms.[78]

The framework of "intersystemic adjudication" draws on this literature but offers an account of judicial engagement that may better capture the interaction of the ECHR and the lower Russian courts. Rather than pure dialogue, intersystemic adjudication focuses on the need for each court to attend to decisions of the other. Perhaps for that very reason, it suggests a bi-directional pattern of learning, rather than the dissemination of values defined by one judicial system to the other.

In what follows, we begin with a brief introduction to the literature of judicial dialogue generally. We then consider important work of Larry Helfer on the potential "embeddedness" of ECHR judgments in the politics

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[75] The backlog of cases in the ECHR makes the need for effective relief in the Russian courts even more obvious. See *infra* Part III.

[76] *See generally* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2050 (2004) (addressing the literature focusing on the dialogic aspects of judicial interactions).

[77] Early work by Anne-Marie Slaughter discussed the international community of courts in great detail. *See, e.g.*, Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

[78] *See, e.g.*, Helfer, *supra* note 7, at 131-33.

and jurisprudence of member states. Finally, we describe the theory of intersystemic adjudication, as well as the scholarly framework from which it is derived.

a. Judicial Dialogue

One influential framework for thinking about the interaction of courts is "transnational legal process," an approach directed primarily to state actors' relationship with international law.[79] In its genesis, transnational legal process derives from the question of why nations obey international law. The answer, as posited by Harold Koh, may lie in the interaction of actors "in a variety of fora[,] to make, interpret, enforce, and ultimately internalize rules of international law."[80]

The goal of transnational legal process, as such, is to foster interactions among actors that will encourage the internalization of international law "into the domestic law of even resistant nation states."[81] This approach, it is hoped, will encourage the voluntary embrace of transnational norms—with attendant benefits in terms of compliance. Transnational legal process does not encompass courts alone, however, but the entire universe of "public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals."[82] Such broad engagement and dialogue, transnational legal process promises, leads nation-states to internalize international norms and to comply with them more consistently.[83]

The framework of transnational "networks" constitutes another rubric for analyzing judicial dialogue. As explored by Anne-Marie Slaughter, such networks are comprised of state actors drawn from multiple jurisdictions.[84] These individuals are bound together, in turn, by one or more shared goals or concerns—usually an issue of global character requiring engagement across jurisdictional lines.[85] Such transnational networks operate below the highest

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[79] Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1502 (2003).

[80] *Id.*

[81] *Id.*

[82] Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 YALE L.J. 2599, 2626 (1997).

[83] *Id.*; *see also* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 203-06 (1996).

[84] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 167-68 (2004).

[85] *Id.*

levels of government, however, with agency or departmental representatives in particular subject-matter areas—or individual judges—as their members. Already widespread, Slaughter argues that such networks will only grow in importance over time, ultimately emerging as the framework of global governance.[86]

Finally, in analyzing the European Court of Justice (ECJ), Joseph Weiler explored a pattern of judicial dialogue by which the ECJ was able to significantly enhance its role and to promote the project of Europe more generally.[87] In Weiler's account, Europe emerged in no small part out of the interaction of the ECJ with the sub-national courts of the European Community's member states.[88] The latter courts, before rendering their own judgments on national legal questions implicated by European law, turned to the ECJ with preliminary references on the questions presented—seeking advance judgments of a sort. In this way, the sub-national courts of Europe came to be actively engaged in the administration and application of European law. Through this trans-judicial dialogue, in turn, European values came to be enshrined in the jurisprudence of the nations of Europe.[89]

b. Embeddedness and the ECHR

Building on the foregoing work, Larry Helfer has explored the role of ECHR judgments at the national level and how that role might be enhanced.[90] Helfer offers high praise for the ECHR, calling it the "crown jewel" of human rights courts.[91] But he also highlights the tremendous challenges presented by the Court's huge backlog of cases.[92] To address the latter, Helfer posits the need to better "embed" the judgments and underlying values of the ECHR in member states.[93]

At base, Helfer's concept of "embeddedness" speaks to how the ECHR can most effectively shape national-level human rights norms. More specifically, embeddedness seeks to achieve this goal by enhancing the place

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[86] *Id.*

[87] J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26 J. COMP. POL. STUD. 510, 512-16 (1994).

[88] *Id.*

[89] *Id.*; *see also* Helfer, *supra* note 7, at 140-41 (describing analogous undertakings by the Italian Constitutional Court, in the early years after its establishment).

[90] *See* Helfer, *supra* note 7.

[91] *Id.* at 125.

[92] *Id.*

[93] *Id.*

of the ECHR's judgments in the political and legal order of relevant states.[94]

Where a member state does not adequately protect human rights, Helfer argues, the Court should decrease the degree of deference given its courts. Rather, the ECHR should seek to embed itself more forcefully, pressing the member state to embrace its interpretations and judgments. Such an assertion of power, coupled with enhanced efforts at persuasion,[95] may allow the ECHR to more effectively extend the European Convention's values within the member states.

This more forceful assertion of ECHR human rights norms ceases to be necessary, however, as a member state embraces the values of the Convention as its own. As it does so, the ECHR should increase its deference—with concomitant reductions in the workload of the Court, and in the burden on the Court to single-handedly protect the rights enshrined in the Convention.[96]

This process, as Helfer sees it, is not particular to the courts. Helfer's concern is with national institutions generally, of which courts are just one.[97] Once embeddedness takes hold, thus, the constitutional court, other high courts, the lower courts, the legislature, the executive branch, and others must all play a part in securing the human rights protections of the European Convention.[98] Claims in the ECHR will become less necessary, as national interpretations come into line with those of the ECHR. No less importantly, however, national legislatures will need to enact the legislation needed to minimize violations in the first place.[99]

As the foregoing suggests, embeddedness largely embraces a uni-directional view of the relationship between the ECHR and national courts. Although an embeddedness approach recognizes the importance of member states in the promotion of human rights, thus, it is essentially a framework to

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[94] *Id.* at 130.

[95] *See id.* at 135 (arguing that "it requires the skilful use of persuasion to realign the interests and incentives of decision-makers in favour of compliance with the tribunals' judgments. In this sense, diffuse embeddedness is linked to the socializing functions that international institutions can exert over the behaviour of national actors").

[96] *Id.* at 130.

[97] *See id.* at 138-39. Interestingly, Helfer identifies Russia itself as a hindrance to embeddedness. *See id.* at 157 (Russia, making up 21 percent of the ECHR caseload, "creates political fault lines that threaten to derail the ECtHR reform process"). Helfer goes on to say that "[t]he most overt resistance has come from Russia," and that relations between Russia and the European Council on Human Rights have soured. *Id.*

[98] *Id.* at 130.

[99] *Id.* at 133.

promote the values of the ECHR at the national level. As a result, it engages less fully than it might with the dependence of the ECHR on national-level institutions, and does not consider the ways in which the value proposition of judicial engagement might potentially be one of mutual learning, rather than something more in the spirit of re-education from above.[100]

c. Intersystemic Adjudication

Intersystemic adjudication offers a distinct perspective on the interaction of courts across jurisdictional lines, which addresses some of the gaps in the foregoing accounts—and may, as we suggest in Part IV, offer greater insight into the interaction of the ECHR and member state courts at all levels, but especially with the lower courts. To understand the core characteristics of intersystemic adjudication—a hybrid dynamic of vertical and horizontal interaction, coupled with alternative legal perspectives and a certain interdependence of the paired systems—it is useful to begin with its conceptual origins.

1. Dialectical Federalism

Writing more than three decades ago, Robert Cover and Alexander Aleinikoff observed a pattern of judicial interaction between state courts and lower federal courts in the United States that they termed "dialectical federalism."[101] This interaction arose from the peculiar relationship between state criminal law and federal habeas corpus review, in which neither state nor federal courts enjoyed complete independence from the other. State courts more oriented to "law-and-order" values could attempt to ignore the jurisprudence of the lower federal courts, imposing the cost of recurrent habeas review on them. The federal courts, however, could repeatedly mandate the release of defendants convicted without what they saw as basic constitutional protections, forcing state courts to re-litigate those cases.[102] They could only do so, though, at the cost of a crushing burden of habeas cases.

In a sense, neither court system enjoyed exclusive authority over the scope of constitutional criminal procedure and the resulting rights of

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[100] *Id.* at 135 ("Thus, if an international tribunal's embeddedness is characterized by its inclusion in an integrated judicial hierarchy – what I label as 'direct' embeddedness – the ECHR is not embedded in national legal systems.").

[101] Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

[102] *Id.* at 1052-54.

criminal defendants.[103] Rather, they were at once partly autonomous of and partly dependent on one another. Within their relationship, "there [were] incentives for each court system to acknowledge and, if possible, satisfy some of the more reasonable demands of the other."[104]

Lower federal courts hearing habeas claims and state courts trying criminal defendants were thus forced by their interdependence to pay attention to each other. Each had to be flexible and seek out ways to compromise.[105] State courts considered and sometimes acquiesced to the interpretations of the federal courts, as did federal courts with state court interpretations. As Cover and Aleinikoff outline, the result was a dramatic transformation in the jurisprudence of criminal due process in the United States, including as to the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel.[106]

2. The Elements of Intersystemic Adjudication

Building on the work of Cover and Aleinikoff, intersystemic adjudication constitutes a further framework through which we might evaluate interactions among judicial systems. As with dialectical federalism, the key characteristic of intersystemic adjudication is a dynamic of interdependence. Incidents of intersystemic adjudication are further characterized by a certain mix of vertical- and horizontal-type interactions between the relevant systems. The relationship among courts in intersystemic adjudication thus has some spirit of appellate review to it, with one system exerting power over the other; but it also has some quality of voluntary dialogue and comity. Capitalizing on the latter, a further feature

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[103] Habeas corpus permits post-conviction review of allegedly unlawful detention. *See* Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 51 (2004).

[104] Cover & Aleinikoff, *supra* note 101, at 1053.

[105] Ahdieh, *supra* note 76, at 2072.

[106] *See id.* at 2069-72 (noting *Hewett v. North Carolina*, in which the Supreme Court expanded the Sixth Amendment right to counsel and to which state courts voluntarily acquiesced, and *Minnick v. Mississippi*, in which the Supreme Court expanded the Fifth Amendment right against self-incrimination following similar expansion by state and federal courts). In later work, Aleinikoff has highlighted transnational judicial interactions analogous to dialectical federalism. *See* T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT'L L. 479 (2008). Courts tend to want to contribute to the systems of which they are a part. When courts are part of a supranational system, these courts will seek to be "good citizens." In this way, courts help create law through a "joint venture" of "negotiation and borrowing." *See id.* at 488.

of intersystemic adjudication also bears noting: the relevant judicial systems will ordinarily bring distinct legal perspectives to the table. Each of these characteristics can be considered in turn.

The interdependence of courts begins with the presence of some overlap in their jurisdiction. Such overlap, however, is not sufficient on its own. Rather, the interdependence of intersystemic adjudication arises where the two systems, though formally independent, are functionally dependent upon one another. As in the case of the federal and state courts in Cover and Aleinikoff's account, each entity lacks the ability to fulfill its mission without cooperation from the other. When relevant courts are interdependent, thus, flexibility and compromise become essential.[107]

Beyond this foundation of interdependence, a key feature of intersystemic adjudication is a relationship blending elements of both vertical and horizontal interaction. In a vertical relationship among courts, there is some necessary element of judicial power. At the extreme, this is dynamic of appellate review, as in the relationship of the US Supreme Court to the US Courts of Appeals.[108] At a minimum, this dynamic of power might be seen in intersystemic adjudication, in that relevant courts are forced into a pattern of dialogue and interaction.[109] Beyond that, the vertical dynamic at work may also play a role in sustaining such interaction, even when it proves unwelcome to the participating tribunals. Lower courts cannot ignore higher courts, even when they disagree. For courts engaged in intersystemic adjudication, such disregard is similarly problematic.

Intersystemic adjudication is not truly appellate in nature, however, but also includes a certain horizontal dynamic of engagement. The vertical dimension of judicial power is thus susceptible to resistance. Some dimension of dialogue—the judicial comity that Slaughter highlights[110]—is therefore equally essential to a pattern of intersystemic adjudication.

Such dialogue implies a certain degree of voluntariness. At a minimum, this may help soften the force of the vertical dimension of the relationship.[111] More importantly, horizontal dialogue may help to foster the type of relationship observed by Cover and Aleinikoff, in which each system

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[107] Aleinikoff, *supra* note 106, at 488.

[108] *See* Slaughter, *supra* note 77, at 107-08.

[109] *See* Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 899 (2006). Something of this spirit might be seen in the operation of embeddedness. *See* Helfer, *supra* note 7.

[110] *See* Slaughter, *supra* note 64, at 708-12.

[111] *See* Ahdieh, *supra* note 76, at 2052-53.

actively engages the jurisprudence, and even the values, of the other. Federal courts engaging the decisions of state courts on habeas review, and state courts' exploration of the resulting federal jurisprudence, thus generated a "joint venture" of sorts in the development of constitutional criminal procedure.[112]

If one set of courts embraces the judgments of another in a *somewhat* in the spirit of comity, then, they may be significantly more likely to internalize the values that undergird those judgments—rather than resist them, as they might in the face of a purely vertical dynamic of engagement. This voluntary quality of engagement may be especially important, moreover, in transnational settings. There is, of course, no overarching legal process by which to meaningfully resolve disputes among independent legal systems. In this regard, intersystemic adjudication differs from dialectical federalism, which enjoys the benefit of a Supreme Court, capable of ultimately resolving any persistent disagreements between the state and lower federal courts. Both the functionality and legitimacy of the international legal order may thus benefit from intersystemic adjudication's embrace of the horizontal elements of judicial dialogue and comity.[113] Transnational adjudication may "require that the courts subject to review not be rendered powerless, as through a system of ordinary appeal."[114]

Beyond its blend of vertical and horizontal dimensions of interaction, intersystemic adjudication is also characterized by the existence of alternative perspectives. This is the ideological component of the joint venture described by Cover and Aleinikoff—in which federal courts were more attuned to constitutional protections, while state courts were more attentive to law and order. Such divergent perspectives are essential, if intersystemic adjudication is to offer meaningful opportunities for change.[115]

Two sources of alternative perspectives among courts might be highlighted: diversity of law and diversity of institutional context. For the most part, judicial dialogue is grounded in differences of law—in legal authorities and interpretation.[116] Even within a single nation, varying rules across state and municipal boundaries give rise to such diversity. This is

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[112] Aleinikoff, *supra* note 106, at 488; Cover & Aleinikoff, *supra* note 102, at 1052-54.

[113] *See* Ahdieh, *supra* note 76, at 2093.

[114] *Id.*; *see also* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 480 (2003).

[115] *See* Ahdieh, *supra* note 76, at 2095.

[116] *See* Cover & Aleinikoff, *supra* note 101, at 1048 (noting that dialectical federalism arises from divergent legal interpretations of Supreme Court decisions).

likely to be even more true, in everything from the sources of law to their substance, across national borders and between supranational and national tribunals. In transnational interactions, consequently, the presence of some *commonality* of law and norms may consequently be as critical a factor as the existence of diverse perspectives, if engagement is to be meaningful.[117] In the human rights setting, for example, some commitment to universal human rights is likely a necessary prerequisite to interaction.[118]

Diversity of institutional perspective, meanwhile, turns on differences in political perspective and context. "Utopian" versus "pragmatic" perspectives on rights constitute a relevant example.[119] Akin to the federal habeas courts in Cover and Aleinikoff's account, a supranational tribunal may be more likely to evaluate human rights concerns in the abstract, asking whether a basic right protected under the relevant treaty has been infringed.[120] By contrast, a national court—and perhaps especially a lower court—might take into account an array of pragmatic concerns "foreign" to the supranational tribunal.[121] The prevailing political landscape of the country, the surrounding judicial culture, and other factors may also inform the national court's perspective.[122] Such diversity of institutional perspective can significantly enrich the engagement among courts in intersystemic adjudication.

In the presence of such diversity of perspective, intersystemic adjudication may provide a means to foster creativity in judicial lawmaking, to promote learning, and to avoid error. But it may also be a vehicle for something deeper: a change in values. By unavoidably engaging and attending to the work of a distinct system of courts and its associated body of jurisprudence, each court will find itself exposed to distinct perspectives and values, with some internalization of those values a likely result. With such internalization, in turn, should come some evolution in values across the courts engaged in intersystemic adjudication.

Intersystemic adjudication thus aspires to change values, but in a way that is less deterministic, and perhaps less uni-directional, than has

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[117] *See generally* ROBERT C. STALNAKER, CONTEXT AND CONTENT 48-49 (1999) (discussing the relationship between commonality and particularity in dialogue).

[118] *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 364-65 (1997).

[119] Cover & Aleinikoff, *supra* note 101, at 1050.

[120] *See* Ahdieh, *supra* note 76, at 2153-54.

[121] *See id.* at 2096-97.

[122] *Id.*

commonly been posited.[123] Further, it recognizes not merely the reality, but the affirmative value, of some greater degree of compulsion in the engagement of otherwise independent courts—in certain settings. Through a balance of the latter with a horizontal dynamic of judicial comity and dialogue, intersystemic adjudication offers a better prospect for an evolution in each system's norms and values. As to the freedom of expression in Russia, a dynamic of intersystemic adjudication between the ECHR and the Russian lower courts promises just the shift away from the legal values inherited from the Soviet Union that is needed by the country today.

IV. INTERSYSTEMIC ADJUDICATION, THE ECHR, AND RUSSIA'S LOWER COURTS

Among alternative frameworks for thinking about the interaction of the ECHR with Russia's lower courts, intersystemic adjudication comes closest to capturing the dynamic at work today. This is not to say that reality aligns perfectly with that framework. To the contrary, as we will suggest, key steps might be taken to enhance the quality, and hence the ultimate benefits, of intersystemic adjudication in that setting. By engaging both the ways in which the structure of that relationship already lends itself to intersystemic adjudication, and those by which it might more fully do so, we can begin to discern a path to the increased protection of free expression in Russia.

a. Indicators of Intersystemic Adjudication

As described above, intersystemic adjudication is ultimately grounded in the interdependence of otherwise independent court systems.[124] Such interdependence is precisely the dynamic that operates between the ECHR and the Russian lower courts, given their overlapping jurisdiction and inability to accomplish their respective missions without the cooperation of one another.

Their jurisdictions overlap at least implicitly, if not explicitly, in their engagement with the scope of individuals' rights of free expression. The lower courts hear cases involving individuals who are being prosecuted for exercising their rights of free expression, who have asserted those rights by way of defense, or who have suffered harm or injury because of such expression. Where those rights go unprotected, in turn, the ECHR acquires jurisdiction to hear the claims of those same individuals and to provide

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[123] *See, e.g.*, Helfer, *supra* note 7.

[124] *See supra* Part III.C.

appropriate remedies.[125]

Further, the ECHR and Russia's lower courts would each be hard-pressed to achieve their goals without cooperation from the other. Where Russian courts fail to protect rights dictated by the European Convention, they can minimally expect aggrieved litigants to seek relief from the ECHR and to receive monetary compensation for that failure.[126] Further, they may face pushback from national authorities obliged to cover the cost of such compensation. Finally, they may ultimately face directives from the ECHR to reopen relevant proceedings or otherwise to give relief to relevant claimants—undermining their decisions, or at least denying them finality.

Yet the ECHR is no less dependent on the Russian lower courts. Enforcement of the ECHR's judgments in individual cases falls largely to the national courts.[127] More broadly, disregard of the ECHR's decisions in the Russian lower courts explains much of the flood of cases in which the ECHR is drowning.[128] If it is to get its docket in order and manage it in the future, then, the ECHR is dependent on the assistance of those courts.

Beyond their interdependence, the presence of alternative legal perspectives between the ECHR and Russia's lower courts could not be clearer. Regarding diversity of law, each relies on dramatically different sources of law and methods of interpretation, from the European Convention and international norms to the Russian Constitution and national legal rules and interpretations. Yet the requisite commonality is also present. The Russian Constitution, to begin, incorporates the European Convention.[129] Beyond that, important aspects of due process and human rights are explicitly enshrined in that text, however often they might fail to be upheld in practice.[130]

Diversity of institutional context is equally apparent. Generally, domestic courts are more prone than international tribunals to approach law from a pragmatic perspective.[131] This may be especially true in the human rights arena, where domestic courts must look to the political and practical

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[125] *See* Smith, *supra* note 34, at 518-25.

[126] *See* Dernovsky, *supra* note 30, at 489 (explaining how Russia frequently pays monetary judgments ordered by the ECHR).

[127] *See generally* Dernovsky, *supra* note 30, at 485-91.

[128] *See* Helfer, *supra* note 7 (discussing the huge backlog of cases facing the court).

[129] *See* KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15 (Russ.).

[130] *Id.* arts. 17-64.

[131] *See* Ahdieh, *supra* note 76 at 2096-97 (discussing the utopian and pragmatic approaches of courts).

implications of protecting human rights.[132]

The dynamic between the ECHR and Russia's lower courts is fully consistent with this pattern. For the Russian courts, declaring that the government has impinged upon the freedom of expression may have challenging political, social, and even fiscal implications. Against the backdrop of recent Russian history, perceived national security concerns, and gross disparities in wealth, the Russian courts seem likely to bring to the table a distinct set of expectations and assumptions, by comparison with the ECHR. Add to that a distinct culture of law and conception of its role, as described in Part I, and diversity of institutional context could not be stronger.

Interdependence, jurisdictional overlap, and contrasting perspectives, then, are clearly present in the relationship of the ECHR and the Russian lower courts. What about the blend of vertical and horizontal interaction that is also essential to intersystemic adjudication? As suggested above, the ECHR enjoys some meaningful degree of power vis-à-vis the Russian courts. At a minimum, with its adjudication of disputes previously heard in those courts, the ECHR has the capacity to force a conversation around freedom of expression and human rights more broadly in Russia. Yet its power vis-à-vis the Russian lower courts does not end there.

The Russian government has shown sensitivity to international critique of its human rights practices.[133] A pattern of adverse ECHR judgments arising from a particular lower court, or even a particular practice of the lower courts, might thus generate pressure on the lower courts to adjust their practices. Even absent any such sensitivity, the pure volume of ECHR litigation directed toward Russia and the country's attendant fiscal exposure gives the ECHR's decision-making a certain kind of "appellate" force. Complaints against Russia make up 20 percent to 28 percent of the ECHR's cases each year—more than any other member state.[134] The Court has ruled against Russia, meanwhile, in 94 percent of those cases.[135] Finally, even

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[132] *See, e.g.*, Sandra Day O'Connor, *Balancing Security, Democracy, and Human Rights in an Age of Terrorism*, 47 COLUM. J. TRANSANT'L L. 6 (discussing the balancing of security and civil liberties).

[133] *See, e.g.*, Eleanor Bindman, *Russia's Response to the EU's Human Rights Policy*, OPENDEMOCRACY (Oct. 1, 2010), http://www.opendemocracy.net/od-russia/eleanor-bindman/russia's-response-to-eu's-human-rights-policy (noting Putin's increasing hostility towards being lectured by the international community regarding human rights).

[134] Lapitskaya, *supra* note 47, at 486-87.

[135] *Violation by Article and by State: 1959–2011*, EUR. CT. HUM. RTS., http://www.echr.coe.int/Documents/Stats_violation_1959_2011_ENG.pdf (last visited Sept.

beyond the administrative and fiscal impact of this volume of adverse judgments, the ECHR's decisions can be understood to constitute a kind of appellate "reversal" of the lower courts, whether in forcing actual revision of a decision, prompting a grant of relief in the higher courts, encouraging a change in law, or even simply denying finality to the lower court's judgment.

Some vertical element of interaction, then, can be seen in the engagement of the ECHR and Russia's lower courts. The horizontal element of judicial dialogue and comity, by contrast, is more elusive. As we will suggest in the following section, though, enhanced horizontal engagement presents a viable opportunity for future development of the relationship.

The necessary predicate for horizontal dialogue already exists. Given their interdependence, the ECHR cannot fulfill its aspirations for human rights protection in Russia without the cooperation of the lower courts. Cooperative dialogue is therefore necessary for the ECHR. Such dialogue is also essential for the lower courts, for the reasons already suggested. The Russian courts thus stand to benefit from meaningful engagement and coordination with the ECHR, given their own priorities and pursuits.

Notwithstanding this potential for horizontal engagement, however, it has not been characteristic of the interaction to date, between the ECHR and the Russian lower courts. This is evident when we consider the various forms such interaction might take. Minimally, each group of judges could take into consideration the decisions of the other. Russian courts considering cases involving the prosecution of political speech or public protest might look to ECHR decisions directed to just those questions—in the specific context of Russia. Likewise, the ECHR, in adjudicating disputes involving Russia, might undertake to make itself aware of relevant principles of Russian constitutional law and due process, as reflected in jurisprudence and judicial practice of the Russian courts. However rudimentary, this would constitute an important step toward meaningful engagement.

Going a step further, each might find occasion to make affirmative reference to the aforementioned sources in their own decisions. Such explicit citation goes beyond mere consideration.[136] But it need not entail any obligation to agree. Simply by engaging explicitly with one another's judgments, the ECHR and the Russian courts might plant the seeds of a

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[136] Cover and Aleinikoff also observed this type of interaction in habeas cases, where federal courts cited state court decisions and vice versa, allowing both to contribute to the development of due process jurisprudence. Cover & Aleinikoff, *supra* note 101, at 1052.

pattern of intersystemic engagement, in which each begins to learn from the other.

Such a practice of citation to one another's judgments has the potential to change the relationship between the courts significantly. By highlighting the voluntary qualities present in their interaction, it may help reduce resistance to dissemination of the values of the European Convention—even if infused with Russian characteristics.[137] More ambitiously, one can imagine such mutual citation as suggesting the existence of a shared project—with varying methods and even values, to be sure, but shared nonetheless.[138] And with that, one might plausibly overcome not only the Russian courts' affirmative resistance to the ECHR, but perhaps also their more pernicious indifference to it.

Neither mutual citation to one another's judgments nor even mere engagement with them, however, characterizes the current dynamic of interaction between the ECHR and the Russian lower courts. If intersystemic adjudication is to generate progress toward the freedom of expression in Russia, this must be a particular focus.

b. Enhancing Intersystemic Adjudication

If intersystemic adjudication has the potential to help alter the values of free expression in Russia, it is useful to consider what further innovations might help to close the gaps in its implementation, and thereby encourage its further development. Most particularly, how might a horizontal dynamic of engagement be more systematically encouraged?

To begin, the aforementioned practices of considering and even citing relevant judgments of the countervailing courts should be actively encouraged. At a minimum, the ECHR should make a point of increasing its knowledge of Russian rules and procedures. And in appropriate cases, citation to relevant Russian authority might be expected to go a long way.

Beyond these preliminary steps, it will be important to increase the persuasive quality of the ECHR's judgments. Those judgments already achieve the vertical dimension of intersystemic adjudication, as exercises of the ECHR's effective power.[139] What needs greater attention is their

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[137] *See* Weiler, *supra* note 87 (elaborating on the resistance an exercise of appellate power by the ECJ would have on E.U. member states).

[138] *See* Burkov, *supra* note 48, at 35 (lamenting that such mutual citation is not yet present in Russian courts).

[139] For a discussion of the vertical and horizontal aspects of intersystemic adjudication, *see supra* Part III.C.

rhetorical framing—the primary source of their horizontal, dialogic contribution to intersystemic adjudication. It is such framing that gives ECHR judgments the potential to persuade, and not simply to impose. Careful attention must therefore be paid to the crafting of ECHR opinions, with the lower courts in Russia (at least in appropriate cases) among the Court's most critical audiences.

Mere persuasion, however, is insufficient. It is equally important for ECHR judgments to be clear and specific in their remedial directives. For many years, the ECHR did not even consider itself competent to offer any remedy in its judgments.[140] While it has since moved away from that view, the Court must go further in engaging questions of how Russia's courts—and particularly the lower courts—might execute relevant judgments of the ECHR. Article 13 of the Convention requires the ECHR to provide an effective remedy.[141] In reality, however, the most important determinant of efficacy may be the articulation of specific remedies to guide the response of Russia's lower courts.[142]

Careful framing of the binding effect of ECHR interpretations of the Convention in national courts may also help promote more robust lower court engagement with judgments of the Court. Without prejudice to the ECHR's ultimate authority to impose its interpretation, some invitation to flexibility may be appropriate.[143] Instead of insisting on imposing its own interpretations as to each detail, a preferable approach might be more flexible in nature. By inviting the lower courts to join with the ECHR in defining the demands of the European Convention, the Court might give the lower courts a sense of investment in that project. Even further, the ECHR might seek to link its interpretation of the Convention with the Russian courts' interpretations of the Russian constitution. In this way, lower courts might gradually begin to shift away from a natural tendency to rely on domestic, as opposed to international, interpretations of the demands of free expression.

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[140] *See* Helfer, *supra* note 7, at 146.

[141] Convention, *supra* note 32, art. 13.

[142] *See* Helfer, *supra* note 7, at 150, 153-55.

[143] As Helfer pointed out, a former ECHR judge explains there is:

> [A] difference between the Convention as part of the constitution and the Convention as an international treaty interpreted by the ECHR. Within the domestic legal order, the Convention is only one element in the mosaic of different constitutional provisions and its interpretation in that context may differ considerably from an interpretation based on the Convention alone.

Helfer, *supra* note 7, at 137.

Returning to the mutual citation of judicial authority, a potential technique by which the ECHR can encourage the Russian lower courts to reference its opinions is offered by Protocol 14. Under Protocol 14, the ECHR can promulgate certain rules for dismissal.[144] One possible rule, as proposed by Helfer, would prohibit such dismissal where the national court failed to consider relevant ECHR judgments and interpretations.[145] Thus, if a lower court aims to avoid having its judgments overturned by the ECHR, a natural step would be to confront relevant decisions of the Court.

Taking this possibility a step further, one might imagine a mechanism by which lower courts could seek advisory opinions from the ECHR.[146] As in the case of the preliminary reference procedure by which sub-national courts in the European Community engaged the European Court of Justice,[147] a device of this sort might be especially useful in fostering a bi-directional pattern of engagement. Tailored to a specific factual circumstance, the dialogue inherent in such advisory review may be especially useful. The internalization of ECHR values becomes all but inevitable in such an interaction.

Adoption of such a proposal may be difficult to envision as an immediate matter. In the various ways outlined above, however, a pattern of recurrent, low-stakes engagement between the ECHR and the Russian lower courts will begin to build a dynamic of intersystemic adjudication. And in that way, it can help to foster the protection of free expression in Russia.

CONCLUSION

Ultimately, what impact can we expect to arise from a more robust dynamic of intersystemic adjudication between the ECHR and the lower courts of Russia? As suggested above, a narrow and instrumental conception of law, of its role, and of its capacity may be an important cause of the weak protection of free expression in Russia today. Especially among Russia's lower court judges, before whom much of the day-to-day battle over free expression is fought, a change of mindset is therefore essential.

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[144] *See* Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, May. 13, 2004, C.E.T.S. No. 194.

[145] *See* Helfer, *supra* note 7, at 153.

[146] This reform was first proposed by the "Group of Wise Persons" in 2006. *See id.* at 151. In their recommendation, however, they proposed (unwisely) that such access only be given to high courts. *See id.*

[147] *See* Breyer, *supra* note 63, at 1049.

Such a change in thinking will not come easily. Nor will it come by force. Rather, it requires the gradual, yet systematic, engagement of those courts with the values of free expression that have come to stand among the universal rights and liberties enjoyed by all. Intersystemic adjudication between the Russian lower courts and the European Court of Human Rights—perhaps the leading institutional repository of those values—offers an avenue for such engagement.

In recognizing their mutual interdependence—as defined by the elements of both hierarchical power and judicial comity present in their interaction—the ECHR and Russia's lower courts may begin to better attend to the other. As they do so, the prospect of mutual learning, and even cultural change, becomes possible. Once established in the courts, those aspirations may ultimately be realized more broadly.