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The power of law versus the law of power - Interview with Stanislav Markelov, Lawyer, Moscow, 3 June 2008

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The power of law versus the law of power - Interview with Stanislav Markelov, Lawyer, Moscow, 3 June 2008

This interview was initially published in Russian in our 8th issue devoted to military justice in Russia. As a tribute to Stanislav Markelov, we are publishing here an English translation of this interview. Pipss.org is grateful to Zoé Andreyev who translated the interview into English and to Yohanan Petrovsky-Shtern who edited the English translation.

1 **PIPSS.ORG** – You worked as a lawyer on the Budanov case¹, and you created the Rule of Law Institute². How long since this institute was created?

2 **Stanislav Markelov:** About two years.

3 **PIPSS.ORG** – Who is the founder of the institute?

4 **Stanislav Markelov:** I am.

5 **PIPSS.ORG** – In which regions of Russia is this institute active? How many regions have branches?

6 **Stanislav Markelov:** If I'm not mistaken, there are branches in 22 regions of Russia, and in other CIS countries: Belarus and Ukraine.

7 **PIPSS.ORG** – What are its sources of funding?

8 **Stanislav Markelov:** There are none. It's the "potluck" method.

9 **PIPSS.ORG** – So you belong to a grouping of lawyers and people come to see you?

10 **Stanislav Markelov:** No, we are not a grouping of lawyers. We are a voluntary organization. There are not only lawyers, but also journalists working on legal topics, sociologists, translators, psychologists, etc.

11 **PIPSS.ORG** – But do you have an office?

12 **Stanislav Markelov:** Really we have the minimum of what we need. In some regions, we have enough space; in Moscow though, all we have is a very small room that we rent in the centre. The rent is very expensive for us, because we have no endowments, no funds, and we work on very specific projects.

13 **PIPSS.ORG** – How many cases dealing with military justice have you worked on?

14 **Stanislav Markelov:** I am always working on cases like that.

Case n° 1 – Officer vs. soldiers

15 **PIPSS.ORG** – Could you describe one or two cases you've been involved in?

16 **Stanislav Markelov:** Let's take the last one as an example: that of the Volgograd military court. Here's the story: one night a soldier ran into the garrison barrack shouting "our sentinels have just been attacked". An attack on sentinels is considered a war crime, and a serious crime. Of course, everybody started running to the other building where they found an officer dressed in civvies, completely drunk, and a bunch of drunk contract soldiers (*kontraktniki*) just back from Chechnya. They had attacked the sentinels. (This happened over a year ago, and the trial is on now: I often travel to Volgograd these days.) The officer jumped up and started to throw insults at them – «I will beat you up». He was pushed back, and the soldiers started a fight with the *kontraktniki* who had just beat up the sentinels; a general row followed (I do not understand this), the officer threw himself into the fight, and got beaten up. The whole things might have remained unnoticed, but just then a commission from headquarters arrived. In order to cover the officer's actions (because the headquarters are responsible for their officers' actions), two soldiers were sued for attacking the officer. Of course, the fact the officer himself was drunk, in civvies and that he was the one to start the fight....

17 **PIPSS.ORG** – He’s not allowed to be in civvies?

18 **Stanislav Markelov:** How does one know in that case that we’re dealing with an officer and not with just anyone? But no one pays attention to these things. As soon as one of the soldiers began to seek defense, he was accused of extorting money because another soldier hadn’t paid back a debt and he’d asked for his money. This is a typical case, which shows how officers are covered and soldiers are sentenced instead.

19 **PIPSS.ORG** – And the other soldier isn’t a draftee?

20 **Stanislav Markelov:** The two soldiers who are being sued are draftees, the other is a *kontraktnik*.

21 **PIPSS.ORG** – When you use the term soldier, this can mean either a draftee, or a *kontraktnik* ?

22 **Stanislav Markelov:** Yes, it’s a generic term for filling out the troops. This case is typical precisely because it shows how soldiers are punished for the crimes of the officers. To this, one must add all the problems that emerged in the army in the 1990s. The state of the army was a disaster, riddled with economic crime, for the simple reason that the prime minister of the early 90s, Yegor Gaidar, had authorized the army to conduct commercial activities. As a result, the army’s property was completely dilapidated.

23 **PIPSS.ORG** – Was it a question of survival for some individuals?

24 **Stanislav Markelov:** Yes, for many it was a question of survival but as a result some people filled their pockets. Others did it to survive. People sold everything they could. I don’t know what happened with weapons of mass destruction, but I cannot guarantee that none were sold, because really everything was for sale, even soldiers, as slaves, now available as free construction workers for example.

25 **PIPSS.ORG** –Are you defending the soldiers in this case?

26 **Stanislav Markelov:** Yes, one of them, but their cases are identical. The other is defended by Ms. Tikhomirova, the lawyer working with me on the Budanov case. In the Budanov case she also defended the victims. Then she defended the victims in the Ulman case³.

Case n° 2 – Prokuratura (Military Prosecution) vs. the Committee of Soldiers’ Mothers

27 **Stanislav Markelov:** The second case I can tell you about was a case brought by the *Prokuratura* against Liudmila Yarilena, chairperson of the Soldiers’ Mothers Committee of the city of Vladimir. Liudmila Yarilena has often helped young men escape the army; in this case, she helped two young draftees. One was frequently beaten up by his comrades in the barracks, and the other, after having been wounded in Chechnya, was at the military hospital, and “for some strange reason” refused to return to combat. Another one had been badly wounded, and had suffered trauma due to an explosion. Yarilena, with the help of a doctor, was able to obtain a medical certificate for these young men, but the *Prokuratura* deemed these suspicious and accused Yarilena of aiding desertion. It must be said that civil courts are usually less scrupulous than military courts and that’s why the military prosecutor’s office decided to transfer the case to a civil court.

28 **PIPSS.ORG** – Is this legal?

29 **Stanislav Markelov:** Before, it wasn’t. Now it is, but it rarely happens. The *Prokuratura* can entrust the case to whichever court it wishes. A civil court cannot bring a case to the military court but the reverse is possible. In this case there were military prosecutors, from the central military district, that’s a serious level... and this was an exceptional case, because the witnesses, in particular those who had to testify that there had indeed been an “agreement” with the physicians to have the soldiers exempted were driven to the court handcuffed in vehicles belonging to the military prosecutor’s office. There are photographs proving this. I was on this case together with Vassili Vassilievich Syzganov, a lawyer who specializes in military courts. Yarilena was given a suspended sentence. She is free and can be contacted. She was in Chechnya several times.

30 **PIPSS.ORG** – Was she there during the first war?

31 **Stanislav Markelov:** Yes. This case is representative of their determination to repress an organized opposition, to prevent people from helping soldiers return home, even those who were subjected to pressure and ill-treatments. One of these soldiers had been beaten, we had to go and get him at the hospital where he was being treated. The second soldier had already been discharged from the hospital, he'd been wounded, he didn't want to go back. He was indicted, even though there had been many irregularities, for example the interrogation had been conducted by different persons, even the handwriting was different on the transcripts, there was no real proof, the witnesses were brought in handcuffed, as I said... Unfortunately, in our country there is what we call the "telephone law": the judges call their superiors or political authorities before giving a sentence. And there are many advantages to being a judge: good salary, significant bonuses for special zeal... the judges do not want to lose all that!

32 **PIPSS.ORG** – In the Budanov case, was any use made of the "telephone law"?

33 **Stanislav Markelov:** We cannot prove it but there are good reasons to believe that there was. Moreover everyone knows about this practice, no one ever mentions it but everybody knows what is going on.

34 **PIPSS.ORG** – How can you prove it?

35 **Stanislav Markelov:** That's impossible to prove. Just as no one can prove that the verdicts are in fact given before the end of the hearings. This is common practice, the fact of giving the verdict before the hearings have ended. We now call this part of the trial, which is the most important part, when all the main arguments of the defense and the prosecution are reviewed, the "clown number", because by that time everything has already been decided and the verdict already given..

36 **PIPSS.ORG:** Members of the army are judged by other members of the army: do you think that's a problem for justice?

37 **Stanislav Markelov:** No, it's not a problem. Of course, the fact that officers try to put the blame on simple soldiers whenever they can is a problem, but it's a more general problem which is not specific only to the army. In the civilian world as well, bosses try to throw the blame on their subordinates, it's just that it's more visible in the army because of the military hierarchy. What's more, when one asks the question of whether or not military courts are necessary, they say they usually answer that there are some offenses that are specific to the army, such as desertions, etc. but this category also exists in other professions, for border guards for example. Does that mean there should be specific courts for border guards? Formally, this argument could have legal weight but since in practice we observe that military courts are more professional than the civil courts....

38 **PIPSS.ORG** – How do you explain this?

39 **Stanislav Markelov:** Military courts consider themselves a privileged branch of the judiciary. This may also be due to the fact that the civil courts are closely linked to political authorities. The military courts are organized along a separate hierarchy, so the authorities have less power over them. Even though of course corruption and incompetence do exist in these courts as well, overall the military courts are more competent.

40 **PIPSS.ORG** – So then it may be a good thing that the military are judged by the military?

41 **Stanislav Markelov:** Yes, even if this may seem strange. However, if one looks at the issue from a strictly judiciary point of view, justice should be the same for all.

42 **PIPSS.ORG** – Are there other cases linked to Chechnya besides Budanov, Ulman, Arakcheev, that have reached the courts?

43 **Stanislav Markelov:** There is another case, but in this case those involved were from the police force and not the army; so the case was defended in a civil court.

Case n° 3 – Arbitrary power in the police force

44 **Stanislav Markelov:** I was the lawyer for the Lapin⁴ case, Anna Politkovskaya was the victim. This is the first case tried in Grozny itself, exactly where the events took place, and this case received greater publicity than the Budanov case, because it was a matter of principle that the trial should not take place thousand of miles away, in Rostov for example, but should rather take place in Chechnya. The trial was held in the district court of Zavodskoy in Grozny.

45 **PIPSS.ORG** – When?

46 **Stanislav Markelov:** The trial began in 2003, if I am not mistaken. During the war.

47 **PIPSS.ORG** – What was Lapin accused of?

48 **Stanislav Markelov:** Assault and battery with aggravating circumstances, abuse of power with aggravating circumstances. Usurpation of office. He had also forged documents, attempting to prove that he hadn't done it. When the case was tried once again – the Supreme Court had sent the case back to court: after the first trial he had been sentenced to eleven years of prison, more than Budanov, and the Supreme Court cancelled the verdict. So for the second trial, I was still the attorney, only the last accusation was withdrawn because of the statute of limitations (the limitation for a forgery is two years) and he was sentenced to nine years.

49 **PIPSS.ORG** – In a penal colony?

50 **Stanislav Markelov:** Yes, in Nizhny Tagil; former police officer serve their sentence in a separate colony. The final court of appeals confirmed this verdict and now it's the turn of the Supreme Court. This case was particularly important because for the first time we showed that one could press charges in federal courts for assault on Chechen civilians, that one would provoke a reaction, and that courts could make concrete decisions. Before, for the last ten years, no one knew what a court of justice was like in Chechnya. People knew only weapons, corruption: what ruled was the "corruption law" or the "Kalashnikov law". Which meant that if one had lost a relative, if a member of the family disappeared or was killed, one went to see the rebels and gave them money so that they would "deal with the case" on their own perpetrating revenge. And then all of sudden people saw that they could obtain retribution through the courts! To them the hearings were like a show.

51 **PIPSS.ORG** – The trial was open to the public?

52 **Stanislav Markelov:** Yes, the hearings were public, open to all.

53 **PIPSS.ORG** – Who was the judge?

54 **Stanislav Markelov:** For the second trial it was Mameva, a Chechen judge.

55 **PIPSS.ORG** – And was the judge also a Chechen in the first trial?

56 **Stanislav Markelov:** Yes. Mezhidov. There was a bench of three judges.

57 **PIPSS.ORG** – Where had they been trained?

58 **Stanislav Markelov:** Some of them had been trained there, but others came from Ingushetia, the neighboring Republic.

59 **PIPSS.ORG** – And the prosecutor?

60 **Stanislav Markelov:** The prosecutor was Russian. That too was important. It was very important that the prosecutor and the victim's lawyer be Russian. That proved that the conflict was not an ethnic one, but that the goal was to reestablish the standards of Russian law in Chechnya. Actually, if you go to the famous website Kavkaz-Center (the website of Caucasian Islamists, for whom Chechnya is where the Djihad is being fought), you can see that they have written a great deal about this trial. I was quite satisfied because the case was presented in a very negative light, since for them worst is best. But this case proved that it was possible to restore Russian law on their territory, which they consider as their own private hunting grounds. Ownership of a country, as you know, is defined not by military force but by existing laws.

61 **PIPSS.ORG** – And what did the civilian population think of it?

62 **Stanislav Markelov:** The civilian population was very much concerned by the trial. It was a kind of positive shock for them.

63 **PIPSS.ORG** – It’s your greatest success?

64 **Stanislav Markelov:** Yes. No doubt about that.

65 **PIPSS.ORG** – Greater than the Budanov case?

66 **Stanislav Markelov:** Yes, much greater. Although this case was less publicized, I believe it is more important. The most revealing moment was when Lapin, who had tortured prisoners himself, prisoners who were being illegally detained, declared that he was being held under bad conditions because he had not been given a towel and toothbrush. I repeat, this man had personally tortured illegally detained prisoners. At the following hearing, there occurred what one might call a “happening” in the West. It was completely spontaneous, and I find this event extremely revealing. The families of the missing persons (nearly 100 persons) came to the court with towels and toothbrushes on which they had written the names of the missing persons. As if to say: “give him what he wants, but he must make an effort to remember, maybe he knows where my husband, my son, my nephew, etc. is”. I wasn’t expecting this kind of initiative from the population. Some terrible revelations were made in court. The prosecutor Batalov said that forty-two unidentified corpses had been found under the building occupied by the special forces from the district of Khanti-Mansiisk. The building used to be an institution for dumb and deaf. Since then it’s been destroyed by an explosion, and now nothing is left. I published the last photos of this building on my website. There is blood on the walls, documents left around, a skull with a hole in it. It gives us an idea of the conditions the prisoners were held in. Of course there are no videos of the torture sessions but all the prisoners speak of it. Racks, hangings, shock treatments, needles under nails. Lapin, for instance, had invented the “place a call to your lawyer” torture: if someone asked for a lawyer, he would attach an electrical wire to the prisoner’s ears and turn on the electric current.

67 **PIPSS.ORG** – Do you travel to Chechnya?

68 **Stanislav Markelov:** Often. Right now I have several cases going in Chechnya. One of them is the Zaur Mussikhanov case on the conditions of enforcement of amnesty. It’s a crazy situation: there has been an amnesty decree but the conditions have not been determined. As a result, all those who agree to join Kadyrov’s armed groups can be amnestied, even if they are responsible for the deaths of dozens of people. And those who do not agree are treated as bandits and receive long sentences. Zaur Mussikhanov just managed to dig a trench and march down the village street. That’s all he’s accused of. After which he buried his machine gun and surrendered. He refused to join Kadyrov’s gangs and was sentenced to ten years as a bandit.

69 **PIPSS.ORG** – By which court?

70 **Stanislav Markelov:** A Chechen court. The Russian Supreme Court confirmed the verdict. This is one of the cases I wanted to talk about. The other is the “M” case. He asked that his name not be published, but I don’t think that’s a problem for the West. This is the only person who has had the courage to file a complaint with the Prokuratura concerning the secret prisons. Kadyrov’s prisons are secret prisons. There are official prisons. Torture is practiced there too, but that’s another problem. But there are illegal prisons too. They are located in basements, where dozens of persons are detained. And the only person who has had the courage to file a complaint was “M”. He is a very religious person. I have a hard time with him from a psychological point of view, he has a difficult personality, but that’s what gives him his courage, because no one in his right mind would have had the courage to do file a complaint as he did.

71 **PIPSS.ORG** – How old is he?

72 **Stanislav Markelov:** He can’t be too old, but it’s difficult to give an age to someone dressed in Islamic garb and with a big beard. Forty or so, maybe younger.

73 **PIPSS.ORG** – Is he a former rebel?

74 **Stanislav Markelov:** No, he was arrested by mistake, because of religious proselytism, then they let him go after two days. He wasn’t really tortured, just beaten, “on principle”. In any case, he was illegally detained.

75 **PIPSS.ORG** – He wasn't tortured?

76 **Stanislav Markelov:** No, they just kept him for a few days, two, I believe, not longer. At that time I was in Chechnya, it was about a year ago. But the complaint was accepted and the case will be examined. Now, the employees of the Prokuratura even call me to tell me: "please come and work on these cases, there are a lot of cases of arbitrary abuse of power (*bespredel*), that happened during the war" . These are indeed shocking cases, but unfortunately I don't have enough money to go there and take on these cases.

77 **PIPSS.ORG** – Why do the Prokuratura people come to you?

78 **Stanislav Markelov:** Because Chechnya is Chechnya, and people there like the "strong guys'." I won the Budanov case and the Lapin trial: so now I have a reputation and a sphere of influence, that's why. But that would mean leaving everything to go and work there, and who would pay for that?

79 **PIPSS.ORG** – Does that mean the prosecutor wants you to win the case?

80 **Stanislav Markelov:** Yes.

A novelty: the investigation committee

81 **Stanislav Markelov:** Some changes were made with the creation of the investigation committee. This creation is a good thing, because when the Prokuratura was obviously guilty of injustice, there was no one to complain to other than the direct superiors, and the superiors transferred the complaint precisely to the persons against whom one was complaining. Now the situation is different: the investigation and the control over the investigation are separate. It's a very positive change. But a new problem has arisen... as a result of the rivalry between the two institutions, there has been an overall weakening of the Prokuratura because the investigation in the source of most pressure. Now the Prokuratura is fighting against the investigation committee. And that's a huge obstacle. It is trying to prove that the investigation committee is redundant.

82 **PIPSS.ORG** – How was this committee formed?

83 **Stanislav Markelov:** All the investigators who used to work for the Prokuratura found themselves in the committee. Before, there was a single organization, the Prokuratura, part of which was in charge of the investigation. The other part consisted of units in charge of control and other functions. And now they are told: "Hey guys, now you belong to a different organization". Of course the Prokuratura didn't like this, not only because they represent an important part of the institution, but also because it was a crucial instrument to exert pressure: deciding who will build the case, who will investigate, transmit it to the court. So they didn't like it at all. And they tried to prove that the investigation committee was redundant. The committee on the other hand began to appreciate its independence and attempted to prove the opposite. Unfortunately, as a result everything is now subjected to this rivalry between the two institutions. Even though this division is a good thing, because for some time now everybody had been saying that in ordinary justice, if a police investigator broke the law, one could complain to the prosecutor, but if the investigator belonged to the Prokuratura, then there was no one to complain to. Now the situation has changed but it is not yet stable.

What reforms are necessary?

84 **PIPSS.ORG** – In your opinion, what important reforms should be undertaken in the field of military justice?

85 **Stanislav Markelov:** The general problem of the judiciary system, which is not specific to military justice but also pertains to civilian courts is that evaluations are made on the basis of the number of solved cases. The result is that some cases are artificially created just "for the figures". Officially, this system was abolished, but that's not true; the percentage of solved cases remains the gauge of the efficiency of the judiciary system. This is a grave problem

plaguing the entire system. The serious crimes are ignored, because they are difficult to solve, and easy cases are invented, where innocents are accused. This system is widespread.

86 The evaluation method should be changed and based on the complaints lodged by the citizens. But the objection of the judiciary authorities is “well then, all the criminals will start lodging complaints”. In reality, there will always be a certain percentage of complaints filed by criminals: maybe 10, maybe 15 %, no more. And if the percentage exceeds that proportion, that that will be a warning sign.

87 The second problem is that although we have a codified legal system, we should introduce certain standards of the precedent law. I do understand that our system cannot become like the British system, because that’s not our legacy. Our judiciary system is not yet stabilized, which does leave some margin of creativity to the lawyers, but most citizens have to deal with bad, or middling, lawyers. When you go and see a doctor, you don’t know if he’s good or bad, you trust his reputation, you try and get some information, or else it’s just the lottery. You take the risk. And for a similar case (this is true especially for simple cases), the judgment should be the same in all regions of Russia without exception. This would mean introducing basic precedent standards. If not, we end up having different verdicts for similar cases depending on the region where the trial took place.

88 **PIPSS.ORG** – Is this true for the case you were speaking of?

89 **Stanislav Markelov:** That happened for a civilian court case, but it’s the same for military courts. I manage to obtain something in one district, I suggest the same in another one and they look at me in astonishment: “What an idea! We live in a vast country”. Even if the cases are absolutely identical, and only the names are different, that doesn’t mean anything. Today, the written rule is that the judge reviews the evidence according to his “inner conviction”. I have been a lawyer for twelve years, and for twelve years I have been trying to solve this mystery: what is a judge’s “inner conviction”? It’s a mystical, hermetic notion. It’s a quotation from the penal code- “the judge’s inner conviction”. Really, I don’t know what that is.

90 **PIPSS.ORG** – It doesn’t exist in other countries?

91 **Stanislav Markelov:** The sentence is given by the court, but according to clearly codified standards, in a codified legal system like the Franco-German system to which we belong. But our system is not stable, we have the judge’s “inner conviction”. Suppose you are a judge: you don’t like me, my behavior at the court did not please you, and your inner conviction is against me. And conversely, you like me, you are favorable. Or others are breathing behind your back, or you don’t like the lawyer, or the weather was bad that day.... The notion of a judge’s inner conviction means that either he is suffering from schizophrenia, or there is inside him another person with his own opinion, or some speaking soul or other. It’s the same thing. I am not a believer, that’s why I cannot understand what this “inner conviction” is. Personally I think that with this rule, all judges must suffer from schizophrenia or split personality.

92 **PIPSS.ORG** – Do you think something must be changed concerning the power of prosecutors or judges?

93 **Stanislav Markelov:** The further examination procedure must be reinstated, undoubtedly, despite what the human rights advocates say. On this point, my position coincides with that of the Prokuratura. Because now they practically fake it. According to the law, if a technical error is found in a bill of indictment, the case is sent back to the Prokuratura which must correct it within five days.

94 **PIPSS.ORG** – If a technical error is found...

95 **Stanislav Markelov:** ...the case is sent back to the Prokuratura. Right now the five-day limit is not respected, which turns it *de facto* into an additional investigation. In reality it is clearly necessary, because the courts never give an acquittal verdict, and if they see that the bill of indictment is insufficient and that the accusation is falling apart, they use this additional time. The judges are then fully consciously obliged to do something that is perfectly illegal: on this

point I understand them perfectly and support them in this. Officially, we speak of a technical error, but in reality it is an additional investigation..

96 **PIPSS.ORG** – How can they speak of a technical error in this case?

97 **Stanislav Markelov:** They say that there are technical errors which could influence the content of the bill of indictment and that only the Prokuratura can correct them. The five-day deadline is “respected” in the following way: they say that it took the file one month to get there by mail, even if the Prokuratura is in the same building as the court. Then they count five days from the moment the Prokuratura gets the file and sends it back to the court. Then you count another month, or two or three, while the file travels back to the court, even if it is sent by special post. We are reduced to this kind of absurdity.

98 **PIPSS.ORG** – Are there any statistics on the number of members of the military who have been sentenced, on what charges and what kind of sentences were they given?

99 **Stanislav Markelov:** According to the indicators of previous years, these are the statistics: 0,2 % of sentences in civil courts; 0,3 – 0,4 % in military courts.

100 **PIPSS.ORG** – Did almost all the army staff members whose trial went through receive a sentence?

101 **Stanislav Markelov:** All those whose case has gone to court. But the case can be closed at the end of the investigation, or forgotten, dropped...

102 **PIPSS.ORG** – Does that often happen?

103 **Stanislav Markelov:** Yes, that’s the equivalent of a judgment of non-suit. In twelve years of practice, I have managed to obtain a non-suit only in a very small number of cases. There can be a *de facto* non-suit, when the case is closed, or when the accused suddenly changes status and becomes a witness, or...

104 **PIPSS.ORG** – What do you mean by – “changes status”?

105 **Stanislav Markelov:** Well the charges against him are suddenly withdrawn. A *de facto* non-suit, that’s when the case is cut short at the investigation stage, and no one speaks of it any more. Before, the “additional investigation” procedure was used, then the case was halted, the charges withdrawn, and was equivalent to a non-suit. Now that the additional investigation procedure no longer officially exists, we find ourselves in a difficult situation.

“Russian law is not based on precedent”

106 **PIPSS.ORG** – What are the other specificities of Russian law?

107 **Stanislav Markelov:** Russian law, not being based on precedent⁵, has another rather unpleasant specificity: as you know, there are systems based on jurisprudence, like the *common law* Anglo-Saxon system, based on the jurisprudence of past decisions; and there is the codified legal system. Traditionally, Russia has a codified legal system, based in the legal Romance and Germanic system, Russia’s system is similar to the German system. However, in Germany, the judiciary system is stable: any attempt to stray from the system is seen as an attempt to escape justice. On the contrary, here the system is still unstable. As a result, given identical cases, even if a case has been won in one region, not only will this decision not be considered as a reference in another region, but everything must begin again from scratch and one can expect very different reactions. We’ve actually had comical situations where we started betting on the outcome of two similar situations that were being tried in two different regions. In our system, for civil, not penal cases, one can choose the court where the trial will be held: we then made bets among lawyers. We would lodge exactly the same complaint in two courts in two different regions. For example, for a property conflict, the case can be judged either in the court of the region where the disputed property is located, or in the region where the defendant resides. We would thus start a case in two regions, each file containing exactly the same documents, the original in one and a copy in the other, and we’d obtain different results. It seems unthinkable, but that’s what happened!

108 In theory Russian law develops thanks to cases that have been termed “strategic”. The strategic cases are those that influence the lives of a larger group of people than those who are directly involved in the trial. The examination of these cases of course differs from the mainstream cases. The crowd of mainstream cases just follows the lead of these few crucial cases, like the tail of a comet.

109 The Budanov case was precisely one of these decisive cases. It brought a change in Russian justice, a change which can influence and help it move ahead. Unfortunately, the structure of the Russian legal system is characterized first, by its arbitrary nature and second, it resembles a production line which can only lead to a sentence and nothing else. The accused must be found guilty. It’s practically impossible to break this system. If a case comes to court, it must end in a sentencing, regardless of whether we are in a civil or military court. This is one of the main characteristics of military courts and military justice in general in Russia. In theory, for more general cases, one can say that in the vast majority of cases they are more carefully and professionally examined in military courts. Military courts would like us to believe that they are the more healthy part of the system but in fact they are just the same. There is corruption, arbitrariness is also possible there, and the tendency to give guilty verdicts also dominates. It’s not that the judges are bad or incompetent or unkind of course, but it’s the implicit rule that any case that comes to court must end with a sentencing. The irony is that the human rights advocates have made the situation much worse: most of them were trained in seminars and private practices but they are not practicing lawyers. They obtained the abolition of the additional investigation procedure. Before, when a judge saw that a case was not sufficiently strong, it was sent back to those in charge of the investigation with the mention that the case could not be examined in its present state. Very often, that meant the case was closed or suspended. So as not to have to pronounce a non-suit, the judge would send the case back and the case would die out in the hands of the investigators. When this became no longer possible, the judges had to take on and bring to completion cases where evidence was very scarce or even non-existent. Completion: this means a sentencing, since the number of non-suits has not increased.

110 **PIPSS.ORG** – When was the additional investigation procedure abolished?

111 **Stanislav Markelov:** With the adoption of the new Code of Penal Procedure.

The role of associations

112 **PIPSS.ORG** – Do you think that this is due to the actions of human rights groups?

113 **Stanislav Markelov:** Yes, it’s due to general pressure. They wanted the Code to comply with European standards but in the end, if the adoption of European standards doesn’t go along with a global transformation of the judiciary system, the result can only be hybrid and unsatisfactory.

114 Another similar problem was the issue of arrests. Before, arrests were decided by the Prokuratura. That was a big problem: the chief prosecutor was the one who decided. The military justice used the same procedure. Now, the courts decide. But instead of examining in detail the requests for incarceration, the courts sign them one after the other. So, although the previous system was not satisfactory, at least one could try and do something through the prosecutor, by explaining the situation. Today, it is impossible to have any influence, because if a detention request is submitted to the court, it is a 100% sure the request will be granted. As a result, lawyers refuse to go to court because they know their client will be locked up regardless of what happens. It’s just a waste of time. Here too, the human rights advocates think this is progress, because they do not know what really happens in practice. The consequences of this “progress” were that many people who could have remained free in the old system are locked up. And if a person is remanded in custody before the trial, it’s practically sure, maybe not 100% but 80 or 90% sure that this person will be given a prison sentence. Because an

unwritten rule persists, even if it isn't 100% true: "from prison to penitentiary, from pre-trial supervision to suspended prison sentence".

The role of the recommendations of the European Court of Human Rights in Strasbourg.

115 **PIPSS.ORG** – What about the cases which were submitted by Human Rights NGOs to the Strasbourg Court?

116 **Stanislav Markelov:** You know, our human rights advocates are intent on going to Strasbourg and I perfectly understand: it is much easier to plead a case in Strasbourg than in Russia. However, in reality, Strasbourg has a negative impact which cannot be ignored: first, all efforts are directed towards Strasbourg, and in the meantime the human rights advocates are not active enough in the field, that is working on the reform of the Russian judicial system. This is a grave problem and it has affected the situation in Chechnya, in the sense that the cases are sent directly to Strasbourg, "skipping" as it were the Russian legal stage. As a result, lawyers have ceased trying to pressure the representatives of law and justice in Chechnya.

117 **PIPSS.ORG** – What is the legal status of the recommendation of the European Human Rights Court in Strasbourg?

118 **Stanislav Markelov:** According to the Russian judiciary tradition, norms given as recommendations are norms which can be ignored. Thus these decisions *de facto* have no legal force at all. The Strasbourg Court is nothing more than an additional source of pressure, one more institution that can be used to exert pressure on the Russian judicial system. Indeed, the Russian judicial system is completely incompetent in matters of control over the judicial decisions. The Supreme Court overturns at most 2 % of the verdicts. This means that there is no body in charge of effectively controlling the judicial decisions (*nadzornaia instantsiia*), no possibility opposing a judgment. This means that a person who has been condemned has practically no chance at all of seeing his situation change. The likelihood corresponds to the margin of error, a ridiculous figure. From that point of view, Strasbourg represents an additional chance. But there is an unpleasant misunderstanding with Strasbourg: the persons whose rights have been violated — and there are many in Russia — believe that the Strasbourg court is an additional court of appeals, but all the lawyers working in Strasbourg have forgotten one elementary fact, which is that Strasbourg does not examine the case's content. This seems banal, but what are the basic questions people want answers to: has a crime been committed or not? Was the verdict fair? Is the sentence proportional to the crime committed? Were the facts accurately characterized? This begins in Chechnya but it extends to other regions of Russia. And when I tell people in Chechnya that Strasbourg will not bring any answers to these questions, when I say "Strasbourg will not help free your son", or "Strasbourg will not designate the person who assassinated your relative as a criminal", they look at me as if I'd destroyed their last hope. These terrible disappointments are due to the fact that the truth is not told about Strasbourg. The European Court is a remarkable body, it is an additional instrument of pressure on the Russian judicial system, but focusing on it is like focusing on an optional instrument whereas the absolute priority is to reform the Russian judicial system, to examine the content of the cases, in the framework of our system, however bad it is, in our courts, including our military courts.

119 Beyond its undoubtedly positive role, the Strasbourg court has also had a negative impact by excessively attracting lawyers' interest and efforts, leading to an imbalance. In addition, there is a legal problem which is never mentioned and which had not been solved: the Strasbourg court works on the basis of precedent whereas the Russian system, as we have seen, does not recognize precedent. Even the Russian Supreme Court *plenium* and the Supreme Military Court (the hierarchy is the same, they are parallel courts) only make recommendations. And as I told

you earlier, recommendations can be ignored. Sometimes someone pays attention to them, but they do not have the value of precedent like they do at the European Human Rights Court.

Endnotes

1 S. Markelov was the Kungayev family's attorney in the case against colonel Budanov, who was accused of having kidnapped and killed their daughter Elza Kungayeva in Chechnya. Colonel Budanov received a ten-year sentence after a tumultuous trial. He was released January 15 2009. On January 19th, as he was leaving a press conference in Moscow, where he had denounced the early release of Budanov, Stanislav Markelov was assassinated in the street [E.S.K.'s note].

2 <http://www.ruleoflaw.ru/>.

3 In 2002, Ulman and his group, made up of members of special commandos from the federal military services, executed the passengers of a car they had targeted by mistake: they were sentenced to terms ranging from 9 to 14 years in June 2007 [E.S.K.'s note].

4 Lapin (nicknamed *Kadet*) is a police officer from Khanti-Mansiisk; he was sentenced to eleven years in prison in March 2005 for the kidnapping and murder of a young Chechen, who was tortured to death in a Grozny police station in January 2001. The preliminary investigation — and later indictment of Lapin — was made possible thanks to an article by the journalist Anna Politkovskaya entitled « Disappearing persons » and published in *Novaia Gazeta* [E.S.K.'s note].

5 Concerning this point cf. V. Yakov, « La notion et le statut de jurisprudence en Russie » (The notion and status of case law in Russia), *Revue d'études comparatives Est-Ouest*, volume 38, # 2, June 2007, pp. 59-76 [E.S.K.'s note].

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